Vol. 6 / 2015 No. 1

Journal on European History of Law

9 772042 640001 01

STS Science Centre

The European Society for History of Law

VOL. 6 / 2015 NO. 1

Editorial staff JOURNAL ON EUROPEAN HISTORY OF LAW:

JUDr. PhDr. Stanislav Balík
Attorney at Law, Prague, Czech Republic
Prof. Dr. Barna Mezey
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary
Prof. JUDr. Jozef Beňa, CSc.
Faculty of Law, Comenius University in Bratislava, Slovak Republic
Doc. JUDr. PhDr. Jiří Bílý, CSc.
Metropolite – University Prague, Czech Republic
Dr. Piotr Fiedorczyk
Faculty of Law, University of Białystok, Poland
Alberto Iglesias Garzón, Ph.D.
Charles III University of Madrid, Spain
Prof. Dr.iur. Dr.phil. Thomas Gergen, MA
European University for Economics and Management, Luxembourg
Prof. Dr. Gábor Hamza
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary
Prof. JUDr. Ignác Antonín Hrdina, DrSc.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic
JUDr. Vilém Knoll, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic
Doc. dr. sc. Mirela Kresic
Faculty of Law, University of Zagreb, Croatia
Prof. zw. dr hab. Adam Lityński
Faculty of Law, University of Silesia, Katowice, Poland
Doc. Dr. Olga Lysenko
Faculty of Law, Lomonosov Moscow State University, Russia
Tony Murphy
Department of Law & Criminology, Sheffield Hallam University, UK
ao. Univ. Prof. Dr.jur. Christian Neschwara
Faculty of Law, University of Vienna, Austria
Doc. Dr. Dmitry Poldnikov
Faculty of Law, National Research University, Higher School of Economics, Moscow, Russia
Doc. JUDr. Karel Schelle, CSc.
Faculty of Law, Masaryk University, Brno, Czech Republic
Dr. Gábor Schweitzer, Ph.D.
Institute for Legal Studies of the Hungarian Academy of Sciences, Hungary
Adw. Ewa Stawicka
Attorney at Law, Warsaw, Poland
Dr. Magdolna Szűcs, Ph.D.
Faculty of Law, University of Novi Sad, Serbia
JUDr. Bc. Jaromír Tauchen, Ph.D., LL.M.
Faculty of Law, Masaryk University, Brno, Czech Republic
Prof. Dr. Wulf Eckart Voß
Faculty of Law, University of Osnabrück, Germany

TABLE OF CONTENTS

Introduction 2

Morris Silver: Reinstating Classical Athens: The Production of Public Order in an Ancient Community 3

Mark Horsley, Justin Kotzé, Steve Hall: The Maintenance of Orderly Disorder: Modernity, Markets and the Pseudo-Pacification Process. 18

Diane Roussel: A Mosaic of Controls: The Plurality of Order Maintenance Mechanisms in 16th Century Paris 30

John Walliss: Crime and Justice in Georgian Cheshire. The Chester Court of Great Sessions, 1760–1830 38

Scott Gilfillan: Institutional Imperialism. Extraterritoriality and the British Consular Court System in Japan 56

Jonas Campion: Maintaining Law and Order in a Democratic and Pillarised country: the Belgian Gendarmerie between 1918 and 1957 68

Martin Doherty: Tackling the Terrorists: the Experience of Internment without Trial in Northern Ireland 76

Alan Sked: Hollywood: Propaganda and Control 84

Tony Murphy: The Nomenclature of the Underserving Poor: an Enduring History of Marginalisation 103

John Lea: Back to the Future: Neoliberalism as Social and Political Regression 109

Bob Jeffery, Waqas Tufail, Will Jackson: Policing and the Reproduction of Local Social Order: a case study of Greater Manchester 118

BOOK REVIEWS

Zwischen Sisyphos und Herakles: Zu Heinz Barta: „Graeca non leguntur". Zu den Ursprüngen des europäischen Rechts im antiken Griechenland. Band III Teil 1: Das griechische Recht in seinem kulturhistorischen Umfeld – Beispiele aus Dichtung, Geschichtsschreibung, Philosophie und (Kautelar)- Jurisprudenz. 129

Hanno Rebhan: Österreich wird Verfassungsstaat. Entstehung und Entwicklung moderner Verfassungsstaatlichkeit (1918–1948) 130

Johannes Michael Rainer: Das Römische Recht in Europa. Von Justinian zum BGB. Kurzlehrbuch . . . 131

Katalin Gönczi/Wieland Carls, unter Mitwirkung von Inge Bily: Sächsisch-magdeburgisches Recht in Ungarn und Rumänien. Autonomieund Rechtstransfer im Donau- und Karpatenraum . . . 132

Éva Jakab, Norbert Pozsonyi (eds.): Essays in Honour of Professor Imre Molnár in Occasion of His Eightieth Birthday 133

REPORTS FROM HISTORY OF LAW

Werner Ogris †. 140

Drei Szegediner Rechtshistoriker und das Tripartitum (Tagungsbericht) 141

Das Symposium über den Einfluss des deutschen Rechtsdenkens in Mitteleuropa am 22. Oktober 2014 an der Andrássy Universität Budapest 143

Guidelines for authors 152

JOURNAL ON EUROPEAN HISTORY OF LAW

© 2015 STS Science Centre Ltd.

All rights reserved. Neither this publication nor any part of it may be reproduced, stored in a retreival system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of STS Science Centre Ltd.. Published semiannually by STS Science Centre Ltd. „Journal on European History of Law" is a registered trademark of STS Science Centre Ltd.

Issued twice a year.

Printed in the EU.

ISSN 2042-6402

Introduction

Maintaining Law and Order: Essays on Law and Order throughout history

This special edition brings together academics from a number of disciplines, and indeed countries, to write about different processes of order maintenance throughout history. Our common theme at the outset was seeking to understand the ways in which law and order, and more subtle forms of social control and discipline, have been created and maintained throughout periods of history, and in different contexts - sometimes within the *everyday*, sometimes following notable c*rises*. This collection of papers reflects a truly interdisciplinary endeavour, bringing together criminologists, historians, sociologists and legal scholars alike. Some papers explore the nature of capitalism and welfare regimes, and macro-level processes of order maintenance; others evaluate the application of specific CJS policy mechanisms in specific locales; some grapple with the functioning of specific legal systems or more informal mechanisms of control in antiquity; others adopt a more novel focus. The papers explore both domestic and international issues, where the focus of enquiry varies from Chester in England, to the UK as a whole, and from Paris to Japan, with Athens in-between.

Morris Silver explores the nature of order maintenance in classical Athens, noting how if Athens, as some have argued, was a 'remarkably peaceful and well-ordered society', then this was less a consequence of an unusually peaceful outlook of its residents or their reliance on self-help and social pressures, but rather a consequence of harsh penalties and resources provided by the state. Mark Horsley and colleagues explore the origins of early market economies in relation to a decline in interpersonal violence after the fourteenth century, drawing on the critical theory of the 'pseudo-pacification process'. Diane Roussell explores the 'plurality of order maintenance mechanisms' in sixteenth century Paris. Whilst John Walliss considers the workings of the Chester Court of Sessions between 1760 and 1830, demonstrating how 'justice' was meted out in different ways. Scott Gilfillan examines the issue of 'extraterritorality' and the British Consular Court System in Japan, noting how this was a form of 'institutional imperialism'. Next, Jonas Campion recounts the development of the Belgian Gendarmerie between the end of World War one and the late 1950s, offering an analysis of its changing role and practices.

Martin Doherty grapples with the controversial issue of internment without trial in Northern Ireland in the early 1970s. He notes how such a policy was understandable in the context of unfolding events, and once examined in a historical perspective, can be viewed as a 'more humane' and 'honest' policy than what followed. Alan Sked offers an extensive analysis of the role of propaganda in Hollywood, demonstrating how, if anything, the industry was controlled by its audiences rather than vice versa. Tony Murphy tracks the various 'labels' used in political and cultural discourses to identify and marginalise the 'underserving poor', arguing that processes of marginalisation of the neediest in society has been a recurrent feature of British society. John Lea states the case for viewing contemporary social and political developments as reflecting those of the past: a regression back to earlier relationships shaped by capitalism. Finally, Bob Jeffries and colleagues offer a critical perspective on the history of public order policing in Greater Manchester.

Tony Murphy*

* Tony Murphy, Senior Lecturer in Criminology, Department of Law and Criminology, Sheffield Hallam University, United Kingdom.

Reinstating Classical Athens: The Production of Public Order in an Ancient Community*

*Morris Silver***

Abstract

Scholars have argued that Athens was stateless. Specifically, it is has been asserted that residents in classical Athens relied predominantly on themselves and neighbors in resisting criminals who sought to forcefully take their property. This is rather a surprising proposition since Athens was a rather large and diverse city with a well articulated division of labor and occupational specialization. The present paper begins by advancing a functional definition of 'state' as an organization (firm) specializing in the production of protection from and punishment of criminals. Then the paper theorizes about the origin, division, and demise of states and applies this reasoning to Athens. This is followed by an examination of evidence, mainly speeches delivered by Attic orators for various public occasions, political meetings, and law-courts. These texts preserve many details concerning how Athens actually dealt with property crime. The main finding is that if, as been suggested by some scholars, Athens was a 'remarkably peaceful and well-ordered society' then the explanation lies not in an unusually peaceful outlook of its residents or in their reliance on self-help and social pressures to deter criminal activity, but in reliance on harsh penalties and the provision of enforcement resources by the Athenian state.

Key words: *Athens; monopoly; protection/punishment; public good; public slaves (dēmosioi); state/stateless.*

I. Introduction

Berent claims that Athens was 'stateless' although 'not tribal'.[1] He cites various scholars and mentions 'structure of the governmental system,' 'authority of the state,' use of 'physical coercion,' 'monopoly of force,' and the fundamental contribution of 'private initiative and self-help' in policing Athens but he does not actually advance a definition of 'state'.[2] He recognizes, however, that state/stateless is a matter of degree: 'As for police, it seems to be agreed that the ancient polis [quoting Badian] 'never developed a proper police system', the nearest thing to it was usually [quoting Finley] a 'small number of publicly owned slaves at the disposal of different magistrates' (emphasis added).[3] Thus, Berent mainly makes his argument against an Athenian state by relying on escape words used by previous scholars. Berent does concede that the Eleven (see below) might be seen as law enforcement magistrates, 'Yet they, like most Athenian magistrates, were ordinary citizens, chosen by lot for one year'.[4] What number of police is 'small'? Why does it matter if the police were 'publicly owned slaves' or if they served 'different' magistrates or if the chief magistrates were 'ordinary citizens'?

More openly and realistically, Lanni notes, 'Classicists debate whether Athens had enough coercive force to qualify as a 'state' in the modern sense' (emphasis added).[5] In answering this question Lanni does not rely on the escape term 'modern sense,' however:

> In classical Athens, there was no professional police force to investigate crime or to arrest and detain offenders. And there was no state prosecutor charged with bringing charges in the interests of the public. Every step in the legal process, from the summons

* My thanks to Thomas J. Figueira and Peter Rhodes for numerous helpful suggestions. The responsibility for remaining errors is entirely my own. My research benefited greatly from the conscientious assistance of Evelyn Bodden of the Interlibrary Loan Department in the Cohen Library in the City College of New York. I am especially grateful to Tony Murphy for his painstaking editorial services.

** Morris Silver, Professor Emeritus of Economics, City College of the City University of New York, USA.

1 Moshe Berent, 'Anthropology and the Classics: War, Violence and the Stateless Polis', *Classical Quarterly,* 50:1 (2000), 257–89 (pp.260–262).

2 Similarly, Moshe Berent, 'The Stateless Polis: A reply to Critics', *Social Evolution* & *History,* 5:1 (2006), 141–63 (pp.142–43). And Morgens Herman Hansen, 'Was the *Polis* a State or a Stateless Society?' In *Even More Studies in the Ancient Greek Polis,* Papers from the Copenhagen Polis Centre 6. ed. by Thomas Heine Nielsen (Stuttgart: Steiner, 2002) p.20.

3 Berent (2000), pp. 260–61.

4 Berent (2000), p.261.

5 Adriaan Lanni, 'Social Norms in the Courts of Ancient Athens' *Journal of Legal Analysis,* 1:2 (2009), 691–736 (p.693).

> to the enforcement of judgments, depended on private initiative. As a result, the prosecution of crime and other violations of law was irregular, turning not on the seriousness or visibility of the infraction, but on the ability of the victim to bring charges or the willingness of personal or political enemies of the defendant to step in and serve as volunteer prosecutors (citations omitted).[6]

Further,

> It was entirely up to the victim of damage or theft, for example, to seek out witnesses and act as his own private investigator. The law imposed reasonable limits on such investigations: a citizen was authorized to search another's house for stolen goods provided that the head of the household gave his consent and the searcher left his cloak outside to make it more difficult to plant evidence. A victim of physical violence or otherwise unlawful behavior *typically* called on bystanders to protect him and to serve as witnesses if the incident later resulted in a trial (emphasis added).[7]

Despite the purported absence of a state, 'Athens was a remarkably peaceful and well-ordered society. Violent crime appears to have been much less prevalent than in other ancient societies, notably Rome. When citizens walked from the countryside to the city or to the port to attend the Assembly, to do business at the market, or to visit friends, they did not arm themselves or take other precautions against theft or attack'.[8]

Lanni does not document the dominance of private initiative in combating criminal activity. With respect to Athenians not carrying weapons she is content to cite Herman. Herman cites Thucydides: 'The whole of Hellas used once to carry arms, their habitations being unprotected, and their communication with each other unsafe; indeed, to wear arms was as much a part of everyday life with them as with the barbarians… The Athenians were the first to lay aside their weapons, and to adopt an easier and more luxurious mode of life…'[9] In no way would the failure of Athenians to carry weapons demonstrate that Athens did not need or did not possess a state. Did the Athenians lay aside their weapons when they could afford to replace them with police patrols? Or did the Athenians lay aside their weapons (say daggers) because they were banned by the state? A ban of this kind is regarded as 'likely' by Herman.[10] Herman also notes that in the opening scene of the *Republic*, 'Socrates and his companion are strolling near Athens without any apparent fear for their personal safety.'[11] That philosophers do not take explicitly take note of dangers in their environment is hardly proof that dangers are absent. Moreover, Herman remarks 'Socrates' sense of security may have been increased by the long walls that until 404 surrounded both the city and the Peiraeus from the rest of Attica. It may well be that the area inside the walls was safe, whereas that outside them was still infested with brigands and highwaymen, just as it had been in the old days.'[12] These walls which served to impede the entry and escape of criminals were of course built by the state (see below). None of this is to mention the detail that the philosophers were probably attended by the usual 'follower' slaves.

Further, a dissenting report on the bearing of "arms" may be cited. Diogenes Laertius informs concerning Diogenes the Cynic: 'He did not lean upon a staff until he grew infirm; but afterwards he would carry it everywhere, not indeed in the city, but when walking along the road with it and with his wallet; so say Olympiodorus, once a magistrate at Athens, Polyeuctus the orator, and Lysanias the son of Aeschrio'.[13] Diogenes was admittedly eccentric and perhaps he saw nonexistent threats but in this instance his behavior seems commonsensical. Those most vulnerable to predators carried protective devices. Today many such individuals in stated societies carry canes or metal-tipped umbrellas to ward off street criminals. Such use of force has always been regarded as legitimate in their communities. Note the opinion of the Roman jurist Paul: 'Those who do damage because they cannot otherwise defend themselves are blameless; for all laws and all legal systems allow one to use force to defend oneself against violence'.[14]

No historical 'community' can be credited, in Weber's terms, with the creation of or the intention to create a 'monopoly of the legitimate use of physical force.'[15] This paper advances a positive argument with supporting evidence (direct and comparative) that classical Athens intended to possess and did in fact possess 'enough legitimate coercive force' to be regarded as a stated society. It will be seen that the argument for an overwhelming reliance on self-help against criminals consists mainly of pointing to the deficiencies, real or imagined, of the evidence for state action.[16] First, however, 'state' is defined as a specific kind of organization (a firm). Unlike mainly nonempirical approaches, the 'state as firm' perspective utilizes a neoclassical economic analysis with measurable demographic independent/explanatory variables to *predict* when states will be desired, formed, divided and discarded. No other approach to the state does this. Part III of the paper 'Compaction and the Formation of an Athenian State' very much depends on the theory. It should be stressed that the contribution of the present paper is analytical and empirical; it does not allocate scarce publication space to the history of scholarly thought about 'Der Staat', a subject already dealt with by countless excellent studies.[17]

---

6 Lanni, p.692.

7 Adriaan Lanni, *Law and Justice in the Courts of Classical Athens,* (Cambridge: Cambridge University Press, 2006), pp.31–32.

8 Lanni (2009), p.693.

9 Thucydides (1.6.1–3) tr. Richard Crawley, *Thucydides; A History of the Peloponnesian War,* (London: Dent, 1910), cited in Gabriel Herman, *Morality and Behaviour in Democratic Athens,* (Cambridge: Cambridge University Press, 2006), p.133.

10 Herman, p,239.

11 Herman, p.208.

12 Ibid.

13 Diogenes Laertius (6.2.23) tr. R.D. Hicks, *Diogenes Laertious. Lives of Eminent Philosophers,* (Cambridge MA: Harvard University Press, 1925).

14 *Digest* (9.2.45.4) tr. Alan Watson, *The Digest of Justinian,* (Philadelphia, PA: University of Pennsylvania Press, 1998).

15 Max Weber, *Essays in Sociology,* (New York: Oxford University Press, 1946), p.78.

16 See Rachel Hall Sternberg, *Tragedy Offstage: Suffering and Sympathy in Ancient Athens,* (Austin, TX: University of Texas Press, 2006), pp.79–82.

17 See Edward Ch. L. Van der Vliet, *The Early Greek Polis: Regime Building, and the emergence of the State*, In *State Formation in Italy and Greece: Questioning the Neoevolutionist Paradigm,* ed. by Nicola Terranto and Donald C. Haggis (Oxford: Oxbow, 2011).

II. About States: Definition and Origin

What is a State?

Societies, usually the smallest ones, lacking a regularly or continuously functioning 'full-time' organization specializing in the production of protection and punishment are stateless. That is, by 'state' is meant an organization (indeed, a firm!) specializing in the production of punishment/protection.[18] Contrary to traditional approaches the state is not viewed as the expression of some transcendental force and/or identified with society/nation/community/class. No more than Ford or Microsoft or any other for profit firm must its origin be contractual in the sense of requiring prior agreement. The state must first of all be viewed as an organization present in a society, formed, owned, and managed by certain individuals and not by others. This definition is meant to apply in all times and places.

The 'state as firm' definition has much in common with Weber's 'ideal-type' with its focus on legitimate coercion but Weber's state is non-functional. It probably has more in common with the Marx's view that the state is the executive committee of the ruling class.[19] Here Marx escapes from the idealist dead end of the state as 'alienated social power' to an operational definition: the state is an organization whose role is to protect private property. The cost is the building in of a controversial and untestable conception of the ruling class and the consequent burden placed on the analyst to explain away the countless historical cases in which Marx's 'ruling class' has been attacked by its 'executive committee'. Neither Weber nor Marx provides a clean path to the scientific study of the state. Finally, while this is not a matter of definition several ancient Greek historians including Herodotus, Thucydides and Plutarch arguably view the state as an organization concerned with the provision of punishment and protection (see further below).[20]

Morris observes, '"The State' is notoriously difficult to define.' This is the case if 'The State' must include all the idiosyncratic dimensions and historical accretions that have been or might be observed together with specialized production of protection/punishment.[21] Neither does it help very much to immediately pack into the definition fine distinctions such as 'formal state'/'early state'/'pristine' or 'secondary' state/'semi' or 'proto state'/'polis-state'/'independent state'/'empire'/'modern state'.[22] Needless to add the idiosyncrasies, accretions, and demarcations are worthy of (later) study in their own right.

Of course, definitions, including the one proposed above, are useful but imperfect tools. They are useful because once formulated they provide a structure for organizing the available facts and then, most importantly, moving on to models for predicting/explaining changes in the control over criminal activity. Refusal to lay a proper foundation by delimiting the state's essential/common features, an approach recommended recently by Anderson, perpetuates an undoubtedly interesting and sometimes profound discussion that produces ample heat but no closure.[23] A definition whether the one proposed above or another one is absolutely essential for making scientific progress. The obvious first step in deciding whether Athens had a state is to say what is meant by 'state.' This, amazingly, is precisely what has been lacking in the discussion of the Athenian case.

Why and When the State?

Individuals, including ancient Athenians, desire/demand 'order'—that is, they prefer to control their property (individual and joint) and not have it taken away from them by criminals. 'Criminals' are defined as those who take property, including one's person, by force, without the permission of owners. They may be individuals or groups of local or external origin. Criminality may be reduced—order increased—by deciding to allocate scarce resources to production of protection and punishment.

Protection (or defense) refers to human and material means that reduce the productivity of criminal activity. The latter include the use of locks, alarms, walls, anti-missile missiles, posting sentries, mace, learning how to defend oneself with fists or weapons, and so on. Thus, Demosthenes observes in passing: 'Against all others who in their wrongdoing work harm upon those who come into contact with them men may protect themselves, some by setting a guard (*phylakē*) over their household effects, others by staying at home at night, so as to suffer no harm, and again, by taking precautions in one way or another men can guard against the plots of those who wish to work them harm…'[24]

Punishment necessarily involves the use of force against criminals. It has a direct effect by incapacitating those who commit criminal acts (e.g. by fining, mutilating, executing, jailing, retraining, or brainwashing them). Punishment of criminals also has an indirect effect by deterring (raising the expected costs of crime to) those who would otherwise find it rewarding to commit criminal acts. Property-owners prefer to have scarce resources devoted to the production of punishment just as they prefer to have scarce resources devoted to repairing automobiles, providing entertainment, or whatever. Forceful acts against criminals (punishments) are regarded as *legitimate* by the public including even perhaps by (internal) criminals themselves.

In 'small' societies, non-specialists including the victims of crime or their revenge-seeking family and neighbors produce protection and punishment.[25] These activities may be

[18] See M.B. Sakellariou, *The Polis-State, Definition and Origin,* (Athens: Boccard, 1989), pp.66–9.

[19] Karl Marx and Friedrich Engels, *The Communist Manifesto,* (New York: Penguin Books, 2011).

[20] See Herodotus (1.97.1–98.1–6) tr. A.D.Godley, *Herodotus,* (Cambridge, MA: Harvard University Press); Thucydides (2.15.1-3) tr. Crawley; Plutarch (*Theseus* 24.1-3) tr. Bernadette Perrin, *Plutarch's Lives,* (Cambridge, MA: Harvard University Press, 1914).

[21] Ian Morris, 'The Early Polis as a City State', In *City and Country in the Ancient World,* ed. by J.W. Rich and Andrew Wallace-Hadrill (New York: Routledge, 1991), pg.40.

[22] See W.G. Runciman, 'Origins of the State': The Case of Archaic Greece', *CSSH,* 24 (1982), pp.352–53. And Van der Vliet, pp.120–123.

[23] Greg Anderson, 'The Personality of the Greek State', *Journal of Hellenic Studies,* 129 (2009), 1–22 (pp.3–4).

[24] Demosthenes (58.65) tr. Norman W. DeWitt and Norman J. DeWitt, *Demosthenes,* (Cambridge, MA: Harvard University Press, 1949).

[25] Tracey E. Rihll, 'War Slavery, and Settlement in Early Greece', In *War and Society in the Greek World,* ed. by John Rich and Graham Shipley (New York: Routledge, 1993), pp77–107.

observed in larger societies as well. Their relative importance has been reduced, however (see further below). The absence of a state in a small society is readily explained by economic theory.[26] The explanation is that the division of labor/specialization is limited by the extent of the market.[27] Each individual places a value on the level of order, which is the amount the individual is willing to pay for the specified level of order rather than do without it. The value placed by the society on the level of order is the sum of the individual's valuations. Aggregate demand for order is obtained by summing the individual valuations because, as discussed below, order is mainly a 'public good.' In smaller societies the amount that may be potentially collected by the specialist firm—that is, the sum total of the individual valuations—is less than the total cost of producing that level of order.

However, when the population of a given territory increases, again other things equal, the demand for order (that is, the sum of the individual valuations) necessarily increases. Finally, a level of population is reached at which the specialist firm's total receipts from production of order are potentially greater than his total cost of producing it. At this point, the society is positioned to benefit from a fuller exploitation of cost-reductions resulting from a finer division of labor and specialization ('practice makes more perfect') and fuller use of 'lumpy' material resources, meaning resources that must be used in the size in which they come or not be used at all, that are subject to economies of scale. The state is ready to be 'born'. It is usually called '*the government*' and its decision-maker(s) is (are) usually called '*the ruler(s)*'.[28] Finley comes close to this formulation when he says that 'in a study of politics there is no meaningful distinction between the state and government.'[29] Note that whether criminals are punished by private individuals or by a specialized organization is a question of a community's institutional structure. But 'the state' like the private individual is a concrete entity not as an abstraction.

States are born when population increases and they die when it decreases. On the other hand, beyond some point increases in population will lead to a proliferation of states. This is expected because of diminishing returns—that is, the specialist producer will find that his cost per person of producing a given level of order will at some point begin to rise as the ruled population increases. At this point, other things equal, a second specialist firm will be able to compete away part of the original firm's market. Sometimes, however, instead of a complete new state the cost issue is addressed by dividing the ruling function between a central and a local state or by contracting out certain functions (e.g. maintaining prisons) to separate firms.

Independently of increases in the population in a territory, an increase in population density or better 'compactness' will encourage the emergence of a specialist in the production of order. In this case the effect is not through an increase in aggregate consumer demand but from a decrease in the cost of producing order. An increase in compaction of the population results in a downward shift in the entire average total cost curve (cost per unit curve) with respect to number of people served/ruled. That is, the cost of serving each ruled person declines. This is expected because a reduction in 'distance' results in economies of scale. Fewer soldiers/police/officials/fortifications are required to produce a given level of order. Compaction of the population also reduces transport and communication costs. As population density rises, other things equal, a point is reached at which the specialized producer's total production cost of order is less than the aggregate demand for (valuation of) order. Increases in urbanization, a somewhat less precise term, generally are reflected in increased population density or compaction. Hence, it may be predicted that small, urbanized populations are more likely to be ruled by a state than equally small but less urbanized populations. In terms of this framework the usually ambiguous term *city-state* might be understood as a state which rules over a city (or a city which is ruled by a state).

While the theory is clear and some decent examples present themselves, it is often difficult to isolate trends in population.[30] Generally speaking, evidence for compaction, usually of an archaeological nature, is often more clear, however. For example, the effect of compaction on state formation is supported in the case of archaic Corinth.[31] In practice, however, the compaction of a population is likely to be accompanied by an increase in the number of people. The two trends are difficult to disentangle. Fortunately, both effects, of increased compaction and of population increase, operate to encourage state formation.[32]

III. Problems in the Theory of the State

The Monopoly Problem

Deioces told the Medes that he found no profit in judging for the benefit of his neighbors but, when they had made him king, he demanded a palace to live in.[33] When Israel's assembled elders requested the making of 'a king to judge us like all the nations' the prophet Samuel warned: 'This will be the manner of the king that shall reign over you: he will take your

[26] See Richard D. Auster and Morris Silver, *The State as a Firm: Economic Forces in Political Development,* (The Hague: Martinus Nijhoff, 1979); and more recently, Morris Silver, 'From State of Traders to State against Traders: The Economic Development of Archaic Corinth', *Classics Ireland,* 17 (2010), pp.1–50.

[27] George Stigler, 'The Division of Labor is Limited by the Market', *Journal of Political Economy,* 59:3 (1951), pp.185–93.

[28] Sakellariou, p.69.

[29] M. I. Finley, *Politics in the Ancient World,* (Cambridge; Cambridge University Press, 1985), p8.

[30] Runciman, p.365.

[31] Silver (2010), pp.14–16; Carl Roebuck, 'Some Aspects of Urbanization in Corinth', *Hesperia,* 41:1 (1972), pp.96–127.

[32] Van der Vliet, p125. is uncomfortable with states managed by "tyrants": "Tyranny was in any case considered by the Greeks themselves as the denial of the political community which formed the polis, although in the Archaic period itself, *one-man rule* may have seemed less strange than it was in later periods" (emphasis added). Van der Vliet seems to be building the special case of public ownership into the definition of the state. This is like saying that owner-operated producers of good/service X are not firms but corporations are. How "the Greeks" looked at "tyranny" is very interesting but it tells us nothing about whether they were ruled by a state. Indeed, whether the Greeks had an idea of "the state" (they did) has nothing to do with whether they had one.

[33] Herodotus (1.97.1-98.1-6), see Thomas F. McGlew, *Tyranny and Political Culture in Ancient Greece,* (Ithaca, NY: Cornell University Press, 1993), pp.82–3.

sons, and appoint them unto him, for his chariots, and to be horsemen… And he will appoint them … to plow his ground, and to reap his harvest, and to make his instruments of war, and the instruments of his chariots. And he will take your daughters to be perfumers, and to be cooks, and to be bakers. And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants. And he will take a tenth of your seed, and of your vineyards, and give them to his officers, and to his servants. And he will take your menservants, and your goodliest young men, and your asses, and put them to his work. He will take the tenth of your flocks; and you shall be his servants'.[34] Such tales are obviously anti-state or at least anti-monarchical state propaganda but they trade on an important aspect of the coercion problem.

The emerging state has monopoly (price-making) power. Historically speaking, the limited groups owning states will operate them in their own interest. In this respect the emerging state like Microsoft (once the emerging producer of the Windows operating system) is 'predatory.' Suffice it to say that to increase profit this 'ruling class', like the managers of any firm with monopoly power, will reduce the production of its product (order) below the socially optimal level in order to raise the (tax)-price.[35] Why, indeed, will not the 'protective state' simply use its means of force to transform itself into a 'protection racket' and extort by force whatever it wishes from its 'customers/subjects'? The transformation of the monopoly state into a monopoly criminal (not a state) is not impossible but it is an improbable outcome much easier to contemplate theoretically than to bring about. The cost conditions leading to the emergence of a state remain in effect. The current ruling firm is not necessarily more powerful than potential competitors who will seek to supplant it. There are also potential nullifying groups who decline to purchase the state's services—that is, who are willing to bear the costs of resisting its demands![36] With respect to the costs of resistance it should be noted that while a full time producer of punishment (or an extortionist) may afford a gun or a spear or a skilled mercenary but so can others. Hoplites (basically heavy infantrymen), for example, were not to be taken lightly by owners of the Greek states and/or by owners of Greek criminal gangs.[37] This would especially be the case for hoplites bound by ties of kinship, whether real or fictive.[38] Monopoly power is limited, perhaps severely, by the entry of competing 'states' (producers of punishment/protection) attracted by the prevailing monopoly profits and by coalitions ready to use violence to defy tax-collectors.

Other things equal, the greater the loyalty/recognition ('legitimacy') of the ruling state among the ruled the lower its costs of tax-collection and the lower its cost of excluding rival producers of punishment/protection. However, misunderstandings may result from incorporating legitimacy in the core definition of 'state'. In the first place such inclusion is redundant as the state—that is, a specialized producer of punishment and protection—is by definition legitimate. States are legitimate precisely because what they do is to employ force against criminals. On the other hand, while all states are legitimate some may be more legitimate than others. In a political equilibrium (comparable to a market equilibrium), the ruling firm in a community is not necessarily more legitimate than potential competitors (entrants or insurgent/revolutionary firms).

The Public Goods Problem

Fundamental problems arise because order is to a large extent a public good, not a private good.[39] In the case of private goods, turkey sandwiches for example, the aggregate demand is the total quantity the society will purchase at a given price. Each sandwich purchased/consumed by one individual is a sandwich that cannot be consumed by a different individual. In stark contrast, the level of order paid for by one consumer is often available to be consumed by the rest of society. Thus, when the specialist firm uses one's taxes to apprehend and punish a pickpocket, all residents are less likely to find that their purses have gone missing. When the specialist firm deploys an anti-missile shield or builds a citadel or a circuit-wall around a city, it protects everyone in the city from invaders including those who have not paid. Interestingly, it appears that the original meaning of polis is 'fortified place'.[40] The purchaser does not use up order as he does purely private goods like turkey sandwiches. A 'rational' consumer recognizing the difficulties (costs) of excluding him from consuming the available level of order may, using one pretense or another, decline to pay his true valuation of order to the specialist firm. 'Free-rider' behavior tends to reduce the production of order below the socially optimal level.[41] Peer pressure in small societies may mitigate this problem. *However, in larger communities a certain amount of coercion (or voluntary coercion) is often necessary to deal with this behavior.*

The Democracy Problem

Behavior is much less predictable in a 'democracy' or publicly owned state. Indeed, when a population group has achieved a certain real income they may choose to participate directly in order production and to forego available gains from specialization. That is, individuals derive satisfaction not only from consuming order but also from producing it.[42] At the limit,

---

[34] 1 Samuel (8.5, 11-17) in Jewish Publication Society, *The Holy Scriptures According to the Masoretic Text,* (Philadelphia, PA: JPS, 1917).

[35] William A. McEachern, *Economics: A Contemporary Introduction,* (Cincinnati, OH: South Western, 2009), pp.214–16.

[36] William J. Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure', *American Economic Review,* 72:1, (1982), pp1–15.

[37] Miriam Valdes Guia and Julian Gallego, 'Athenian *Zeugitai* and the Solonian Census Classes: New Reflections and Perspectives', *Historia,* 59:3 (2010), 257-81 (pp265 & 271).

[38] K.R. Walters, 'Geography and Kinship as Political Infrastructures in archaic Athens', *Florilegium,* 4 (1982), pp.1–31.

[39] Richard D. Auster and Morris Silver, 'Collective Goods and Collective Decision Mechanisms', *Public Choice,* 14 (1973), pp.1–118.

[40] Mogens Herman Hasnsen, *Polis: An Introduction to the Ancient Greek City-State,* (Oxford: Oxford University Press, 2006); see also Sakellariou, pp.155–6.

[41] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups,* (Cambridge, MA: Harvard University Press, 1977).

[42] Morris Silver, 'Towards a Consumption Theory of Political Democracy', in *Economics of Public Choice,* ed. by Robert Leiter and Gerald Sirkin, (New York: Cyrco, 1975) ; Auster and Silver (1979), pp.89–95; compare with Damon Acemoglu and James Robinson, *Economic Origins of Democracy and Dictatorship,* (New York: Cambridge University Press, 2006).

this choice manifests itself in a change from a stated society to a stateless society.[43] Athens, as will be seen shortly, did not go to this limit. Further, whether representative or direct, a democratic state, a state with numerous owners, is subject to important shirking/free rider problems of its own.[44] Such firms are more likely than firms with a handful of owners to experience serious incentive problems. The incentive problem is captured in the classic formula of the organization literature, 'separation of ownership from control'.[45] The formula may be explained as follows: a free-rider problem among the diffused owners limits oversight of the firm's controllers/managers who are enabled to pursue their private interests at the expense of profit for the owners. In the case of the democratic state the rulers implement policies of their own choice which are not those preferred by the public.

IV. Compaction and the Formation of an Athenian State

A static form of evidence for the role of compaction should be noted. Attica and Boeotia had similar cultures and were roughly equal in area and in total population. However, in the fifth century, Attica was ruled by one state (demonstrated below) and Boeotia possibly by as many as eleven.[46] Ehrenberg notes in this connection 'the comparative thinness of population in Boeotia as compared to Attica'.[47] The former was largely an agricultural district and the latter was more densely settled in and around Athens. All eleven Boeotian urban centers are classified 'P' (attested as *polis* in the political sense) but of these only eight (Chaironeia, Haliartos Lebadeia, Orchomenos, Platiai, Siphai, Thebai, and Thespiai) are attested as having a town wall—that is, visible evidence of having produced a significant public good.[48] It also begins to appear that Arcadia with its late developing urban centers (not before the late archaic period) provides a classic example of dispersed settlement and multiple 'states'.[49] To date no archaic walls are known in Arcadia with the possible exception of Tegea.[50]

It is now generally agreed by archaeologists that a precipitous increase in burials in eighth century Attica probably does not indicate 'a demographic explosion, helping to precipitate the formation of the [Attic] state'.[51] There is some evidence of an increase in population but it is far from being conclusive. On the other hand, the observed explosion in burials probably reflects a shift from intra- to more easily quantified extra-mural burials.[52] Morris (*OCD* s.v. cemeteries) concludes: 'Burial within the settlement had been common in many parts of the Greek world in the early iron age, but after the 8th cent. BC it was rare. Cemeteries normally lined the roads leading way from cities.' The shift to extra-mural cemeteries may itself be understood as a response to a rise in the value of urban land due to increased compaction.[53] Thus, the precipitous rise in burials may indirectly signal the formation of an Athenian state.

There is some direct archaeological evidence for compaction in Attica beginning in the late eighth century. Osborne summarizes:

> At Thorikos there is evidence for continuous occupation during the ninth and eighth centuries in the area of the West Cemetery. In the ninth century ore was smelted in the area, and then in the course of the eighth century this was abandoned and settlement spread further south. There was no seventh century occupation here. At the beginning of the seventh century an area east of the summit of Velatouri hill was briefly occupied, yielding sub-geometric pottery, but this area also seems to have been deserted, and the sole evidence of occupation at Thorikos during the rest of the seventh century is provided by a handful of sherds, some of very high quality, from the fill in Insula 3 of the classical Industrial Quarter. No structural remains have been recovered from the early seventh century and the early sixth century. There is, by contrast, good evidence for cult activity at Mycenaean Tomb 1 on Velatouri, where pottery dedications and votives begin in the seventh century and reach a peak in numbers in the latter part of the sixth century. That there were seventh century residents at Thorikos is not in question, what is striking is their absence from the areas occupied both earlier and later, and the way they begin new cult practices.[54]

In addition a number of hill-top residential sites were abandoned at the end of the eighth century with continuing cultic activity. New cultic activity is also detected on a few hill-top sites. Thus, the archaeological evidence for settlements, 'thin and poor as it is,' indicates 'a break at the end of the eighth century…'[55]

---

[43] Anderson, pg. 6.

[44] Morris Silver, 'Transaction/Administrative Costs in Greco-Roman Antiquity, with Special Reference to the Implications of Atheism/Naturalism in Classical Athens', MBAH, 29 (2011), 49-93 (pp.57–60).

[45] Eugene F. Fama and Michael C. Jensen, 'Separation of Ownership and Control', *Journal of Law and Economics,* 26:2 (1983), pp.301–25.

[46] Victor Ehrenberg, *The Greek State,* 2nd edn, (London: Methuen, 1969), pp27–33; J.A.O. Larsen, *Greek Federal States: Their Institutions and History,* (London: Oxford University Press, 1968), pp.33–40.

[47] Ehrenberg, pg.32; see also Runciman, p.366.

[48] Mogens Herman Hansen, 'Was Every Polis State Centered on a Polis Town', in *Once Again: Studies in the Ancient Greek Polis,* ed. by Thomas Heine Nielson (Stuttgart: Steiner, 2004), pg. 138, Table 1.

[49] Thomas Heine Nielsen and James Roy, 'Introduction: Progress in Arkadia', ,in *Defining ancient Arkadia: Symposium,* ed. by Nielson and Roy (Copenhagen: Munksgaard, 1999), pp.7–15.

[50] Rune Frederiksen, *Greek City Walls of the Archaic Period, 900–480 BC,* (Oxford: Oxford University Press, 2011). pp.42; 114.

[51] A.M. Snodgrass, 'Archaeology and the Study of the Greek City', in Rich and Wallace-Hadrill, p.1–23; see also Morris (1991), p.28.

[52] Snodgrass, p.11; Robin Osborne, *Greece in the Making, 1200–479 BC,* (London: Routledge, 1996), pp. 83–4 & 101.

[53] 2. An emphasis on urban land prices as a determinant of intra- vs. extra-mural burial in archaic times is consistent with later trends. Thus, Ian Morris (*OCD* s.v. "cemeteries" (307) notes, "Meanwhile, by the 4th cent. [CE], the population of many western cities was shrinking, leaving open spaces within the walls. From Britain to Africa, city-dwellers started burying in these spaces in the 5th cent. At Rome, the last-dated known burial outside the city and the first epitaph from within it both date to 567." *Oxford Classical Dictionary* 3rd edn, ed. by. Simon Hornblower and Anthony Spawforth, (Oxford: Oxford University Press).

[54] Robin Osborne, 'A Crisis in Archaeological History? The Seventh Century B.C. in Attica', *ABSA,* 84 (1989), pp.304–07.

[55] Osborne, p.308; compare with Thucydides (2.15.4).

The archaeological evidence for compaction and a 'late' (Iron Age) *synoikismos*' (movement from the country into the city) seems to be reflected in Plutarch's *Theseus*:

> After the death of Aegeus, Theseus conceived a wonderful design, and settled all the residents of Attica in one city, thus making one people of one city out of those who up to that time had been scattered about and were not easily called together for the common interests of all, nay, they sometimes actually quarreled and fought with each other. He visited them, then, and tried to win them over to his project township by township and clan by clan. The common folk and the poor quickly answered to his summons; to the powerful he promised government without a king and a democracy, in which he should only be commander in war and guardian of the laws, while in all else everyone should be on an equal footing. Some he readily persuaded to this course, and others, fearing his power, which was already great, and his boldness, chose to be persuaded rather than forced to agree to it. Accordingly, after doing away with the townhalls and council-chambers and magistracies in the several communities, and after building a common town-hall and council-chamber for all on the ground where the upper town of the present day stands, he named the city Athens, and instituted a Panathenaic festival.[56]

Thucydides, like Plutarch, emphasizes the political aspects but he places less stress on compaction:

> From very early times this had been more the case with the Athenians than with others. Under Cecrops and the first kings, down to the reign of Theseus, Attica had always consisted of a number of independent townships, each with its own town-hall and magistrates. Except in times of danger the king at Athens was not consulted; in ordinary seasons they carried on their government and settled their affairs without his interference; sometimes even they waged war against him, as in the case of the Eleusinians with Eumolpus against Erechtheus. In Theseus, however, they had a king of equal intelligence and power; and one of the chief features in his organization of the country was to abolish the council chambers and magistrates of the petty cities, and to merge them in the single council-chamber and town-hall of the present capital. Individuals might still enjoy their private property just as before, but they were henceforth compelled to have only one political center, viz. Athens; which thus counted all the inhabitants of Attica among her citizens, so that when Theseus died he left a great state behind him. Indeed, from him dates the Synoecia, or Feast of Union; which is paid for by the state, and which the Athenians still keep in honor of the goddess. Before this the city consisted of the present citadel and the district beneath it looking rather towards the south.[57]

Note that it is a mistake to think of an 'early' (Bronze Age) *synoikismos* and a 'late' *synoikismos* as competitors for ***the*** *synoikismos*.[58] If absolute population levels and compaction decline significantly (think of the 'Dark Ages') a region will cease to be ruled by a state.[59] It is not true that once a state, always a state or that a new state must necessarily owe something to the defunct fallen state.[60, 61]

The problem is that attribution of increased compaction to Theseus' 'wonderful design' is not an explanation. Growing commercialization would provide an explanation. There is archaeological evidence for commercial activity in the Industrial Quarter in the seventh century and before the fifth century in the Laurion area.[62] We may cite Solon's (early sixth century) encouragement of olive oil exports—only olive oil was to be exported—and regulations concerning the cultivation of olive trees.[63] Solon takes note specifically of the striving to increase one's wealth through sailing, agriculture, and various trades:

> One roams over the fish-filled sea in ships, longing to bring home profit…Another whose concern is the curved plough, cleaves the thickly wooded land and slaves away for a year. Another who has learned the works of Athena and Hephaestus, the god of many crafts, gathers in his livelihood with his hands…But of wealth no limit lies revealed to men, since those of us who now have the greatest livelihood show twice as much zeal. What could satisfy everyone?[64]

The quoted lines with their focus on gain through effort go beyond the merely conventional. They provide a reflection of what Solon saw happening in front of him: great and the small individuals strove to raise their living standards.[65]

More directly with respect to population compaction, there is Plutarch's observation that 'the city was getting full of people who were constantly streaming into Attica from all quarters'.[66] The immigrants are motivated by a desire for 'greater security of living'. This explanation is consistent with an understanding that Athens was acting as a magnet for those seeking to improve their material circumstances but also for those seeking police and protection services. Weir summarizes evidence suggesting that a circuit wall around Athens existed at some point in the sixth century.[67]

---

[56] Plutarch (Theseus 24.1-3) tr. Perrin.

[57] Thucydides (2.15.1-3) tr. Crawley.

[58] Compare with Henry J. Walker, *Theseus and Athens,* (New York: Oxford University Press, 1995), p.196.

[59] See Koen Van Gelder, 'The Iron-Age Hiatus and the *Synoikismos* of Theseus', *MedArch*, 4 (1991), pp.55–64.

[60] Steven Diamant, 'Theseus and the Unification of Attica', in American School of Classical Studies at Athens, Studies in Attic Epigraphy, History and Topography, *Hesperia Supplements,* 19 (1982), 38-47 (43-4).

[61] The role of compaction in the formation of the state is also recognized by Herodotus (1.96.2, 1.98.3): "Deioces was infatuated with sovereignty, and so he set about gaining it. Already a notable man in his own town (one of the many towns into which Media was divided)… And having obtained power, he forced the Medes to build him one city and to fortify and care for this more strongly than all the rest. The Medes did this for him, too. So he built the big and strong walls, one standing inside the next in circles, which are now called Ecbatana." (tr. Godley)

[62] Noted by Diamant, pp. 46–7.

[63] Plutarch (*Solon* 23.6, 24.1) tr. Perrin.

[64] Solon (fr. 13.43-45, 47-48, 71-73) tr. Douglas E. Gerber, *Greek Elegiac Poetry: From the Seventh to the Fifth Centuries,* (Cambridge, MA: Harvard University Press, 1999), p.133.

[65] Morris Silver, 'The Role of International Trade in the Transformation of Attica's Agricultural Organization: From Solon to Socrates', *MBAH,* 27 (2009), 95-163 (p100).

[66] Plutarch (*Solon* 22.1) tr. Perrin.

[67] Robert G.A. Weir, 'The Lost Archaic Wall Around Athens', *Phoenix.* 49 (1995), pp.247-58; supported by Frederikson, p.32.

It does appear from the above that the *preconditions* for state formation—the emergence of a specialized producer of punishment/protection—were present in archaic Attica. This being said Part IV does not seek to identify the historical period in which the state was born. Neither does it attempt to identify the period in which the ruling organization was transformed from a privately owned firm into a publicly owned one. It is instead more narrowly focused on marshalling the ample evidence that the market for order had grown sufficiently for a state to be present in classical Athens.

V. Fulltime Production of Punishment and Protection in Classical Athens

General Considerations

In contemporary western societies, the punishment component of order is produced overwhelmingly by the state (the specialist firm) throughout its geographic borders. 'Overwhelmingly' mainly because victims and bystanders must make the effort to report crimes to the police and to serve as witnesses. This was certainly the case in Athens.[68] Indeed, individuals might be offered material incentives ('rewards') for reporting criminal behavior to the police. For example, the informer who 'exposed' a market trader who refused to accept coins approved by the Athenian state might receive half the trader's confiscated goods.[69] Obviously, the goods were confiscated by the informed magistrates. In many contemporary states budgetary and other pressures have curtailed routine police patrols increasing the dependence of law enforcement authorities on citizen reports.[70] The monopoly state does not have an unlimited budget and neither is it omniscient.

Even so, it has been suggested that in Athens self-helpers accounted for an inordinately large share of punishment production. One possible reason for this kind of difference would be that the Athenian state did not produce punishment uniformly within the 900 square miles of its territory. It underserved rural areas relative to the city of Athens and the Piraeus. Thus, as Rosivach points out: the *sitophylakes* regulated the price charged for bread but only in the city (*asty*) and the Piraeus; the *metronomoi* regulated weights and measures only in the city and Piraeus; and the *agoranomoi* supervised the quality of goods offered for sale only in the city and the Piraeus.[71] With respect specifically to police: 'One thing is certain … the Scythians [see below] were urban police with no known duties in rural Attica'.[72] Again, Aristotle,[73] shows substantial police resources (guardians of the docks and watchmen in the city) being allocated to urban areas but not to the countryside. In this sense it is fair to approximate by classifying the Athenian state as a city-state—that is, as *a state whose rule was mainly confined to a city.*

The more general point is that in rural areas the identity of criminal perpetrators is often known or relatively inexpensively ascertained by victims.[74] In the punishment of known neighborhood criminals, victims in rural Attica had a cost advantage relative to the specialist firm and it was legitimate for them to participate in punishing their victimizers.[75] Punishment of criminals by victims is a fundamental human right and as such it pre-exists any state although the "right" might be recognized or denied in a state's code of rules.[76]

The visible resources allocated to punishment production by Athenian rulers seem small (but see below). Hence, "primitivist" scholars may reason that if the Athenian specialist firm visibly seemed to do little then the citizen do-it-yourselfers must have done a great deal. It would be equally invalid to demonstrate the "modernist" position by suggesting that since Athenian resources allocated to self-help are largely invisible that the specialist firm must have produced nearly all punishment. This much is clear: classical Athenian law recognized only a few types of punishment inflicted by individual Athenians including, most relevantly, against thieves caught at night.[77] Thus, the Athenian state, like a 'modern' state, did seek to exclude not only rival states but also to limit ordinary individuals from punishing criminals.[78] However, there have always been scenarios in which it was regarded as legitimate (by ruled and rulers) for individuals to overpower and punish criminals.

Evidence for a Classical Athenian State

The classical Athenian state was not run by a king, president, mayor, or even a commissioner of police. However, there were the Eleven, meaning full-time magistrates/rulers (*archai*) usually serving for one year.[79, 80] The *archai* probably received a salary (misthos) up to 411 BCE and probably once again after the restoration of democracy. No doubt annual rotation in

[68] Hansen (2002), p.32.

[69] Josiah Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens,* (Princeton, NJ: Princeton University Press, 2008), p.242.

[70] For the United States, the 2010 National Crime Victimization Report shows that 50% of violent crimes and 60% of property crimes were not reported to the police. It is added, "These percentages have remained stable over the past ten years." Available for download at: http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2224.

[71] Vincent J. Rosivach, 'Some Economic Aspects of the Fourth-Century Athenian Market in Grain', *Chiron,* 30 (2000), pp.50–51.

[72] Suda, *s.v.* toxotai and the scholiast on Aristophanes (*Acharnians* 54) cited by Virginia J. Hunter, *Policing Athens: Social Control in the Attic Lawsuits, 430–320 B.C.,* (Princeton, NJ: Princeton University Press, 1994), p.146.

[73] *Constitution of the Athenians*, (24.3, 52.1) hereafter *AP*. tr. H. Rackham, *Aristotle: The Athenium Constitution, the Eudemion Ethics, on Virtues and Vices,* (Cambridge, MA: Harvard University Press, 1944).

[74] See Hansen (2002), p.34.

[75] Hunter, p.150.

[76] Compare with Anderson, p4.

[77] Demosthenes (24.113, 23.60) tr.DeWitt and DeWitt; Matthew R. Christ. 'Legal Self-Help on Private Property in Classical Athens', *AJP*, 119 (1998a), 521-45. (p.522).

[78] See also Edward M. Harris, *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society, and Politics,* (London: Cambridge University Press, 2006).

[79] *AP* (24.3, 52.1); *AP* (6.1322a)

[80] "Why they should number eleven is not clear, but they presumably ante-date Cleisthenes' creation of the ten tribes, and are in fact mentioned in connection with Solon in 7.iii…", in P.J. Rhodes, *A Commentary on the Aristotlean Athenian Politeia,* (Oxford: Oxford University Press, 1993), p.580.

office 'wasted' valuable experience and resulted in a loss of productive efficiency relative to societies with career or long-term police officials. This, apparently, was a cost the owning public was prepared to bear. Rotation in office/choice by lot may be understood as a device of aligning the incentives of magistrates with those of the public—that is, it is a way of narrowing the separation of ownership from control.[81] Ideally, ruler and subject were fused.

The state-owning public sought to limit efficiency losses in a number of ways. First, it appears that magistrates were specialized. 'When a board of *anagrapheis* ['recorders'] was ordered to publish Drakon's homicide law in 409/8, it was told to obtain the text of the law from the king archon, the Athenian official who oversaw homicide cases. In the same way, we might suppose, other magistrates kept copies of laws that they administered at their offices…'[82] Second, the magistrates were assisted by several responsible officials who, in the case of the archons, they appointed.[83] These officials were called Paredroi (from *paredros* "sitting beside"). Unfortunately, as Kapparis explains: 'The slender evidence available to us allows only a limited understanding of their responsibilities and constitutional status, the method of their appointment and the extent of their accountability'.[84] Third, the owners of the state sought to minimize labor turnover/loss of expertise by relying on *dēmosioi* 'public slaves.' 'The Athenians employed skilled public slaves in many areas of public life, and since most state officials served for only a single year, these slaves provided a degree of expertise and professionalism that the officials they served otherwise lacked'.[85] Ober makes this point exceptionally clear in his discussion of the examination of coins in the marketplace:

> We can now begin to understand why the Approvers were public slaves. The choice of public slaves for this vital office meant that Approvers could become true experts. Men who had engaged in the same demanding task for thousands of hours, who had looked carefully at tens of thousands of coins, could be expected to develop a high level of professionalism and consistency of judgment. That would have been impossible had the Approvers been lotteried citizen amateurs who held office for only a year.[86]

While free public employees might be docked or dismissed for dereliction of state-assigned duties the public slave might be controlled by means of pain incentives.

> The Eleven were empowered by a procedure called *ephēgēsis* to arrest (*apagōgē*) criminals: But he [Solon] thought that no one should be debarred from obtaining redress in whatever way he can best do so. How then will this be ensured? By granting many modes of legal procedure to the injured parties. Take a case of theft. Are you a strong man, confident in yourself? Arrest the thief; *only you are risking a thousand drachmas*. Are you rather weak? Guide the Archons to him, and they will do the rest. Are you afraid even to do this? Bring a written indictment (*graphē*). Do you distrust yourself, and are you a poor man, unable to find the thousand drachmas? Sue him for theft before a public arbitrator, and you will risk nothing. In the same way for impiety you can arrest, or indict, or sue before the Eumolpidae, or give information to the King-Archon. And in the same way, or nearly so, for every other offence (emphasis added).[87]

Note that if less than one-fifth of jurors voted for conviction the accuser was fined.[88] The requirement that individuals take the criminal *ep' autophōrōi* 'in the act' or 'red handed' or best 'flagrantly guilty,[89] together with the very substantial penalty for false arrest or false prosecution shows that self-help by individuals was actually discouraged by the state authorities. Indeed, the initiative of the citizen is limited even in the case of a criminal caught in the act: the scholia on Demosthenes 22.26 explain that a thief caught in the act was to be locked up until the Eleven had been called to arrest him.[90] Judging by the citation of a law of Solon in Lysias the scholia seem to have had burglars in mind.[91]

As Hunter concludes the procedure offered 'everyone some recourse to force' even if they had to request it.[92] Note further that Demosthenes is speaking about what victims can do to obtain redress. He is not saying that the rulers must act against criminals only at the behest of victims. The Eleven were not prohibited from acting on their own initiative. Berent maintains, however: 'The Eleven did not *normally* make arrests on its own initiative' (emphasis added).[93] He presents no supporting evidence for this assertion but then if one begins by *assuming* that arrests were normally made on the initiative of self-helpers then of course they were not normally made on the initiative of the Eleven.

Hunter states: 'Routine arrests of common criminals or kakourgoi and other wrongdoers were within the jurisdiction of the Eleven… [As] jailors, they had the task of caring for

---

81 Alex McAuley, *Officials and Office-Holding,* in *A Companion to Ancient Greek Government,* ed. by Hans Beck, (Malden, MA: Wiley-Blackwell, 2003), pp 176-77.

82 James P. Sickinger, *Public Records and Archives in Classical Athens,* (Chapel Hill, NC: University of North Carolina Press, 1999), p.84.

83 K.A. Kapparis, 'Assessors of Magistrates (Paredoi) in Classical Athens', *Historia,* 47 (1998), pp. 383–93; Herman Mogens Hansen, 'Review Article: A Magisterial Inventory of Athenian Officials', *CP*, 87 (1992), 51-61 (p.53).

84 Kapparis, p.383.

85 Sickenger, p.144.

86 Josiah Ober, 'Access, Fairness and Transaction Costs: Nikophon's Law on Silver Coinage (Athens 375/4 BC)', *Princeton/Stanford Papers in Classics* (2009), available at http://www.princeton.edu/~~pswpc/pdfs/ober/070901.pdf

87 Demosthenes (22.26-7) tr. A. T. Murray, *Demosthenes, Orations.* (Cambridge, MA: Harvard University Press, 1936); see also (23.31; 24.164).

88 Andocides (4.18) tr. Douglas M. MacDowell, 'Andocides', in *Antiphon and Andocides,* ed. by Douglas M. MacDowell, (Austin, TX: University of Texas Press, 1998).

89 Harris, ch. IV.1.

90 Cited by Mogens Herman Hansen, *Apagoge, Endeixis, and Ephegesis against Kabourgoi, Atimoi, and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.,* (Odense: Odense University Press, 1976), p.25.

91 Lysias (10.17) tr. W.R.M. Lamb, *Lysias,* (Cambridge, MA: Harvard University Press, 1930).

92 Hunter (1994), p.137.

93 Berent, p.261.

those in prison … If there was a prison break, they were also responsible for finding the escaped prisoners… They saw to the execution of those condemned by the courts… As a concomitant of these major police duties, the Eleven had a role to play in judicial proceedings by bringing into court those cases in which kakourgoi disputed the charge against them…'[94] It is true that arrests by the Eleven and their agents are infrequently attested. It is also true that arrests by self-helpers and neighbors are infrequently attested.[95] Political criminals, tax delinquents, and adulterers were of interest to the orators, not property criminals who were typically mentioned only incidentally.[96]

No one knows the proportion of criminals who were arrested by the state as opposed to self-helping citizens. It may be ventured, however, that criminals are not law-abiding citizens and many/most law-abiding Athenian citizens would be most hesitant to physically engage *kakourgoi* 'criminals', including armed ones, and drag them to the Eleven. Indeed, evidence that Athenian bystanders rendered physical assistance in violent episodes of any kind is 'scarce'.[97] But the evidence that is available does not favor citizen intervention against street criminals. Ariston reports that he was violently assaulted in the Agora by Conon and his sons.[98] Sternberg summarizes the role of bystanders: 'The speaker in *Against Conon* claims there were bystanders present, people he did not know—*agnōtes ontes*. Their names were Lysistratus, Paseas, Niceratus, and Diodorus. He says they have testified that they saw him being beaten, stripped of his cloak, and subjected to violent outrage. … If we are to believe Ariston, there were at least these four strangers present… who stood by and watched but did not physically intervene. *Yet Ariston does not complain*' (emphasis added).[99] On the other hand, it is clear is that substantial police resources were made available to Athenian residents by the law and, as we shall see, on the ground.

There is possible evidence for investigative work in Aeschines' pessimistic comment about the trial of secret thieves: 'For what foot-pad [mugger] or adulterer or assassin, or what man who has committed the greatest crimes, but has done it secretly, will be brought to justice? For whereas such of these criminals as are caught in the act are instantly punished with death, if they acknowledge the crime, those who have done the act secretly and deny their guilt, are tried in the courts, and the truth can be determined by circumstantial evidence [likelihood] only'.[100] Antiphon recommends:

> The enormous risk makes them [criminals] devote a great deal of thought to the problem of executing the crime in safety, and they take no steps until they have completely secured themselves against suspicion. With these facts in mind, you must place implicit confidence in any and every indication from probability presented to you. We, on the other hand, who are seeking satisfaction for the murder, are not letting the guilty escape and bringing the innocent into court; we know very well that as the whole city is defiled by the criminal until he is brought to justice, the sin becomes ours and the punishment for your error falls upon us, if our prosecution is misdirected. Thus, as the entire defilement falls upon us, we shall try to show you as conclusively as our knowledge allows that the defendant killed the dead man.[101]

Police, the Eleven and especially *dēmosioi* who were assigned to the various courts would have participated in gathering the circumstantial evidence. Despite the alleged importance of self-help and 'social controls' Athens had a sufficiently high property crime rate for Aeschines and Antiphon to be concerned about prosecuting criminals who acted in stealth. Or at least the orators thought that the jury would find their expressed concerns plausible.

It appears possible that citizens were authorized to search another's house for stolen goods provided that the head of the household gave his consent,[102] and the searcher left his outer garments outside to make it more difficult to plant evidence or to steal.[103] Might those harboring stolen goods and criminals escape punishment by refusing entry to their property? What did a citizen do if he found his stolen property and the owner of the searched property declined to return it? Demosthenes asserts: 'And yet, by the gods, if I had led you off to prison as a thief caught in the act, piling upon your back—if this had been in any way possible—the wealth which you now possess…'.[104] Rhetoric aside, this kind of arrest even if possible is most improbable. How many victims could/would drag a desperate thief to the magistrate with (or without) the stolen goods? Obviously, the rulers would have to apply force.[105] As already noted, Demosthenes is not speaking here about a method of making an arrest but of a method for establishing guilt.

Athens had a slave-police force (*dēmosioi hypēratai*) called the 'Scythians' or Scythian archers' which is placed by Pollux

[94] Hunter, p.144 & see *AP* (52.1); Hansen (1976).

[95] One possible example of self-help against a thief might be mentioned: "Nay, if you were one of the Eleven, you would refuse to accept a prisoner arrested on the charge of having pulled off the accuser's cloak or stripped him of his shirt: by that same rule, you would rather let him go, because he was not called a clothes-stealer!" (tr. Lamb). The question is would he have made the arrest? Also, in Lysias (23.9) when Nicomedes tried to arrest Pancleon as his runaway slave fighting/arguing ensued and the arrest was aborted.

[96] Demosthenes (18.132) tr. DeWitt and Dewitt; Isocrates (15.90) tr. George Norlin, *Isocrates,* (Cambridge, MA: Harvard University Press, 1980).

[97] Matthew R. Christ, *The Litigious Athenian,* (Baltimore, MD: Johns Hopkins University Press, 1998b), p.257 n.18.

[98] Demosthenes (54.7-9) tr. DeWitt and DeWitt.

[99] Sternberg, pp.102–3.

[100] Aeschines' (1.91) tr. Charles Darwin Adams, *Aeschines,* (Cambridge, MA: Harvard University Press, 1919).

[101] Aeschines (1.91) tr. K.J. Maidment, *Attic Minor Orators,* (Cambridge, MA: Harvard University Press, 1968).

[102] Compare with Hansen (1976), p.50.

[103] Christ (1998a), pp.530–31, citing Aristophanes, *Clouds*, 497-99, with Scholia; cf. Edward M. Harris, 'Who Enforced the law in Classical Athens', in *Vorträge zur griechischen und hellenistischen Rechtgeschicte* (Salerno, 14-18. September 2005), ed. by Eva cantarella (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2007), 159-78 (p.168).

[104] Demosthenes (45.81) tr. Murray.

[105] Hansen (1976), p.51.

'before the law-courts and other gatherings…'[106] Berent quotes Badian's dismissive suggestion that the archers were 'probably more decorative than useful, especially for keeping order in law-courts and assemblies.'[107] In Aristophanes' *Acharnians* the Scythians forcefully remove an unauthorized speaker (Amphitheus) from an assembly.[108] Based on the text they acted on their own initiative but some scholars reason that since the Scythians were public slaves the ejection could only have been carried out after an unspoken signal from the Prytanes.[109] Aristophanes *Thesmophoriazusae* shows that Scythians might accompany magistrates and subdue criminals for them: In line 920 'Third Woman' says: 'You seem to me to be a cunning rascal too; you are in collusion with this man, and it wasn't for nothing that you kept babbling about Egypt. But the hour for punishment has come; here is the Magistrate with his Scythian'.[110] This is not taking place during an official assembly and, indeed, it has the sound of a regular patrol, not crowd control.[111] In Aristophanes' *Ecclesiazusae* 'First Woman' tells Praxagora that archers can be seen dragging drunkards from the *agora*.[112] These examples do not prove that the archers functioned as a general city police force. The question arises, however, what the Scythians did when not maintaining order at official gatherings. If, as seems reasonable, police were stationed in the *agora*, and in other *public places* residents would also have seen archers dragging thieves away. The problem is that Aristophanes and his audience might not have found this to be amusing.

'Did the Scythians attend the Eleven? Unfortunately, there is no direct evidence associating them with the Eleven. However, we do know that the Eleven did not act alone in making an arrest but were assisted by public slaves… It is reasonable to suppose that in the fifth century these slaves were Scythians'.[113] It is clear that numerous, well-armed *hypēretai* assisted the Eleven in forcibly removing Theramenes from the altar and leading him to the execution site:

> At this moment the herald of the Thirty ordered the Eleven to seize Theramenes; and when they came in, attended by their servants and with Satyrus, the most audacious and shameless of them, at their head, Critias said: 'We hand over to you', said he, 'this man Theramenes, condemned according to the law. Do you, the Eleven, take him and lead him to the proper place and do that which follows.' When Critias had spoken these words, Satyrus dragged Theramenes away from the altar, and his servants lent their aid. And Theramenes, as was natural, called upon gods and men to witness what was going on. But the senators kept quiet, *seeing that the men at the rail were of the same sort as Satyrus and that the space in front of the senate-house was filled with the guardsmen, and being well aware that the former had come armed with daggers*. So they led the man away through the market-place, while he proclaimed in a very loud voice the wrongs he was suffering… (emphasis added).[114]

This is not a description of "crowd control" and there is no reason to assume that the armed guardsmen were unpaid citizen volunteers or even part-time employees of the Eleven. Neither, may we take it for granted that the guardsmen were Scythians or other *dēmosioi*.

The exact number of 'archers' has been a subject of much discussion. The scholiast on Aristophanes *Acharnians* 54 describes the archers as 'public slaves, guards of the city, 1,000 in number…'[115] The number 1,000 is also reported by the *Suda* s.v. *toxotai*: 'Archers: The public slaves, guards of the city 1000 in number, who formerly lived in the Agora, but later moved to the Areopagus. These were called 'Scythians''.[116] Andocides (3.5) says 300 men in a most interesting statement: 'To begin with, we fortified Peiraeus in the course of this period: secondly, we built the Long Wall to the north: then the existing fleet of old, unseaworthy triremes with which we had won Greece her independence by defeating the king of Persia and his barbarians—these existing vessels were replaced by a hundred new ones: and it was at this time that we first enrolled three hundred cavalry and purchased three hundred Scythian archers. Such were the benefits which Athens derived from the peace with Sparta, such the strength which was added thereby to the Athenian democracy'.[117] Later in the same speech Andocides (3.7) refers or seems to refer to 1200 archers: 'The peace in question exalted the Athenian democracy; it rendered it so powerful that during the years after we gained peace we first of all deposited a thousand talents on the Acropolis and passed a law which set them apart as a state reserve; in addition to that we built a hundred triremes, and decreed that they should be kept in reserve likewise: we laid out docks, we enrolled twelve hundred cavalry and as many archers, and the Long Wall to the south was constructed'.[118] (The Greek is: *chilious te kai diakosious ippeas kai toxotas tosoutous eterous katestēsamen*.) Similarly, Aeschines states: For we deposited on the Acropolis a thousand talents of coined money we built one hundred additional triremes, and constructed dockyards; we formed a corps of twelve hundred

[106] tr. David Braund, 'In Search of the Creator of Athens' Scythian Archer Police: Speusis and the 'Eurymedon Vase'', *ZPE,* 156 (2006), 109-13 (p.109).
[107] Berent (2000), p.261.
[108] *Acharnians* (54); see also. *Acharnians* (22) tr. C.E. Graves, *Aristophanes, the Acharnians,* (Cambridge: Cambridge University Press, 1905).
[109] Benjamin Bickley Rogers, *The Archarnians of Aristophanes,* (London: Bell, 1930), p.11.
[110] Aristophanes (*Thesmophoriazusae* 920-46), see also. 1084, 1125-27, 1135, tr. Eugene Jr. O'Neill, *Aristophanes,* (New York: Random House, 1938).
[111] Compare with S.C. Todd, *The Shape of Athenian Law,* (Oxford: Oxford University Press, 1995), p.79.
[112] Aristophanes (*Ecclesiazusae* 143), tr. O'Neill.
[113] Hunter (1994), pp.146–47 citing Diodorus Siculus (13.102.1) and other sources.
[114] Xenophon, *Hellenica,*(2.3,54-6), tr. Carleton L. Brownson, *Xenophon,* (Cambridge, MA: Harvard University Press, 1918, 1921); Diodorus Siculus (14.5.1-4) tr. C.H. Oldfather, *Diodorus of Sicily,* (Cambridge, MA: Harvard University Press, 1933); Virginia J. Hunter, 'The Prison of Athens: A Comparative Perspective', *Phoenix,* 51 (1997), 296-326 (p.300).
[115] Braund, p.109.
[116] tr. Alexander Yakobson, *Political Stability and Public Order - Athens vs. Rome*, in *Stability and Crisis in the Athenian Democracy,* ed. by Gabriel Herman (Stuttgart: Steiner, 2011), p.141; see also Rachel Louisa Sargent, 'The Size of the Slave Population at Athens During the Fifth and Fourth Centuries Before Christ', Ph.D dissertation, University of Illinois (Westport, CT: Greenwood, 1924), p.118.
[117] tr. MacDowell; see also Aeschines (2.173) tr. Adams.
[118] tr. MacDowell.

cavalry and a new force of as many bowmen, and the southern long wall was built; and no man undertook to overthrow the democratic constitution'.[119] Many scholars have interpreted Andocides' Greek to mean 1.200 cavalry and 1,200 archers; others disagree. What is disturbing is that a number of scholars seem to prefer the number 300 for non-linguistic reasons (or even against the Greek) such as that an 'increase in the Scythians from 300 to 1,200 within twenty years would be too great a financial burden for the state' or because 1,200 'is needlessly large for the police of a city like Athens'.[120]

Aristotle tells:

> They also established a plentiful food-supply for the multitude, as Aristeides had proposed; for the combined proceeds of the tributes and the taxes and the allies served to feed more than twenty thousand men. For there were six thousand jurymen, one thousand six hundred archers and also one thousand two hundred cavalry, five hundred members of the Council, five hundred guardians of the docks, and also fifty watchmen in the city, as many as seven hundred officials at home and as many as seven hundred abroad; and in addition to these, when later they settled into the war, two thousand five hundred hoplites, twenty guard-ships and other ships conveying the guards to the number of two hundred elected by lot; and furthermore the prytaneum, orphans, and warders of prisoners—*for all of these had their maintenance from public fund* (emphasis added).[121]

The sources do not make fully clear whether the 1,000 or 1,200 or 1,600 archers were in addition to the 300 Scythians or included them or actually replaced the Scythian corps.[122] Neither does Aristotle make clear the relationship between the Scythians and the 'five hundred guardians of the docks' and 'fifty watchmen in the city'. The same kind of uncertainty applies to the police unit formed to aid merchants mentioned by Demosthenes.

The additional publicly financed archers and cavalry referred to by Andocides, Aeschines and Aristotle might be called a 'militia' or even a 'standing army'. Interestingly, no one seems to refer to Andocides' publicly financed 300 Scythian archers and 300 cavalry in this way. Such a reference would of course be troublesome as Aristophanes depicts 'Scythians' and 'archers' as policemen. The implicit assumption behind the militia/standing army characterization must be that classical Athens could not have found productive police work for more than 300 archers (see above). More realistically, the archers, however many, would be available to man the walls in the event of a sudden attack on Athens by another state or by pirates. However, in times of peace they would be available to respond to reports of crime and to capture thieves on their own initiative. The dual role is perfectly consistent with the characterization of the archers as 'guards of the city'. Indeed, Sargent notes an inscription dated about 432 BCE that 'refers to three citizen *toxotai* detailed for sentinel duty at an entrance to the Acropolis to prevent runaway slaves or thieves from entering'.[123] Chaniotis also discusses this inscription which he cites as *IG,* I^3, 45 (*IG*, I^2, 44).[124] This inscription *proves that 'archers' (not 'Scythians') might be deployed against ordinary criminals.* Perhaps, in addition to urban crowd control, the cavalry helped to provide security for rural areas. It is known from Aristotle that even in times of peace Attica's border areas were patrolled/guarded by armed forces and inscriptions show that the *peripoloi* included citizen and foreign professional (= paid) soldiers (*stratiōtai* and *xenoi*).[125] Kent thinks that they formed 'a kind of rural police force' and he suggests that a 'police duty common to all garrisons was to assure an uninterrupted harvesting of the crops, but the evidence is weak.[126] Aristotle says the duty of a border commander was to 'guard' (*phylassō*) his sector and also to 'command in any war that takes place in it'.[127] It does seem that Aristotle distinguishes between 'guarding' a sector and fighting invaders. It is clear that, at the very least, the presence of the garrisons in rural areas deterred bandits and this must have been understood by the Athenians who financed their deployment.

Demosthenes makes clear that government institutions counted on the support of taxes and payments made by government debtors: 'Moreover, men of Athens, the law shatters our financial system, both sacred and civil; and I will tell you how. You have a law in operation, as good a law as ever was enacted, that holders of sacred or civil moneys shall pay the money in to the Council house, and that, failing such payment, the Council shall recover the money by enforcing the statutes applicable to tax-farmers; and on that law the administration of the treasury depends. That is the law that ensures the supplementary supply for the expenses of meetings of the Assembly, religious services, the Council, the cavalry, and so forth, because the revenue from taxation is not sufficient for current expenses, and what we call the supplementary payments are made under the constraint of that law'.[128] He does not provide the number of tax/debt-collectors.

Were there too few paid police for a 'proper' state? Berent maintains: 'To the extent that this apparatus could be described as a police force, its rudimentary character becomes obvious when one is considering the size of the population of Attica (above 200,000 including non-citizens)'.[129] Berent does not estimate the size of Athens' police force.[130] As noted above: Aristotle provides numbers: 1,600 archers, 500 guards on the

[119] Aeschines (2.174) tr. Maidment
[120] See Sargent, pp.115–119, and discussion below.
[121] *AP* (24.3) tr. Rackham.
[122] Sargent, p.117.
[123] Sargent, p,117.
[124] Angelos Chantiotis, 'Conflicting Authorities. Asylia between Secular and Divine Law in the Classical and Hellenic Poleis', *Kernos,* 9 (1996), 65-86 (p.72).
[125] *AP* (61.1) in John H. Kent, 'A Garrison Inscription from Rhamnous', *Hesperia,* 10 (1941), 342-50 (pp.344; 347).
[126] Kent, p.347.
[127] *AP* (61.1) tr. Rackham.)
[128] Demosthenes (24.96-7) tr. Murray.
[129] Berent (2000), p.261.
[130] 300 archers are referred to in Berent (2006), p.145.

docks and 50 city watchmen.[131] A scholiast and the *Suda* speak of 'public slaves, guards of the city, 1,000 in number…' If there were as many as 1,000 (or 2,000) (or 300) full-time policemen in Athens then, using 200,000 for the total population,[132] there were 200 (or 100) (or 667) persons for each police officer. In the United States in 2008 there were 665,700 'police officers' for a total population of 301,621,157 or 453 persons per police officer. If we look at Sweden we find 500 persons per police officer (about 18,000 police officers for a population of about 9 million); for the UK the number is about 381 (about 163,000 police officers for a population of about 62 million).[133] Athens did not have a 'rudimentary' police force and, comparatively speaking, it was not underpoliced. However, it is conceivable that 200,000 is a gross underestimate of the population governed by the Athenian state. According to a much disputed fragment of Ctesicles,[134] a chronicler whose exact date is not known, in the last quarter of the fourth century BCE, Demetrius of Phalaron carried out a general census in Attica that recorded 10,000 metics (probably adult males) and 21,000 citizens (adult males) and 400,000 slaves (probably men, women, and children).[135] If we jump up to a total population of 525,000, probably a gross overestimate, and employ for the police the *very conservative* number of 1,000 then we have 525 persons per policeman. More cautiously the number of persons per policeman ranges from a minimum of 200 to a maximum of 525. Either way the point is that Athens's rulers chose to make scarce resources available for policing because such services were desired and would be utilized by the public. Moreover, in addition to archers, guards, and watchmen there were court workers, special police units, and jailers.

Demosthenes speaks of a kind of international police to aid merchants against internationally mobile criminals and pirates operating from foreign bases: "Moerocles, men of the jury, who proposed the decree against those who injure merchants, and who persuaded, not you alone, but your allies as well, to organize a sort of police to repress the wrongdoers, will not be ashamed presently on behalf of Theocrines to speak in opposition to his own decree… For surely, Moerocles, we are not now going to exact ten talents from the Melians in accordance with the terms of your decree, because they gave harborage to the pirates, and yet suffer this man to go free who has transgressed both your decree and the laws which maintain our state. And shall we prevent from wrongdoing the islanders, against whom we must man our ships in order to hold them to their duty'.[136] It is clear that Athens maintained a significant standing navy which,[137] whatever else may be said, helped the nation to participate and benefit from an international division of labor in which it paid for imported grain by exporting wine/oil. Note the references of Demosthenes to actions against pirates and naval convoys for grain ships.[138]

A prison (*desmōtērion*) was maintained for detaining persons prior to trial or prior to the imposition of the death sentence or for incarcerating those failing to pay taxes or for those sentenced to imprisonment. Actually there is reason to believe that there were several prisons. Andocides tells: 'We [some forty persons] were all thrown into one prison. Darkness fell, and the gates were shut. Mothers, sisters, wives, and children had gathered. Nothing was to be heard save the cries and moans of grief-stricken wretches bewailing the calamity which had overtaken them'.[139]. If there were only one prison there would be no need to say that all the arrested were 'thrown into one prison'. In the prisons the Eleven were served by public slaves.[140] There were also 'official torturers' (*basanistes*) and a slave-executioner.

With respect to imprisonment as a punishment, note Demosthenes:

> Let me give you a proof that my account of the matter is correct. It would not have been lawful for you, gentlemen of the jury, to assess any penalty, corporal or pecuniary, for imprisonment is a corporal punishment, and therefore you could not have inflicted it as a penalty, nor could it have been provided by statute, in cases where information is laid or summary arrest is allowed, that 'the Eleven shall put in the stocks any man against whom information is laid, or who has been arrested,' if it had been unlawful to imprison any offenders other than those who conspire to betray the commonwealth, or to overthrow popular government, or tax-farmers who do not satisfy their contract… The oath, gentlemen of the jury, does not contain the words 'I will not imprison any Athenian citizen.' The courts alone decide every question brought to trial; and they have full authority to pass sentence of imprisonment, or any other sentence they please.[141]

In the same speech Demosthenes notes that penal imprisonment is not uncommon: 'The commonwealth, having decided to distrust them, did not choose to be cheated of retribution by the process of putting in bail, but preferred that they should stay in a place where many genuine Athenians have sojourned. Yet people have been imprisoned there before now both for debt and on judgement, and have taken it quietly. Perhaps it

[131] *AP* (24.3).

[132] See recently Mogens Herman Hansen, 'How to Convert an army Figure into a Population Figure 2011', *GRBS,* 51 (2011), 239-53 (pp.244 & 252).

[133] US police officers available at: http://www.bls.gov/oco/ocos160.htm; EU police officers available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/crime/data/database.

[134] Athenaeus (6.272c), tr. Charles Brown Gulick, *Athenaeus: The Deipnosophists,* (Cambridge, MA: Harvard University Press, 1941).

[135] Sources for population e.g. Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles and Ideology,* (Oxford: Blackwell, 1991). For a reinterpretation of the census data, see Hans Van Wees, 'Demetrius and Draco: Athens' Property Classes and Populations In and Before 317 BC', *Journal of Hellenic Studies,* 131 (2011), pp.95–114.

[136] Demosthenes (58.53, 56) tr. Murray.

[137] Thucydides (2.62) tr. Crawley; Ian Morris, 'The Greater Athenian State', in *The Dynamics of ancient Empires: State Power from Assyria to Byzantium,* ed. by Walter Scheidel, (Oxford: Oxford University Press, 2009), p.136.

[138] Demosthenes (58.53 ff & 18.73).

[139] Andocides (1.48) tr. MacDowell; see also. Eugene Vanderpool, 'The State Prison of Ancient Athens', in *From Athens to Gordian,* ed. by Keith DeVries, (Philadelphia: University Museum, 1980), pp.17–31.

[140] Plato (*Phaedo* 116b-c, 117a-118, *Crito* 43a).) tr. Howard North Fowler, *Plato,* (Cambridge, MA: Harvard University Press, 1966).

[141] Demosthenes (24.146,151) tr. Murray.

is rather invidious to mention names, but I cannot help giving you a list for comparison with the men before you'.[142] Allen explains, 'The penalty of imprisonment was not simply an option open to a defendant who could not pay a fine but was actually a penalty that the jury (or presiding magistrate) could use in sentencing on its own volition'[143]. Demosthenes does not have in mind that juries might sentence the convicted to self-help prisons. Imprisonment might be utilized as the primary punishment and, moreover, the rigors of prison life were not softened by thoughts of "rehabilitating" criminals.[144]

Indeed, prisoners might be kept in the stocks within the prison as a harsher form of punishment: 'At the end of the meeting of the Council's secret decision to arrest us was carried out. We were put in stocks in the prison'.[145] Penal torture is also noted by Demosthenes in which one Antiphon is tortured and executed.[146]

It is true that the oratorical corpus does not often focus on individuals who were imprisoned specifically to punish them. A possible example is provided in Isaeus: 'So that it is much more fitting that they should claim to receive the estate by gift than Chariades. The latter, when he resided here, was first caught in the act of theft and thrown into prison; he was subsequently released with certain other criminals by the Eleven… '[147] Nevertheless, the orators were not much concerned with thieves and robbers who were eminently qualified for corporal punishment. Gagarin notes: 'An Athenian trial was often just one case in an ongoing series of disputes between two litigants and their allies…'[148] Hunter wonders 'what purpose such a punishment [imprisonment] might have served in a penal system that sought either restitution or retribution and rarely, if at all, correction or reform.'[149] The purpose, it seems to me, is that imprisonment—deprivation of freedom—deters criminality by *inflicting pain* upon those apprehended but also by *incapacitating* them—that is, by preventing apprehended criminals from committing new crimes. Did the Athenians understand the concept of deterrence? Antiphon explains: 'The enormous risk [even of execution] makes them [criminals] devote a great deal of thought to the problem of executing the crime in safety, and they take no steps until they have completely secured themselves against suspicion'.[150] We may safely assume that after pondering the benefits and costs of deliberately harsh penalties some potential criminals decided that honesty was for them the best policy. Lysias is aware of and advocates punishment as a deterrent: 'Now it is reasonable, gentlemen of the jury, that men who are now trying such a case for the first time since we settled the peace should act not merely as jurors, but in fact as law-makers. For you know well that your decision upon these cases will determine the attitude of the city towards them for all time. And it is the duty, in my opinion, alike of a loyal citizen and of a just juror to put such constructions on the laws as are likely to be of benefit to the city in the future'.[151]

Berent responds that 'imprisonment was not *normally* a form of punishment imposed by the courts in the classical *polis*' (emphasis in original).[152] Berent does not provide any evidence bearing on the punishment normally meted out to property criminals but then he does not have to 'since prisons are typical of the bureaucratic machinery of the state' which he asserts did not exist in the classical *polis*.[153]

Officials called *praktores* were made responsible for collecting arrears in public debts and taxes. They might call upon the assistance of slave-assistants.[154] Hunter suggests: 'When the state's own property was at issue, a public slave went along as a kind of symbol of authority, validating the proceedings.'[155] However, one might imagine that the accompanying public slave not only served as a witness and symbol of authority but also represented a physical threat to the debtor. Indeed, in Aristophanes both public and private slaves commit violence against free men at the direction of their controllers/owners.[156] However, in the case reported by Demosthenes the *praktor* encountered resistance in the doorway from the debtor Theophemus and sent his deputy/slave away to obtain witnesses. In any event, after some give and take Theophemus punched the *praktor* in the mouth; the *praktor* fought back and was later convicted for assault. I do not know how much of this scenario was typical or normal. It is clear that at least one Athenian citizen was willing to disregard or forcibly resist a decree of the Council. The question remains what happened to public debtors who refused to pay and refused to be placed on trial? Demosthenes, quoted above, maintains 'You have a law in operation, as good a law as ever was enacted, that holders of sacred or civil moneys shall pay the money in to the Council house, and that, failing such payment, the Council shall recover the money by enforcing the statutes applicable to tax-farmers.'[157] There was a point at which the state would

[142] Demosthenes (24.32) tr. Murray; see also Danielle S. Allen, *The World of Prometheus: the Politics of Punishment in Democratic Athens,* (Princeton, NJ: Princeton University Press, 2000), p.228.
[143] Danielle S. Allen, 'Imprisonment in Classical Athens', *CQ,* 47 (1997), 121-35 (p.125).
[144] Demosthenes (24.101, 122, 132); Hunter (1997), p.317.
[145] Andocides (1.45); tr. MacDowell.
[146] Demosthenes (18.133).
[147] Isaeus (4.28) tr. Edward Seymour Forster, *Isaeus,* (Cambridge, MA: Harvard University Press, 1962).
[148] Michael Gargarin, 'The Torture of Slaves in Athenium Law', *CP*, 91 (1996), 1-18 (p.6).
[149] Hunter (1997), p.296.
[150] Antiphon (2.1.2) tr. Maidment.
[151] Lysias (14.12) tr. Lamb; see also Mary Margaret Mackenzie, *Plato on Punishment,* (Berkeley, CA: University of California Press, 1981).
[152] Berent (2000), p.261.
[153] Ibid.
[154] Demosthenes (47.33-6); Antiphon (6.49).
[155] Hunter (1994), p.124.
[156] Aristophanes *Thesmophoriazusae* (920-46); *Acharnians* (926); *Clouds* (1297).
[157] Demosthenes (24.96-7).

apply overwhelming force to recalcitrant debtors. In Demosthenes, after a decree by the Assembly, public debtors were arrested in their homes and imprisoned.[158] The state placed law-enforcement feet on the ground.

In addition to police, jailers, court employees, and tax/debt collectors there were, as noted earlier, *dokimastai* "approvers," *dēmosioi* "public slaves" who combated counterfeiters by testing coins in the central Agora and Piraeus and were supervised by magistrates called *syllogeis tou demou*.[159] The Syllogeis was in turn supervised by other officials and ultimately by the Counci.[160] *Dēmosioi* also had the duties of supervising measures and caring for state documents.[161] Also, beginning in the 340's Athens introduced maritime courts that required written contracts and, according to Cohen,[162] employed panels of commercially experienced judges/jurors.[163]

Lastly we turn to protection production. Focusing narrowly, note that the state supported watchmen on the docks.[164] More importantly, Andocides' 'we' who purchased archers is the same 'we' who (ignoring dating problems) fortified the Piraeus and built several important (and very expensive) defensive walls including the Long Wall connecting Athens and Piraeus.[165] Inscriptions show that the work on rebuilding the Piraeus fortification was accomplished by means of payments for daily-paid work (not costed), for yoke-teams bringing the stones (160 dr.), for iron tools (53 dr.); the Contractor Demosthenes of Boeotia who brought the stones up was paid 700 dr.[166] The 'we' who built/repaired the fortifications and walls was the Athenian state.

VI. Concluding Remarks

Classical Athens desired to possess and did possess a full-time organization specializing in the production of punishment and protection. This organization greatly relied on the services of public slaves to provide continuity, expertise and professionalism and it hired private contractors as well. This Athenian *state* was not at all rudimentary and it supported itself by collecting taxes, tribute and debts. Neither 'primitivists' nor 'modernists' can produce crime statistics. There is some but not a very much direct evidence for the apprehension and treatment of property criminals, whether by police or self-helpers.[167] There is, however, a good deal of evidence that the Athenian public and the rulers were aware of the property crime problem and made available substantial resources (police, prison, jailers, arbitrators, executioners, investigative, dock-guards, coin-testers, market inspectors…) to suppress criminals. The rulers also financed a standing navy and the building of walls and fortifications to protect Athenians from external criminals. Further, while this may be somewhat marginal to a minimalist punishment/protection production definition of the state, the state in Athens also employed officials to 'keep watch to prevent any scavenger from depositing ordure within a mile and a quarter of the wall; and they prevent the construction of buildings encroaching on and balconies overhanging the roads, of overhead conduits with an overflow into the road, and of windows opening outward on to the road; and they remove for burial the bodies of persons who die on the roads, having public slaves for this service… [and also] five Highway-constructors, whose duty is to repair the roads, with workmen who are public slaves'.[168]

In conclusion, if Lanni is correct in suggesting that 'Athens was a remarkably peaceful and well-ordered society',[169] then the explanation probably lies not in an unusually peaceful outlook or in reliance on self-help and social pressures but in reliance on harsh penalties and the enforcement resources of the state.

[158] Demosthenes (24.164).
[159] Darel Tai Engen, ‚Ancient ‚Greenbacks': Athenian Owls. The Law of Nikophon, and the Greek Economy', *Historia,* 54 (1995), 359-81 (pp. 368–76).
[160] Harris (2007), p.162.
[161] *IG*, II^2,1013.5.45-90; Sickinger, pp.115-16; 119; 123; 144.
[162] Edward E. Cohen, *Ancient Athenian Maritime Courts,* (Princeton, NJ: Princeton University Press, 1973), pp.93–5.
[163] Cohen bases his suggestion on Demosthenes (35.43).
[164] *AP* (24.3).
[165] Andocides' (3.5, 3.7) tr. MacDowell; Thucydides (1.107.1, 108.3) tr. Crawley.
[166] *Greek Historical Inscriptions,* ed. by Peter J Rhodes and Robin Osborne, (Oxford: Oxford University Press, 2003), pp. 46–9; Irving Barkan, 'Imprisonment as a Penalty in Ancient Athens', *CP,* 31 (1936), pp. 339–41; Sandra J. Burgess, 'The Athenian Eleven: Why Eleven?', *Hermes,* 133 (2005), pp. 328–36
[167] Additional sources consulted for this section: Allen (2000), p. 314–15); David Cohen, *Theft in Athenian Law,* (Munich: Beck, 1983); Hansen (2002), pp. 28–9, 36-8); Virginia J. Hunter, 'Policing Public Debtors in Classical Athens', *Phoenix,* 54 (2000), 21-38 (p.26-7); (1994), p.136; (1997), p. 300–6.
[168] *AP* (50.2, 54.1); tr. Rackham; see also Harris (2007), p. 163.
[169] Lanni (2009), p. 693; similarly Ober (2008), p. 256.

The Maintenance of Orderly Disorder: Modernity, Markets and the Pseudo-Pacification Process

Mark Horsley[*], *Justin Kotzé*[**], *Steve Hall*[***]

Abstract

In contrast with the rather violent and unstable period between the collapse of the Roman Empire and the rise of Plantagenet monarchy, the earliest phase of England's market economy coincided with a remarkable attenuation of brutal interpersonal violence. While, for some, this diminution of aggression is indicative of a 'civilizing process', this paper sets out to advance our theorization of the shift from physically violent to pacified socioeconomic competition in England and Western Europe between the late fourteenth century and the mid-twentieth century. In this pursuit we draw upon the more critical theory of the 'pseudo-pacification process' to explain how physical violence was sublimated and harnessed to drive the nascent market economy, which established and reproduced an economically productive condition of pseudo-pacified 'orderly disorder'.

Key words: *civilizing process; market economy; orderly disorder; pseudo-pacification; violence.*

1. Introduction

A good deal of historical evidence suggests that the earliest phases of Western liberal capitalism coincided with a remarkable decline in the more egregious forms of interpersonal violence.[1] In contrast, the period between the collapse of the Roman Empire around 400 AD and the rise of the Plantagenet monarchy toward the end of the thirteenth century seems to have been rather violent and destructive. The archaeological record of the British Isles, along with much of Western Europe, suggests a pronounced and multifaceted technological decline alongside a social order that relied on intimidation and privatized physical violence as the principal means of social structuring and economic acquisition.[2] By the beginning of the fourteenth century, however, the capacity to do harm in the service of instrumental or expressive interests was increasingly repressed, initially by the nascent state, in ways that reduced violence in civil society in order to inspire and energize more economically productive social interactions.[3]

Elias[4] described the dynamic force behind this socio-historical transformation as a 'civilizing process', in which human beings underwent a significant change in their emotional constitution as they developed sentiments of revulsion towards violence and bloodshed. For Elias, the three cornerstones of this process were the state's monopolisation of violence, the maintenance of social interdependence and the diffusion of 'manners', or civilizing behavioural codes. However, it has become increasingly clear that there are a number of problems with Elias's analysis, not least of which is his apparent reluctance to plumb the depths of political economy. Mucchielli[5] and Wieviorka[6] identify similar trends throughout Europe but frame them in a 'pacification process' much more reliant on the maintenance of social institutions external to the individual. The sustainability of pacifying social systems, they suggest, may depend on unstable political, socioeconomic and cultural contexts in which disruptive forces abound, such as the ebb and flow of 'business cycles', the distor-

* Mark Horsley, Lecturer in Criminology, University of Cumbria, United Kingdom.
** Justin Kotzé, PhD Researcher, Teesside University, United Kingdom.
*** Steve Hall, Professor of Criminology, Teesside University, United Kingdom.

1 Hall, S. 'The Emergence and Breakdown of the Pseudo-Pacification Process' in *Assaulting the Past*, edited by K. Watson (Cambridge: Cambridge University Press, 2007).

2 Maddern, P. *Violence and Social Order: East Anglia, 1422–1442*, (Oxford: Oxford University Press, 1992); Ward-Perkins, B. *The Fall of Rome and the End of Civilisation*, (Oxford: Oxford University Press, 2005).

3 Hall, S. 'The Socioeconomic Function of Evil' in *Sociological Review Monograph: Violence and Society: Towards a New Sociology*, edited by Ray, L & Kirby, J (Chicester: Wiley, 2014) 13-31.

4 Elias, N. *The Civilizing Process*, Rev. Edn. (Oxford: Blackwell, 1994 [1939]).

5 Mucchielli, L, 'Are we Living in a More Violent Society?: A Socio-Historical Analysis of Interpersonal Violence in France, 1970s-Present', *British Journal of Criminology,* 50 no. 5 (2010) pp. 808–829.

6 Wievioka, M. *Violence: A New Approach* (London: Sage, 2009).

tion of social institutions and relations, and the establishment and reproduction of a highly competitive and individualistic consumer culture. The upshot of this contextualized critique of the 'civilizing process' is that the decline in fatal and serious violence in the public sphere was not accompanied by a general decline in crime[7] or a general improvement in social harmony.[8]

To explain this juxtaposition we turn to the theory of the 'pseudo-pacification process', which allows us to reveal the interactive cultural, psychosocial and socio-legal dynamics behind the rise of capitalism's market economy.[9] Using the historical 'crossover' of the declining homicide and rising property crime rates as an empirical backdrop, the theory explains how physical violence was neither 'eliminated' nor 'spiritualized' in the cultural shift away from the bodily defence of land and family honour as Spierenburg[10] claims, but repressed and sublimated to perform two vital functions on behalf of the nascent market economy. First, to energize the sociosymbolic competition required by a burgeoning culture of consumption that was stimulated and diffused throughout the social body to increase market demand. Second, to evacuate as much physical violence as possible from civil society to protect property rights, lubricate the nodes and arteries of trade, legitimize exploitative business practice by reducing the likelihood of violent retribution, and thus clear the way for the rise of the market.[11]

In this article we will use this theoretical framework to further explore the significance of a number of legal transformations that took place during the Middle Ages – specifically, primogeniture and entail, labour and trading regulations, changing perspectives on usury and, of course, laws governing interpersonal violence as well as other forms of criminality – to the establishment and expansion of the early market economy, particularly in England. We will first outline the basic socio-historical processes that emerged after the fall of the Roman Empire, with an emphasis on the remarkably consistent decline of serious interpersonal violence since the late fourteenth century. With this empirical context in place our intention is to push beyond existing explanations to explore the ways in which socio-historical processes and ethico-legal regulation combine to open up a 'third space' between order and disorder.[12] In this third space physical violence is sufficiently pacified for a thriving market economy, but only in a way that allows for the expansion of the aggressive sociosymbolic competition necessary to boost the consumer demand required by the market.

2. After Rome

The prominent revisionist tendency of recent decades has portrayed the end of the Roman Empire as a gradual, relatively peaceful transition into the Renaissance rather than an abrupt and catastrophic dissolution caused, in large part, by internal decay and violent invasions.[13] It has become fashionable, notes Ward-Perkins[14], to shy away from terms such as 'crisis', 'collapse', 'decay' and 'destruction' in favour of a more neutral lexicon that describes the influx of Germanic peoples as a co-operative, mutually beneficial settlement that played a vital role in refreshing the rather staid, repressive cultures of the Roman world. In this version of events the 'settlers' adopted the best of classical civilisation whilst bringing their own diverse and vibrant cultural practices, ideas and beliefs to the table in such a way as to push Western Europe into the comparative sophistication of the later Middle Ages.

While this is undoubtedly a rather seductive narrative, it arguably suffers from a rose-tinted revisionism that risks confining socio-historical analysis to the overly optimistic assertion that, as Voltaire's character Professor Pangloss said, 'everything is for the best in the best of all possible worlds'. In more practical terms, Ward-Perkins[15] argues, this gradualist narrative of peaceful transition fails to account for empirical data from the archaeological record, which suggests crisis, loss and a catastrophic collapse of living standards that affected almost every aspect of everyday life. Contrary to late-twentieth century revisionism, he asserts, the dissolution of the empire plunged large swaths of Western Europe into an extended crisis of governance, civility, economic productivity, technological sophistication and cultural vibrancy, such that post-Roman Europe – the period after about 400 AD – seems to have been a significantly less stable and developed place than it had previously been.

Drawing on a diverse body of archaeological field research, Ward-Perkins argues that the collapse of the Roman Empire led to a 'disappearance of comfort' from the remains of civil society. The Roman world, he notes, relied upon a complex and highly specialized system of skilled manufacturers producing goods to a high standard for a scattered market of consumers across the imperial territory. In effect, high quality goods along with people of skill and training flowed outward in the wake of advancing conquest, constructing the nodes and arteries of long distance production and trading networks, which included a supportive infrastructure of boats, roads, exchangeable coinage and wayside hostelries. When these international networks were severed by the 'influx' or 'invasion' of external populations, local infrastructures, particularly at the periphery, seem to have failed to pick up the slack such that:

> [T]he post-Roman world reverted to levels of economic simplicity, lower even than those of immediately pre-Roman times, with

7 Sharpe, J. A. 'Crime in England: Long Term Trends and the Problem of Modernisation', in *The Civilization of Crime,* edited by Johnson, E & Monkkonen, E (Champaign, IL: University of Illinois Press).
8 See Wieviorka, 2009; Hall, S. *Theorizing Crime and Deviance: A New Approach* (London: Sage, 2012).
9 Hall, S 'Paths to Anelpis: Dimorphic Violence and the Pseudo-Pacification Process' *Parallax* 6 no. 2 (2000) 36-53; see also, 2007; 2012; 2014.
10 Spierenburg, P, *A History of Murder: Personal Violence in Europe from the Middle Ages to the Present* (Cambridge: Polity, 2008).
11 Hall, 2014.
12 *ibid.*
13 Brown, P. *Late Antiquity* (Cambridge, MA: Harvard University Press, 1998); Bowerstock, G. *Late Antiquity: A Guide the Post-Classical World* (Cambridge, MA: Harvard University Press, 1999).
14 Ward-Perkins, 2005.
15 *ibid.*

> little movement of goods, poor housing, and only the most basic manufactured items.[16]

In other words, it seems as though the benefits of long-distance trade and access to foreign 'experts' supplanted local skills and knowledge during the empire's outward march, but, when access to these networks was cut off, local systems could not maintain standards, and thus fell back to pre-Roman levels of cultural, social and technological sophistication. Throughout his work Ward-Perkins refers to a great many practical illustrations of a general deterioration following the collapse of imperial power, including the loss of productive capacity at the level of food production, shrinking and more divided, hostile and isolated populations, a loss of scale and complexity in the built environment and, perhaps most tellingly, a retrenchment of literacy and education, all of which seem to have fallen into steep decline to remain at a substantially reduced level for a number of centuries.

Taken as a whole, Ward-Perkins argues, the multifaceted decline of the post-Roman world can be legitimately described as the 'end of civilization' in the territory, by which he means an extraordinary loss of complexity and sophistication, economic production, socio-political interaction and cultural output.[17] This degeneration, he adds, is captured most clearly in the archaeological record, much of which paints a picture of a society reeling from a traumatic change of circumstances. In the wake of the collapse, high-quality mass-produced goods all but disappeared from everyday life and, in some of the outer provinces, including the British Isles, there seems to have been a remarkable decline in general literacy as common written records – graffiti – all but disappeared. Furthermore, until the Norman building programme of the eleventh century, there also seems to have been an almost complete lack of large-scale stone building on the order of Hadrian's Wall, not to mention the decline of ceramic tile production, which led to a decrease in cleanliness and an increase in diseases.

For our purposes, however, by far the most significant aspect of this socio-cultural deterioration is the explosion of everyday physical violence that appears to have taken place within the space evacuated by Roman imperial power. The empire enjoyed a moderate degree of success when it came to reducing the prevalence of interpersonal violence in everyday life. Success was achieved partly by sublimating and redirecting violence into armed conquest of land occupied by external 'others', sociosymbolic competition, thoroughgoing behavioural codes, relatively fluid and competitive class structuring and burgeoning blood sports, but also as a result of combining political complexity with a modicum of political stability in the Pax Romana system. However, the same most definitely cannot be said for Dark Age and early Middle Age societies across Europe.

While it is always rather difficult to clearly identify specific features of individual lives at such a remove from the original events, it seems as though one of the most notable features of post-Roman society was an explosion of physical brutality in everyday life and its establishment as a foundation for social relations.[18] The extent to which the collapse of the empire and its networks of social, political, cultural and economic interdependencies opened up a power vacuum that allowed physical violence to bleed back into everyday life is, of course, hotly debated. Even if we leave the headline events – the Viking raids of the eighth century and the Norman Conquest of 1066 – to one side, however, there is a great deal of evidence which suggests that the European societies of the thousand years or so following 400AD had to contend with deeply problematic, socially destructive, culturally degenerative and economically dysfunctional levels of savagery and instrumental violence. In his discussion of early English history and criminal law, for example, Hibbert[19] points to a number of attempts to establish monetary compensation as an alternative to blood feuds and tit-for-tat cycles of interpersonal violence, but notes that any such legal system was hampered by the difficulties of exercising legitimate administrative power over large geographical areas. Even the brutal governance of the Norman invaders failed, he notes, to restore anything that could be called a system of law and order, and this failure occurred despite shifting penalties significantly in the direction of bodily mutilation.

Marauding gangs of brigands, Hibbert[20] suggests, operated with absolute impunity, often seizing control of whole towns and large areas of the countryside for years at a time, or, in one particularly spectacular escapade, managing to break into the Royal Treasury at Westminster and make off with a sizeable portion of its content. This kind of gang rule resulted in a profusion of mini-kleptocracies in which violence, although it may have also been used to establish and maintain power and domination, was fixated primarily on practical economic concerns such as securing the proceeds of the import and export trade, confiscating and counterfeiting money, and kidnapping travellers for hefty ransoms. These acquisitive practices were reinforced by a conspicuous propensity for violence and torture. Even after Edward I's reorganisation of the justice and control system in the late thirteenth century, in northern areas at a greater distance from seats of power this sort of constant threat persisted into the sixteenth century. The Border Reivers, for instance, were a fickle alliance of violent familial clans from the Anglo-Scottish borderlands with little interest in politics, agriculture or craft production but disposed to prey on local populations and, on threat of violence, extract tithes from those involved in agricultural production and commercial transit between the two fledgling nations.[21]

Accordingly, the violence of early medieval life, we might suggest, reflects nothing so much as minimal respect for law and the absence of centralized authority with the capacity to ensure compliance. What operated in their place was a set of

[16] *ibid. 137.*

[17] see also Turner, J. A. *The Collapse of Complex Societies*, (Cambridge: Cambridge University Press, 1988).

[18] Halsall, G. 'Violence and Society in the Early Medieval West: An Introductory Survey' in *Violence and Society in the Late Medieval West*, edited by Guy Halsall (Woodbridge: Boydell & Brewer, 1992), 1-45; see also Maddern, 1992.

[19] Hibbert, C. *The Roots of Evil: A Social History of Crime and Punishment,* (Stroud: Sutton Pubishing, 2003 [1963]).

[20] *ibid.*

[21] Fraser, G. *The Steel Bonnets: The Story of the Anglo-Scottish Border Reivers* (London: HarperCollins, 2012).

autonomous localized cultural codes that placed great emphasis on violence as a principal means of dispute settlement and economic acquisition. Just as technological sophistication, economic production and cultural vibrancy fell back to something resembling pre-Roman forms, so did the social structures, codes and norms that had succeeded in reducing everyday violence. Consequently, social relations during the Dark and early-Middle Ages also came to resemble those of a darker, prehistoric human past.[22]

In the aftermath of the Roman Empire's precipitous collapse, and for the better part of a millennium afterwards, myriad forms of brutal physical violence blighted European populations. Anyone wishing to travel between growing towns and cities had to contend with "brigands who continued to plague open highways, the private noble wars which ravaged the countryside, or even the pirates who corrupted the nearby sea".[23] What's more, it seems likely that there was often a palpable sense of fear and insecurity even within the comparative safety of town walls. Early Medieval streets seem to have been places of quotidian dispute settlement that frequently descended into "brawls, beatings with fists and knives, and vengeful attacks".[24]

While it is almost impossible to put reliable figures on the prevalence of interpersonal violence in the distant past, there is a great deal of evidence to suggest that the surface relief of post-Roman society was frequently and visibly affected by physical conflict. It is not the case that this was a millennium of constant militarized infighting and attack from without. There were undoubtedly periods of relative calm, but, equally, the threat of everyday violence never seems to have been far below the surface. The social order of the Vikings, for example, appears to have been built around a 'spiral of violence' based on the power afforded by heritable property and the various clans' attempts to acquire as much as possible, which resulted in cycles of feuds and reprisals.[25] When the Normans invaded Britain some parts seem to have capitulated relatively quickly, but in the north rival groups entered into a long-running and bitter struggle for Northumbrian sovereignty, in which the introduction of a new power bloc led only to further conflict. In Speight's[26] terms, "many of the assassinations and massacres that litter the region's history can be attributed to the imposition of non-customary dues and practices" even to the extent that the rebel factions invited in and sided with an invading Danish army. It took the infamous 'Harrying of the North' – the decision made in 1070 by William the Conqueror to burn northern settlements, destroy crops and generally pillage the area – for the Norman powers to gain any measure of control. Even with their lordship established and the rebel forces beaten into submission, however, Norman governance often proved quite spectacularly ineffectual. In the course of the next two or three centuries, for example, they were forced, time and again, to announce new measures meant to combat brigandage and reduce the prevalence of marauding gangs of armed bandits, none of which seem to have enjoyed much success.[27]

With the above in mind we can risk the assertion that Dark Age and early Medieval England seems to have been a relatively violent place. Yet this only leaves us with the obvious question surrounding the purpose and function of overt violence in post-Roman society. Cowell[28] suggests that the upper end of feudal society was based on two conjoined principles of 'gift giving' and 'violent taking'. The purpose of both seems to have been to establish a degree of reciprocity within the aristocracy and, more broadly, the chivalric class of warriors on whom the former based their power. Gifts necessarily came laden with a debt accrued from the act of acceptance, such that interrelations of reciprocity and obligation could be replicated without resort to the interference of centralized authority.[29] In much the same way, an act of violence – a raid, an ambush, a declaration of private war – came laden with a return game, an act of vengeance that further served to enshrine reciprocity within the aristocracy whilst simultaneously allowing them to parasitize the lower orders by extracting protection money/resources in the form of tribute. The capacity to deploy violence or to have others do so at individual behest, in other words, was a key aspect of social relations within feudal society even to the extent, as Eisner[30] observes, that it determined exactly who held kingship across Europe.

With closer attention to the less powerful classes in the European social order, Skoda makes a similar point in relation to street violence, which seems to have functioned as a basic form of social ordering that allowed for the generation and maintenance of:

> …self-image and one's place within the community… [and] notions of honour street violence protected the 'psychic property' of the individual, his or her sense of self and place within social networks.[31]

In other words, if individuals were to hold onto property, maintain a sense of honour and prevent themselves from being cheated and dispossessed by their neighbours, a propensity for physical violence seems to have been a necessary and a socially legitimate requirement. At just about every level of the social

---

[22] Armit, I. 'Violence and Society in the Deep Human Past', *British Journal of Criminology*, 51 no. 3 (2011) 499-517; Nivette, A. 'Violence in Non-State Societies: A Review' *British Journal of Criminology*, 51 no. 3 (2011) 578-598.

[23] Skoda, S. *Medieval Violence: Physical Brutality in Northern France, 1270–1330* (Oxford: Oxford University Press, 2013), 51.

[24] *ibid. 50.*

[25] Morris, G. 'Violence and Late Viking Social Order' in *Violence and Society in the Late Medieval West*, edited by Guy Halsall (Woodbridge: Boydell & Brewer, 1992) 141-156.

[26] Speight, S. 'Violence and the Creation of Socio-Political Order in Post Conquest Yorkshire' in *Violence and Society in the Late Medieval West*, edited by Guy Halsall (Woodbridge: Boydell & Brewer, 1992) 157-174.

[27] see Halsall, 1992; Hibbert, 2003.

[28] Cowell, A. *The Medieval Warrior Aristocracy: Gifts, Violence, Performance and the Sacred*, (Woodbridge: D S Brewer, 2007).

[29] *ibid.*

[30] Eisner, M. 'Killing Kings: Patterns of Regicide in Europe, AD 600–1800' *British Journal of Criminology* 51 no. 3 (2011) 556-577.

[31] Skoda, 2013: 56.

order violence appears to have functioned, in the absence of a centralized authority, as a primary means of acquiring and preserving security, wealth and status through the bodily defence of land, property and honour. It is this underlying principle, more than any other, which characterizes the basal structure of the feudal order to the extent that Sharpe[32] is able to point to a society built on the violence of 'hard men' "accustomed to fighting as a normal part of life".

If we take all of the above at face value it is entirely likely that the dark shadow of post-Roman Britain, particularly the early part of the Middle Ages, provided at least some of the inspiration for Thomas Hobbes's[33] idea of a pre-social 'state of nature' lacking any sort of inherent inclination to pacification and plagued by both exploitative and defensive brutality. Violence, he argued, was used to gain control over the lives of other people and their property, used in the defence of honour and property, and often arose at the slightest provocation or perception of threat. In other words, Hobbes seems to be harking back to the type of society we have described thus far – a society in which, as Gurr puts it:

> [M]en were easily provoked to violent anger, and were unrestrained in the brutality with which they attacked their opponents. Interpersonal violence was a recurring fact of rural and urban life.[34]

While the early estimates on which these initial observations are based are inevitably rather imprecise, the improved record-keeping practices of the later Middle Ages in Europe, and, in England from the beginning of the Tudor period, allow for a clearer understanding of historical rates and trends of violence. The increased availability of empirical data in the form of written records has allowed a number of scholars[35] to observe relatively high levels of interpersonal violence into the fourteenth and fifteenth centuries, followed by a long-term decline up to the middle decades of the twentieth century. Eisner[36] identifies the middle decades of the fourteenth century as a high point for the level of overt violence in English life, after which murder rates and, by implication, lesser forms of violence began to drop off. Something significant seems to have changed during the middle part of the fourteenth century that initiated an extended process in which overt everyday violence was eventually all but extinguished from English public life, certainly for the majority who managed to avoid locales of acute marginalisation.[37]

3. Civilization or Pseudo-Pacification?

In many cases accounts of the long-term decline of physical violence in Western Europe rely quite heavily on Norbert Elias's[38] concept of a 'civilizing process', even to the extent, as Mares[39] notes, that there seems to be a broad agreement that this aging work provides us with the most insightful narrative yet available. While a full discussion of the fine details of Elias's thesis is well beyond the scope of a single article it is perhaps best that we at least re-familiarize ourselves with its basic premises.

In the long transition from the Middle Ages to early 'modernity' a series of complex and interlocking psychosocial transformations supposedly led, all but inexorably, to the minimisation of interpersonal violence across Western Europe. The 'civilization' of English society, for instance, Elias argued, relied substantially on the growing power and dominance of the Plantagenet monarchy during the thirteenth and fourteenth centuries, especially their ability to monopolize the means of violence. This monarchical states' centralisation and monopolisation of their legal capacity to do harm allowed them to secure increasingly pacified social interaction across progressively larger portions of their territories, which facilitated a general upturn in commerce, trade and, crucially, taxable income. The interest shown by elites allowed for the growth and maintenance of structural complexity in the form of bureaucratic regulation – particularly legal codes – and the kind of broad-based socio-economic interdependencies last seen during the heyday of the Roman Empire. At this point, Elias suggests, the process effectively assumed a life of its own as the move away from the anxious, defensive and often self-aggrandizing deployment of violence began, over a number of generations, to change the way that people thought, felt and interacted such that the population at large lost any direct acquaintance with their capacity for violence, which became repressed and subsumed beneath culturally maintained and reproduced behavioural codes. Beginning in the courtly upper reaches of the social structure, Elias held, these codes diffused outwards throughout everyday culture to be psychologically internalized and reproduced. The abandonment of everyday hostility and physical violence allowed the development of 'figurational' networks of interdependencies between individuals acting in the various nodes and arteries of socioeconomic life.

---

[32] Sharpe, 1996: 18.

[33] Hobbes, T. *Leviathan*, (Oxford: Oxford World Classics, 2008 [1651]).

[34] Gurr, T. 'Historical Trends in Violent Crime: A Critical Review of the Evidence' in *Crime and Justice 3*, edited by Michael Tonry & Norval Morris (Chicago, MA: University of Chicago Press, 1981) 307.

[35] see, for instance, Gurr, *ibid.*; Gurr, T. 'Historical Trends in Violence Crime: Europe and the United States' in *Violence in America, Vol. 1: The History of Crime*, edited by Ted Gurr, (Thousand Oaks, CA: Sage); Eisner, M. 'Modernisation, Self-Control and Lethal Violence: Long-Term Dynamics of European Homicide Rates in Theoretical Perspective' *British Journal of Criminology*, 41 no. 4 (2001) 618-638; Eisner, M. 'Secular Trends in Violent Crime: Evidence and Theoretical Interpretations', *Crime & Justice: An Annual Review*, 31 (2003) 83-142; Spierenburg, P. 'Faces of Violence: Homicide Trends and Cultural Meanings: Amsterdam, 1431-1816', *Journal of Social History* 27 no. 4 (1994) 701-17; Spierenburg, 2008.

[36] see Eisner, 2001.

[37] see Taylor, I *Crime in Context: A Critical Criminology of Market Societies* (Cambirdge: Polity, 1999); Hall, S., Winlow, S. & Ancrum, C. *Criminal Identities and Consumer Culture: Crime, Exclusion and the New Culture of Narcissism*, (Cullompton: Willan, 2008); Winlow, S & Hall, S. *Rethinking Social Exclusion* (London: Sage, 2013).

[38] Elias, 1994 [1939].

[39] Mares, D. 'Civilization, Economic Change, and Trends in Interpersonal Violence in Western Societies', *Theoretical Criminology* 13 no. 4 (2009) 419-449.

However, while these ideas undoubtedly go some way towards explaining the historical decline of overt violence in Western European society, there are a number of significant problems at the heart of the thesis. They congregate around the assumptions of naturalism, teleological evolutionism, internal cohesion and the vague transcendental conception of 'interdependencies'. In Elias's terms:

> The individual is compelled to regulate his conduct in an increasingly differentiated, more even and more stable manner… characteristic of the psychological changes in the course of civilization: the more complex and stable control of conduct is increasingly instilled in the individual… a self-compulsion that he cannot resist even if he consciously wishes to. The web of actions grows so complex and extensive, the effort required to behave 'correctly' within it becomes so great, that beside the individual's conscious self-control an automatic, blindly functioning apparatus of self-control is firmly established.[40]

In other words, the core of Elias's thesis relies on a repeated assertion that interdependence between people and communities necessarily and all but inevitably fosters civilized, physically non-violent sensibilities in a way that reflects a sort of 'blind' and 'evolutionary' dynamic drive toward increasingly pacified forms of social interaction. Within the confines of his work it is almost as if the development of social, cultural, economic and political complexities, along with the inter-relations they entail, lead inexorably to the development, maintenance and reproduction of 'civilized' behavioural codes. What this does, however, is to gloss over the relationship between internal and external worlds in a way that largely fails to provide a clear and convincing explanation for how we might get from what Elias calls 'sociogenesis' – the generation and proliferation of objective social conditions and relations – to the subjective internalisation entailed by 'psychogenesis'. In positing such a blind drive toward 'civilization', Elias provides a teleological account of pacification, which mistakes effect for drive, and, as a result, overstates and yet oversimplifies one of the defining features of the long run of European history.

If we consider such a linear teleological thesis in light of the general continuation – if not outright escalation[41] – of brutality in European systems of punishment, along with the central role played by exploitation and primitive accumulation within economic systems steadily moving in the general direction of the industrial revolution, the connection between social interdependence and pacification might not be quite as 'stable' or dependable as the original work would tend to suggest.[42] Indeed, throughout history, the artistic, philosophical and technological apexes of civilisations have been closely associated with various forms of violence and exploitation. In much the same way, the centralisation of the capacity for 'legitimate' violence in the hands of the state was never quite as effective, legitimate or neutral as Elias posits. The late Medieval and Tudor monarchical states, just like more contemporary examples of technocratic stewardship in relation to global markets,[43] often engaged in brutality in order to fulfil predatory political and economic aspirations largely immaterial and indeed sometimes damaging to the everyday lives of subject populations.

Furthermore, this attribution of neutrality, along with the underlying naturalist emphasis, points us to the deepest problems in Elias's thesis; two ontological flaws deprive the inhabitants of modernism's relatively pacified social order of a certain amount of their subjectivity. First, it is far too easy to explain away a major behavioural trend such as pacification by psychologising and naturalising it, and positing it as an inexhaustible teleological drive in the movement of history. What this does is to deprive social action of dialecticism, of the push and pull between individuals and their context. Second, the suggestion that 'civilisation' might be a natural corollary of growing interdependencies is to fall into the trap of over-socialising the concept of pacification by associating it with factors all but entirely external to the actor's consciousness. The formulation that growing interdependence between individuals and communities maintained by the centralising power of the state provided a fertile seedbed for the proliferation of emotional empathy, which, over decades and centuries, coalesced into a natural psychosocial aversion to violence and bloodshed is just too neat. It largely ignores the vagaries and contingencies of thinking subjects trying to make their way through life as best they can, particularly in terms of their fears and passions, desires and frustrations. Equally, it ignores the instability and often hostile competitiveness that characterized the capitalist socio-economic environment that was supposed to act as the foundation for the psychogenesis of pacified sensibilities.[44]

If Elias's schema is to be taken at face value, his assertion of growing empathy within and between populations must also contend with a less commonly discussed but equally important counter-trend – the observation that 'crime' in the broad sense of interpersonal violation seems not to have declined in a 'civilized' context so much as mutated and changed with the times. It is in this context, for instance, that Sharpe[45] points to "a shift from 'feudal' criminality based on violence… to a 'modern' criminality based on property offences" between the late Middle Ages and the nineteenth century. Inevitably, this suggestion is rather difficult to substantiate. Nevertheless, amongst historians of crime there seems to be a general acceptance that the processes which reduced the level of overt violence in the public spaces of European life seem to have been matched by a proliferation of non-violent, abstract forms of criminality appearing throughout the social structure.[46]

---

[40] Elias, 1994: 445-446.

[41] Gatrell, V. *The Hanging Tree: Execution and the English People, 1770–1868*, New Edn, (Oxford: Oxford University Press, 1996).

[42] Hall, 2014.

[43] Rancière, J. *Hatred of Democracy*, (London: Verso, 2006); Galbraith, J. *The Predator State: How Conservatives Abandoned the Free Market and Why Liberals Should Too*, (New York, NY: The Free Press, 2008).

[44] Hall, 2000; 2007.

[45] Sharpe, 1996: 20; see also Hibbert, 2003 [1963].

[46] *ibid.*; Sharpe, J. A. 'Crime, Order & Historical Change', in *The Problem of Crime*, 2nd Edn, edited by John Muncie & Eugene McLaughlin (London: Sage, 2001); Wilson, C. *A Criminal History of Mankind*, New Edn, (London: Mercury, 2005); Hall, 2012.

This insight allows us to begin moving beyond the naturalistic bounds of Elias's thesis toward a more nuanced analysis of historical change in the combined fields of political economy and psychosocial pacification. If we acknowledge that the long-term decline in everyday physical violence coincided with the emergence of urban, industrial, commercial and, ultimately, capitalist societies then we must also note that the accompanying process of marketization provided fertile ground for the development of sensibilities, values and meanings conducive to and called forth by the new political economy.[47]

In light of the likely empirical crossover between violent and abstract criminality, however, a number of current theorists, particularly Michel Wieviorka[48] and Laurent Mucchielli[49], have begun to move away from Elias's rather Whiggish and teleological 'civilizing process' toward the essential task of locating pacified emotional dispositions within a properly dynamic and interactive understanding of contemporary political economy. That is to say, within the interplay between grand scale socio-historical transformations and the ways in which they structure and mould everyday life as the material and symbolic foundations for aspirations, beliefs, desires, norms, values and all manner of sensibilities.

What this means, however, is that the physical violence employed as a social ordering technique throughout the social structure of early Europe did not decline because the prevailing values and sensibilities of the age became more orientated towards pacification. It came instead from a dualistic and mutually reinforcing economic need within emerging market economies. Market economies cannot expand in socioeconomic systems structured and driven by either *physical violence* or *altruism*.[50] The expansion of the production and circulation of commodities depended on the contemporary state's ability to protect property rights and economic activity by reducing violence across sufficiently large geographical areas. This was largely achieved through systematic shifts in law and cultural values that repressed and privatized altruism, but simultaneously repressed and sublimated the destructive violence that would normally increase in a non-altruistic culture into a symbolically aggressive yet physically pacified competition for the symbols of wealth and status in Europe's emergent consumer culture.[51]

In other words, pacification was – before individuals became accustomed to its codes and internalized its sensibilities – initially a functional by-product of political-economic change, specifically the development of early market economies and their basic requirement to repress physical violence and simultaneously encourage the individual's interest and participation in pacified rule-bound sociosymbolic competition and economic exploitation; to encourage functional aggression yet, at the same time, to keep a lid on the situation and prevent either pre-emptive or reactive violence becoming physical by expanding systems of governance and control. In other words, pacification emerged as a functional practice before it became culturally established and psychologically internalized. Contra Foucault,[52] control of the body's passions – 'biopower' or 'biopolitics' – seems to have been predominantly focused on *violent and altruistic* interactions rather than political and sexual sentiments.[53]

In this way, the theory of the pseudo-pacification process opens up the possibility of more rewarding explanations for the long term decline of physical violence in Western Europe. It is rooted in material political economy rather than Elias's[54] woolly, evolutionary orientation towards civic peace on the basis of increasingly refined empathic sensibilities, or Foucault's[55] shifts in discursive and classificatory schema and normalized subjectivity that occur for no discernible reason other than 'discipline'. 'Discipline', 'classification' and 'discursive production' are simply the means of shaping and controlling a potent pre-existing libidinal drive that at its root is located in a rule-bound system of stimulation and pacification and activated by increased social anxiety, individual freedom from social obligations, and the commercialisation of consumer desires.[56]

The concept of 'pseudo-pacification' locates the decline of interpersonal violence specifically within the unstable and indeterminate context of market economies in a dynamic relationship with social and individual subjectivity. The sociological implications of this suite of concepts have been dealt with in an embryonic but growing criminological and sociological literature that is largely beyond the remit of this piece.[57] What we want to do here is to take these insights in a slightly different direction by using them as a starting point for a socio-historical analysis of the development of important aspects of the English legal system. It is to this end that we now turn our attention.

4. The Third Space of Orderly Disorder

The process of repairing England's social order after the depredations of the Dark Ages and early Middle Ages – most notably the disruption and violent aftermath of the Norman inva-

47 Hall, 2007.
48 Wieviorka, 2009.
49 Mucchielli, 2010.
50 Hall, 2014.
51 Hall, 2012.
52 Foucault, M. *The History of Sexuality, Volume 1: The Will to Knowledge*, New Edn, (London: Penguin, 1998); Foucault, M. *The Order of Things: Archaeology of the Human Sciences* (London: Routledge, 2001); Foucault, M. *The Archaeology of Knowledge* (London: Routledge, 2002).
53 Hall, 2012; 2014.
54 Elias, 1994 [1939].
55 Foucault, M. *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1991).
56 Hall, 2012; 2014.
57 Moxon, D. 'Consumer Culture and the 2011 'Riots', *Sociological Research Online*, 16 no. 4 (2011); Briggs, D. *Deviance and Risk on Holiday* (Basingstoke: Palgrave MacMillan, 2013); Winlow, S. 'Trauma, Guilt and the Unconscious' in *Violence and Society: Toward a New Sociology*, edited by, J. Kilby & L. Ray, (Oxford: Wiley/Blackwell, 2014); Horsley, M. 'The 'Death of Deviance' and the Stagnation of Twentieth Century Criminology', in *The Death and Resurrection of Deviance*, edited by M. Dellwing, J. Kotarba & N. Pino (New York, NY: Palgrave MacMillan); Horsley, M. *The Dark Side of Prosperity: Late Capitalism's Culture of Indebtedness,* (Farnham: Ashgate, 2015).

sion – began with the coronation of Edward I in 1274. Upon his accession he immediately began a far-reaching programme of legal reform that eventually replaced Feudal power with something a little closer to modern governance.[58] In the first few decades of his reign, spurred by recognition that the prevailing incidence of interpersonal and group violence as a structural ordering technique could not remain unchecked, he set about codifying and adding weight of statute to a host of pre-existing customs in ways that were meant to enhance the enforcement of pacification. If we were looking for a legal cornerstone of modernity's embryonic social order we could do much worse than the 1283 Statute of Winchester, which attempted, under a system of reticular command and delegation, to refurbish and revitalize traditional practices of mutual responsibility for the detection and prosecution of crimes committed within defined geographical areas.

What this involved was, initially, a set of provisions that strengthened the longstanding requirement that all men should have access to some type of weapon, the exact nature of which depended on social rank – knights were to be availed of swords, armour and horses, commoners bows and arrows – supplemented by an administrative caste of 'royal officers' empowered to carry out public inspection.[59] With these arms, local watches were to be kept and, in the event of an offence, the bulk of the able-bodied male population were expected to turn out in pursuit of suspects. Furthermore, town gates were to be closed during the hours of darkness and no strangers permitted entry, thereby effectively subjecting any sizeable settlement to an after-dark curfew. The new system engaged in renewed attempts to humanize and pacify the English countryside by limiting brigands' capacity to ply their trade and stipulating that hedges be coppiced for 200 feet on either side of public highways to reduce the possibility of ambush, in what resembles a thirteenth century form of situational crime prevention.[60] In addition, it also specified what was to be done if these practices failed to prevent or convict, such that "the victims of robbery would henceforward be able to claim restitution from the hundreds [a contemporary administrative unit of population] in which they fell among thieves".[61]

In this fashion large parts of the legal system that were established in the wake of Edward's reign seem to have adopted a similarly distributivist emphasis in an attempt to reinstate a modicum of altruism and social justice in everyday life, but they were organized more by *reactive legal practices* than *proactive cultural values*. With the usual caveats around attributing specific thoughts to the inhabitants of the distant past, the early English state seems to have hit upon the idea that pacification relied on the legal system's capacity to reproduce as reactive practices at least some degree of the practical mutuality that had existed before. What the tradition amounted to was simply a series of mutually reinforcing statutory provisions and customary assumptions – including restrictions on trading activities, the prohibition of usury and limitations on both minimum and maximum wages to ensure 'sufficient livelihood' – that set about both limiting individuals' capacity to exploit and prey upon each other whilst ensuring a reasonably fair distribution of economic participation and reward from such abstinence.[62] If we take contemporary usury legislation, for instance, the church-led rejection of 'lending for increase' – charging interest – was based largely on the assumption that it was a distinctly predatory craft, which amounted to "an immoral means of gaining something from nothing… [making] money from money without labour or service and at the expense of the poor and needy".[63]

By way of contrast, medieval regulation of wages and livelihood seems to have tried to increase pecuniary rewards for even the lowest forms of labour such that wages appear to have doubled between 1340 and 1400.[64] While it would be negligent not to acknowledge that at least some of this comparative generosity can be traced to a reduced labour supply after the first wave of bubonic plague this, as Dyer also notes, does not tell the whole story as there had already been significant movements in this direction prior to the epidemic. What this regulatory system produced, however, was a diffusion and democratisation of legally-sanctioned control, which set in motion a gradual diminution of everyday violence, repressed by diffuse social pressure that saw as its reward the material benefits accruing from the pacification and artificial reactive altruism that facilitated the booming pre-capitalist distributivist economy of the late fourteenth century.[65] In this way, the origins of the pseudo-pacification process, contra Durkheim,[66] betray the roots of social order within the enculturation of legal codes rather than the legalisation of cultural codes.

With the cautiously administered delegation of crime control to the citizenry, late medieval social regulation paved the way for more effective responses to the problems of banditry and brigandage that plagued English society in the decades prior to the reign of Edward I. While these systems inevitably elicit the usual caveats around their ultimate effectiveness,[67] they at least went some way to formalising crime control and expanding the reach of the criminal justice system such that we can reasonably talk about a significantly safer territory with increased scope

[58] Hibbert, 2003 [1963].
[59] Summerson, H. 'The Enforcement of the Statute of Winchester, 1285–1327' *Journal of Legal History*, 13 no. 3 (1992) 232-250.
[60] Walsh, D. 'The Obsolescence of Crime Forms' *Crime Prevention Studies* 2 (1994) 149-163
[61] Summerson, 1992: 232.
[62] Hall, S. & Winlow, S *Revitalizing Criminological Theory: Toward a New Ultra-Realism,* (London: Routledge, 2015).
[63] Davis, J. *Medieval Market Morality: Life, Law & Ethics in the English Marketplace, 1200–1500,* (Cambridge: Cambridge University Press, 2012) 65; see also, Graeber, D. *Debt: The First 5,000 Years,* (New York, NY: Melville House, 2011).
[64] Dyer, C. *Everyday Life in Medieval England*, London: The Hambledon Press, 1994); see also, Dyer, C. *Standards of Living in the Later Middle Ages: Social Change in England c. 1200–1520,* Rev. Edn., (Cambridge: Cambridge University Press, 1989).
[65] see Hall, 2014.
[66] Durkheim, E. *The Division of Labour in Society*, (New York, NY: The Free Press, 1997 [1893]).
[67] Hibbert, 2003 [1963].

for production and trade. In conditions of greater security, the more enterprising sections of the general population were able to capitalize on the increased viability of inter-urban trade to begin establishing the sort of sophisticated trading networks that rely on the capacity to move goods, money and people through the developing nodes and arteries of a nascent market system. The pacification of society in other words took place within, around and even as a corollary of a process of commercialisation that itself relied on concomitant and complimentary practices of sovereignty, discipline and control as well as the everyday beliefs and aspirations of an already quite individualistic, profit-minded and increasingly pacified yet rather symbolically aggressive entrepreneurial population.[68] It is quite likely that at this point we can detect the beginning of the rise of what Priestland[69] calls the 'merchant caste' to a position of prominence amongst the ruling elite as it displaced the 'soldier' and 'sage' castes which administered the reproduction of, respectively, organized physical violence and cultural codes and values.

However, the integral pseudo-pacification associated with the development of market economies was not reliant on the total displacement of values by legal codes. It was also fuelled, at least in part, by selected pre-existing practices and beliefs within the general population. Socio-legal codification of evolving and diffusing customs that revolved around commerce and entrepreneurship – which increased markedly from the tenth century as new trade routes were opened up[70] – permitted, compelled and inspired people to internalize and embody such ideas to an even greater extent. If we turn our attention to, for example, Dyer's[71] work on everyday life in Medieval England it is immediately apparent that the nation already contained a growing number of labourers, merchants and skilled tradesmen accustomed to an individualistic, enterprising, 'go-getting' lifestyle within local communities. In the course of the twelfth through fifteenth centuries, however, the increased viability of inter-urban trade, along with other complementary additions to the English legal system, allowed what had been quite disparate and disconnected interests to become something much closer to a proto-bourgeoisie in terms of the ambitious, individualistic beliefs and understandings they held about themselves and the world around them.[72]

It is unlikely that Norman traditions as a whole were entirely alien to the inhabitants of post-Roman England, but there are significant differences between these customs and those favoured by the Plantagenet reform programmes. The Feudal system in place prior to and immediately after the conquest relied on a system of lordship, land title and tenure that provided much of the economic basis for early English society. A large part of the population made their livelihood as tenant farmers on land granted to them by the aristocracy, which came with mutual expectations. The tenant owed tithes and other stipulated services such as stewardship of an allotment of parish land as well as allegiance to none but the king, whilst the lord ran a kind of protection racket, guaranteeing security of tenure against all-comers.[73] This bargain has much in common with a legal contract to the extent that it came with a number of stipulations as to exactly what each party could expect of the other. One of the major benefits on the tenant's side was the right to pass land onto his descendants within a system of coparcenary entail, meaning equal partition between surviving sons.[74] While there were a few issues with these provisions, not least of which the problem of dividing up plots of land already providing little more than bare subsistence, they did have one distinct advantage within early Norman social order: they maintained and even bolstered the nuclear family as a basic protective unit against the brutal violence that permeated the Feudal world.

With the introduction in the late thirteenth century of the twin laws of free alienation and primogeniture, the emphasis of the English common law began to shift into a slightly different, more individualistic frame. In the former case, the holders of title gained the capacity to sell up or otherwise dispose of property without their heirs' consent, such that children could be left penniless with no birth-right. If the parental generation failed to specify where their property would go, the new law of primogeniture came into effect, by which the eldest son would get everything, potentially leaving any siblings destitute. Yet, as Macfarlane[75] puts it, "even the eldest son had nothing except at the wish of his father or mother". What this did was to introduce a level of unpredictability into the transmission of property and wealth, which in turn instigated a form of social mitosis, or, more figuratively, a 'socio-economic tumour'[76] in which relatively well-heeled but by no means wealthy families – it is worth noting that England was the only European nation not to limit primogeniture to the aristocracy – started producing second and third siblings who would have to work hard and independently to replicate the quality of their childhood lifestyle. In other words, it created a process by which English society, based on a peculiar difference from the rest of Medieval and Early Modern Europe, began to spawn and diffuse outwards new generations of anxious proto-entrepreneurs with greater impetus toward commercial approaches to everyday life, which then began to displace and subsume the ethical principles reproduced by the relatively short-lived distributivist system.

In this way we start to shed a little more light on the role of legal regulation and social change in the long-term trajectory of

[68] Macfarlane, A. *The Origins of English Individualism: The Family, Property and Social Transition*, (Oxford: Basil Blackwell, 1979); see also Hall, 2012.
[69] Priestland, D. *Merchant, Soldier, Sage: A New History of Power*, (London: Allen Lane, 2012).
[70] McKendrick, N., Brewer, J. & Plumb, J. H. *The Birth of a Consumer Society: The Commercialization of Eighteenth-Century England* (Bloomington, IN: University of Indiana Press, 1982).
[71] Dyer, 1994; see also Dyer, C. *Making a Living in the Middle-Ages: The People of Britain, 850–1520*, (London: Yale University Press, 2009).
[72] Wood, E. M. *The Origin of Capitalism: A Longer View*, (London: Verso, 2002).
[73] Tilly, C. 'War-Making and State-Making as Organized Crime', in *Bringing the State Back In*, edited by, P. Evans, D. Rueschemayer & T. Skocpol, (Cambridge: Cambridge University Press, 1985).
[74] Baker, J. *An Introduction to English Legal History*, 4th Edn, (Oxford: Oxford University Press, 2002).
[75] Macfarlane, 1978: 83.
[76] see Hall, 2014.

English and later – as trading arteries were once again pacified and opened up – mainland European societies in terms of the minimisation of interpersonal violence and its socio-historical crossover with non-violent, abstract criminality. It is interesting to note that continental Europe, despite its growing trade routes, the birth of the accounting system in Milan and the eventual establishment of Amsterdam as the hub of sea trade, was overtaken by England in the run-up to industrial capitalism. Running alongside the standard reasons is the comparative failure of European territories to pacify their trade routes and rapidly diffuse the norm of sociosymbolic competition in place of physical violence. What's in train here is not, as Elias[77] held, a 'blind', 'evolutionary' drive toward social refinement and interpersonal empathy but the result of dynamic tension between pacification and stimulation, between socio-legal systems as agencies of violence reduction and incentives toward attitudes and dispositions conducive to the sociosymbolic competition that fuelled consumer demand in physically pacified but sublimely and functionally aggressive marketplaces.[78] If we look again at our narrative thus far we might suggest that, within a context of enhanced enforcement, delegation of authority, changing circumstances and the proliferation of an increasingly commercial mentality along with the requisite potential for abstract 'criminality', we seem to be looking at the beginnings of the socio-economic marginalisation and obsolescence of physically violent criminality.[79] In Hall's[80] terms:

> [A]s we became less violent and bloodthirsty we became richer and more pacified but possibly less honourable and… less egalitarian; violence looks to have been sublimated into symbolic and toned-down practical forms rather than dispersed into the transcendental realm of spirituality.

Yet we can take this at least one step further. In light of the above, we might observe, as does Hall,[81] that there are two mutually opposed conditions in which our social order cannot function. With its dual need for pacified trading networks as well as producers, merchants and consumers less likely to acquire property and resolve disputes with violence, it is immediately obvious that capitalism cannot function in chaotic, violent conditions. Equally, however, the requirement for pacified sociosymbolic competition also means that it cannot develop in conditions of excessive pacification reproduced by institutionalized, diffused and internalized altruism. Thus we have to consider the proposition that the measured altruism bound by custom and law that helped to facilitate the growth of the medieval distributivist economy became dysfunctional in an early market-capitalist economy that was more dependent on extracting surpluses from all economic transactions and diffusing aggressive but non-violent competitive individualism throughout the whole sociosymbolic field. When it comes down to it, we might suggest that the function of legal systems, alongside social and cultural change, is to keep social order and subjectivity oscillating between these two poles, as if captured in a magnetic field[82] or held in some sort of socio-cultural Lagrangian point. The regulatory regimes that have grown around market capitalism open up a third space between these extremes, between pacified order and violent disorder – a space of what we might call 'orderly disorder' – in which the fundamental objective is, contra Foucault,[83] not to create a 'disciplinary society', or, contra Garland,[84] a 'culture of control' so much as to systematically facilitate and harness the tension between pacification and stimulation that provided much of the dynamic force behind early capitalism's proliferation of trading activity and the development of the pseudo-pacified socio-economic competition we now call 'consumer culture'.

While we do not have the space for full consideration of appropriate examples, the subsequent development of the English legal system and the pseudo-pacification process into the fifteenth through eighteenth centuries at least provides us with some indication of what this concept of 'orderly disorder' actually means in the context of systems of socio-economic regulation. It is often remarked just how brutal and censorious English socio-legal regulation – known as the 'Bloody Code' – became in the run-up to the industrial revolution. However, it had both shape and function. Important and prominent statutes such as the Waltham Black Acts had a very clear objective and focus, which ultimately came down, as Losurdo[85] suggests, to "terroristic legislation in defence of property". In his well-known commentary on the relationship between property and eighteenth century criminal law, Hay[86] notes that the number of capital statutes grew from around 50 in 1688 to well over 200 in 1820, the vast majority of which were concerned with offences against property. Bourgeois legal power overwhelmingly involved protecting their own property holdings whilst expropriating and enclosing common land, ignoring traditional subsistence rights and criminalising minor acts of appropriation to the extent that even lowly forms of theft and property damage nominally attracted mandatory death sentences. Hay goes on, however, to note that the sheer prevalence of the death sentence actually goes some way to concealing the underlying function of criminal sanction. It is not a case of anyone who committed property offences, upon sentencing, immediately finding their way to the gallows – execution statistics, it seems, do not support such a simplistic conclusion – but instead

77 Elias, 1994 [1939].
78 see Hall, 2007; 2012.
79 see Walsh, 1994.
80 see Hall, 2012: 25.
81 Hall, 2014.
82 see Hall, 2015.
83 Foucault, 1991.
84 Garland, D. *The Culture of Control: Crime and Social Order in Contemporary Society*, (Oxford: Oxford University Press, 2001).
85 Losurdo, D. *Liberalism: A Counter-History,* (London: Verso, 2011) 78.
86 Hay, D. 'Property, Authority and Criminal Law' in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, Rev. Edn., edited by Douglas Hay, Peter Linebaugh, John Rule, E. P. Thompson & Cal Winslow, (London: Verso, 2011); see also Radzinowicz, L. 'The Waltham Black Acts: Study of the Legislative Attitude Towards Crime in the Eighteenth Century', *Cambridge Law Journal* 9 no. 1 (1945) 56-81.

the terror of a vicious penal code acting to theatrically emphasize the mercy of patronage and pardon in order to legitimize the power of the ruling class.

This severe punitive approach to 'lower class' crimes that provided most lawbreakers with little beyond individual subsistence must be juxtaposed with a relatively lax, almost disinterested evaluation of forms of aggressive and exploitative practices still seen by many as 'deviant' but of substantial and systemic economic value. Many of the questionable practices of early capitalism, for example, seem to have attracted little in the way of determined censure, with growing tolerance of usury, price undercutting, short-weighting, low wages, misrepresentation of goods for sale and a host of petty fiddles, perks and pilferage, not to mention a completely unknown level of historical 'white-collar' criminality that attracted next to no censure. In the case of but one example, which perhaps reveals a degree of historical continuity in the decline of economically inhibitive aggression, Emsley[87] points to a class of economically functional deviance that was pretty much expected and for which businesses made allowances. The transportation of coal by canal during the eighteenth century allowed boatmen to sell some of the shipment on route and pocket any such takings, but instead of trying to deal with the problem miners were instructed to simply load more onto the boats than stated in the manifest, as if these offences were part of the 'price of doing business'. In even more forthright terms, Emsley[88] continues:

> In early nineteenth-century Wigan the law appears to be have been administered humanely and impartially… except when it was involved with industry. Employers were rarely prosecuted, and if convicted were only moderately fined… on the other hand, heavy sentences were imposed even for first offences of industrial theft. Workers, including children, were commonly prosecuted for breach of contract in leaving work without proper notice.

What we have here, we suggest, is slightly more complex than the usual analysis of differential power relations in the official criminalisation process because, rather than simply favouring the ruling elite, the prevailing approach to social regulation opens up a third space between order and disorder in which any ambitious entrepreneur can operate and prosper. It affords market capitalism the space to thrive within a regulatory framework of sufficient pacification for its various trading activities to take place relatively unmolested by taking a censorious, punitive approach to economically deleterious criminality. Conversely, it should be noted, however, that this economic system would also struggle to function within an overly pacified and altruistic context. Kant's[89] 'race of devils' was to be repressed by the collective reason of law, but when Durkheim[90] averred that a 'society of saints' would not last long, he was probably right but for the wrong reasons. Violence and immorality, which in the pre-modern era were performed as substantive practices in the service of order and disorder, were sublimated and acted out as symbolic interplay, thus establishing the dynamic condition of pseudo-pacified 'orderly disorder'.

The upshot is that, instead of a unipolar, monotone emphasis on social control, what we see is a dynamic yet undialectical tension between the pacification of violent urges and the stimulation of the libidinal forces of ambition, competition, envy and so on.[91] It is 'undialectical' – or perhaps more precisely a 'suspended dialectic' – because neither aspect of the process, and therefore the process itself, changes according to any politically relevant recognition of its own or the other's contradictions; they simply remain in dynamic tension producing energy. This arrangement is maintained by the abolition of the political discourses that can reveal and inform action against these contradictions and the deleterious social effects of the overall process itself.[92] Western legal systems, it seems, simultaneously stimulate and repress libidinal energy in order to create the dynamic force – pseudo-pacified sociosymbolic competition within the confines of consumer marketplaces – that energizes and drives economic cycles. However, in order to maintain such cycles Western legal systems on balance tend to lean more towards stimulation than repression, resulting in deviant activity inevitably spilling over its repressive boundaries. Indeed, in partnership with a measured amount of punitiveness, acted out predominantly in the symbolic realm, comes a far more open, discretionary take on forms of pacified low-level deviance that enable continued economic vitality. Thus European ethico-legal structures can create a regulatory 'third space' in which certain forms of deviance not only thrive but are integral to the continued viability of the prevailing economic system.

4. Conclusion

The purpose of this article is to explore the origins of early market economies, particularly in England, in relation to the remarkable, progressive minimisation of interpersonal violence after the fourteenth century, and to put forward the claim that it was not so much 'spiritualized'[93] or eliminated from everyday life as repressed and sublimated to perform vital functions in the engine-room of the market system. We began with an analysis of the socio-historical context after the fall of the Roman Empire in order to explore what appears to have been an extraordinary decline in cultural vibrancy, economic production and social sophistication. The vacuum left in the wake of Roman power seems not to have been filled by any comparable power base for a number of centuries, to the extent that English life, with comparable conditions across other parts of northern Europe, seems to have descended into a kind of violent free-for-all reminiscent of, if not actually reflected in, Hobbes's concept of an anarchic 'state of nature'. When power did successfully coalesce under a relatively central authority, it was that of the

87 Emsley, C. *Crime and Society in England: 1750–1900*, 4th Edn, (London: Routledge, 2010).
88 *ibid.* 161.
89 Kant, I. *The Metaphysics of Morals,* (Cambridge: Cambridge University Press, 1996).
90 Durkheim, E. *The Rules of the Sociological Method*, (New York, NY: The Free Press, 1966).
91 see Hall, 2012; 2014.
92 see Hall, 2012; Winlow & Hall, 2013.
93 see Spierenburg, 2008.

Norman invaders after 1066, who, initially at least, seem to have been notably unsuccessful in their attempts to govern large swaths of the country, which ultimately gave rise to a feudal social order simultaneously plagued by and built upon predatory exploitation and interpersonal violence.

The traditional explanation of why serious physical violence in English society started to decline after the reign of Edward I has drawn much from the work of Norbert Elias, specifically his concept of a 'civilizing process'. In this standard formulation, growing centralisation of power allowed for the greater political complexities and social interdependence that eventually took on a life of their own as they began to reconfigure the emotional dispositions of the general population. Furthermore, he argues, the emergence of physically non-violent sensibilities betrays a naturalistic, evolutionary drive toward pacified sociality, indicating an irreducible relationship between complexity and pacification. Unfortunately, Elias's thesis comes laden with a number of problems, not least of which is his tendency to gloss over the relationship between internal and external worlds, particularly in light of the observation that crime seems not to have become 'civilized' so much as changed with the times and developed into a more modernist form with a greater propensity for property offences. What this empirical tipping point allows us to do, however, is to begin moving beyond the problematic bounds of Elias's thesis to consider the possibility of a rather more dualistic and dynamic analytical model of the relationship between contemporary political economy and the diffusion of 'pseudo-pacified' social interaction and cultural-subjective sensibilities. It is, in short, difficult to say that violence was fully pacified because following sublimation it seems to have re-emerged not just in organized military forms but also more subtly in aggressive rule-bound sociosymbolic competition that fuelled consumer culture and market demand and often provided the motivations for more abstract forms of criminality.

In light of these problems a number of contemporary theorists have begun to move away from Elias's work toward locating pacification firmly within the unstable yet dynamic context of market economies in a tense undialectical relationship between social and individual subjectivity. What seems to have happened is that attempts to repair England's social order after the manifold depredations of the Dark and early Middle Ages relied on a certain amount of distributivism characterised, as much as anything, by the delegation of social responsibility for civic peace and moves toward a slightly more equitable distribution of wealth in order to stem the tide of brutality. While these measures probably were not anywhere near as successful as might have been hoped, and were no doubt plagued by all manner of double-dealing, they succeeded in evacuating enough violence from everyday life to facilitate a moderate upturn in trading activity, which, alongside other significant legal changes, began to erode the ethical codes and dispositions associated with distributivism. In other words, prevailing legal systems, as they solicited the population into more entrepreneurial dispositions, encouraged the further sublimation of violence into pseudo-pacified sociosymbolic competition within growing consumer marketplaces. What this means, however, is that the long-term decline in violence between the fifteenth and twentieth centuries is less of an evolutionary process of 'civilization' than a secondary and rather fragile and dependent product of economic functions and relations operating within modernist regulatory frameworks.

A Mosaic of Controls: The Plurality of Order Maintenance Mechanisms in 16th Century Paris*

*Diane Roussel***

Abstract

How was public order maintained in a giant city in the early modern period? Meeting this challenge before the creation of the Lieutenance générale de Police de Paris in 1667 was the result of unspectacular but effective mechanisms, far from the sensational visions of elite contemporaries and royal agents. Using Parisian criminal records as a window on everyday urban order maintenance at the local scale of Saint-Germain-des-Prés, social history unveils the work of a variety of actors (magistrates, "police sergeants" but also common people, individuals and social groups, litigants and witnesses) and a plurality of regulation processes (complaints and trials, extra-judiciary settlements, social control).

Key words*: criminality; extra-justice; justice; neighbourhood; Paris; police; regulation of conflicts; Saint-Germain-des-Prés; scandal; social control.*

In the growing suburb of Saint-Germain-des-Prés at the gates of Paris, on the 6th of May 1605, around 6 PM, residents and passers-by witnessed a boisterous street quarrel that involved a stone-cutter and a widow regarding the employment of a domestic servant. A raging Pasquier Hardy hit the domestic servant and insulted the widow. The latter attempted to calm the former down, first with peaceful words: "Easy, easy, don't beat anybody! One should not get into such a dispute for a chambermaid." Then she offered a way out of the dispute that was both sensible and legal: "If she has done him wrong, justice is available for him and her."[1] For this woman, as for many residents of the largest suburb of the French capital city, the law was a possible instrument to regulate inter-personal conflicts and to keep peace. This anecdote, like many others contained in the records of the local jurisdiction of Saint-Germain-des-Prés, underlines the plurality of controls and actors operating in the settlement of conflicts and in the construction of public order in the largest western city in the early modern period.

The evidence of ordinary life contrasts with the more dramatized and well-known visions given by contemporary commentators of a disorderly and extraordinary city of Paris, populated with as many as 300,000 to 350,000 residents in the middle of the 16th century. In 1599, Thomas Platter the Younger, a student from Basel, warned, in his diary, would-be travellers to Paris: "Crossing a deserted forest is obviously much safer than walking the streets of Paris".[2] Paris, as much as London, was the focus of an imagery that made the metropolis the repository of all vices: for many contemporaries, the giant city, embodied the corruption of morals and the concentration of dangers.[3] As paradoxical as it could appear, the comparison of the political capital of the French kingdom with the wilderness of a forest was hardly new. Proponents of the royal order and absolutist reform actually kept using it until the end of the *Ancien Regime* to promote the extension of royal authority.[4] Hence, after the foundation of the *Lieutenance générale de Police de Paris* by Louis XIV in 1667, its promoters painted earlier times as those of disorder and chaos.[5]

Whether one privileges one documents or the other, the image of Paris turns out very different. Attempting to understand order maintenance in Paris in the early modern period in all its complexity, one has to distance oneself from dominant images that have shaped for so long the historiography of Paris and

* I wish to thank respectively Yann Philippe and Adrian Park for the translation and revision of this article.

** Diane Roussel, Assistant Professor in History, University of Rheims Champagne Ardenne, Centre d'Études et de Recherches en Histoire Culturelle (CÉRHiC – EA 2616), Rheims, France.

1 Archives Nationales de France (AN), Z2 3414, 6 mai 1605, Pasquier Hardy.

2 I translate from the French version in LE ROY LADURIE, Emmanuel (ed.), *Le siècle des Platter* : t. III, *L'Europe de Thomas Platter*, *France, Angleterre, Pays-Bas 1599–1600*, Paris, Fayard, 2006, p. 146-147.

3 See for example KERN PASTER, Gail, *The Idea of the City in the Age of Shakespeare*, Athens, Georgia UP, 1985; MANLEY, Lawrence, *London in the Age of Shakespeare : an Anthology*, London, Croom Helm, 1986.

4 ROUSSEL, Diane, "*Comme en la plus belle forest du monde*?, Discours de l'insécurité et insécurité des discours à Paris au XVIe siècle", in BELLEGUIC, Thierry et TURCOT, Laurent (dir.), *Les Histoires de Paris (XVIe-XVIIIe siècle),* Paris, Hermann, 2012, vol. 1, p. 31–51.

5 For a famous example, Nicolas DELAMARE, *Traité de la police…*, Paris, J. et P. Cot, 1705, t. I, adresse au roi.

leave room for other representations of urban disorder such as the Pasquier incident. Dominated for long by the paradigm of the triumph of absolutism, haunted by the dark view of Paris, and downplaying the social history of the very early modern period, scholars have tended to adopt the teleological view of the reformers who saw Paris as a capital of crime before the so-called "administrative revolution" of 1667. More recent works have, however, revised the revolutionary character of the "invention" of *Lieutenance générale de Police* and of the French model of policing and more generally criticized the idea that the reform of an institution proves its previous inadequacy.[6] Therefore, instead of assuming the city as a naturally abnormal and criminogenic environment, I propose to view the urban experience as appeasing and civilizing. The peculiar ecology of the French capital in the early modern period may have fostered a peculiar matrix of civilization, shaping and moralizing the behaviour, morals, and customs of citizens.[7]

This assumption is first based on a use of sources that stand far from the anxious tales of the Parisian bourgeoisie and authorities. Records from the criminal justice system shed doubt on the validity of the sensationalized representations of Paris. As imperfect as they may be, indicators of crime registered by the criminal justice system do not show particularly high levels of violence in Paris, compared to the countryside. Moreover, by enlarging the perspective, legal records also give an opportunity to re-evaluate the interactions between the judicial system and society and to stand as close as possible to the actors themselves. Engaging not so much in an "history from below" as in an "history from within"[8] helps reveal the mechanisms imbricated in the social fabric by which order was maintained and peace kept.

This lens of observation not only authorizes multiple levels to operate at the same time, but takes into account the peculiarities of the institutional context and the availability of records. An important inheritance of the feudal system was indeed the myriad of institutions in charge of order maintenance and public security in the early modern period, among which the Royal Court of *Châtelet* increasingly functioned as the main policing force. In the 15th and 16th centuries, royal power affirmed its hold on Parisian matters.[9] Scores of ordinances on the Parisian police were issued, in which rampant crime and the failure of traditional order maintenance institutions were denounced. By claiming to reform them, royal power also extended its hold on the capital. However, as many as twenty-five so-called "minor" jurisdictions, mostly seigneurial, but also municipal, ecclesiastic, corporative were still surviving. Among them, the seigneurial justice of Saint-Germain-des-Prés stands out by its exceptional activity and its impressive and extremely valuable production of records – especially if we consider that the records of other Parisian justices and especially the *Châtelet* are gone. Held in contempt for long by higher justice officers, local justice has been recently rehabilitated by historians as an actor of and a window onto ordinary urban order maintenance.

My approach in this paper is thus epistemologically founded on the renewed understanding of the relations between the institutional and social,[10] and more specifically on the new ways of "writing 'law and society' histories" set forth by social historians in the last thirty years.[11] The legal system is thus viewed less as framework of power imposing its authority from above on passive subjects than as the locus of an interaction – uneven as it may have been – with the population. Following Michel Foucault in his attempt "to give oneself as the object of analysis power relations and not power itself", "one must analyse institutions from the standpoint of power relations, rather than vice versa."[12] This historiographical model that insists on the role of actors and on their relations with the legal system allows a new understanding of the working of the judicial process without denying the tensions and conflicts that were inherently part of the judicial system and urban space.

The seigneurial justice of Saint-Germain-des-Prés is thus studied in this paper as a window into the plurality of mechanisms that contributed to maintaining order. Local justice often worked hand in hand with the devices of moral regulation and social control at work within communities and is a part of a *continuum* of mechanisms that produces order rather than imposing it. Records show several instances of social control, that ranged from the most formal to informal ones but that were most often intertwined. For the sake of clarity, they will, however, be studied successively: the local court; the police and finally the local community.

1. Parisian Justice: settling disputes in a pluralistic justice system

Despite the increasing encroachment of royal power, the Abbot and Seigneur of Saint-Germain-des-Prés remained a powerful figure. He actually held the rights of high and middle justice on the largest suburb of the capital – which possibly contained as much as 20,000 to 30,000 residents in the early

6 For a synthetic view, MILLIOT, Vincent, "Mais que font les historiens de la police?", in BERLIÈRE, Jean-Marc, DENYS, Catherine, KALIFA, Dominique et MILLIOT, Vincent (dir.), *Métiers de police, Être policier en Europe, XVIIIe-XXe siècle*, Rennes, Presses Universitaires de Rennes, 2008, p. 9–34.

7 For a more general view, ROUSSEL Diane, *Violence et passions dans le Paris de la Renaissance*, Seyssel, Champ Vallon, 2012.

8 GASKILL, Malcolm, *Crime and Mentalities in Early Modern England*, Cambridge, Cambridge UP, 2000.

9 GAUVARD Claude, "La police avant la police, la paix publique au Moyen Âge", in AUBOUIN, Michel, TEYSSIER, Arnaud, TULARD, Jean (dir.), *Histoire et dictionnaire de la police du Moyen Âge à nos jours*, Paris, Robert Laffont, 2005, p. 94–140 ; COHEN, Esther, *Peaceable Domain, Certain Justice*, Hilversum, Verloren, 1996.

10 See REVEL, Jacques, "L'institution et le social", in LEPETIT, Bernard (dir.), *Les formes de l'expérience. Une autre histoire sociale*, Paris, Albin Michel, 1995, p. 63–84.

11 BOSSY, John (ed.), *Disputes and Settlements, Law and Human Relations in the West*, Cambridge, Cambridge UP,1983 ; COSS, Peter (ed.), *The Moral World of the Law,* Cambridge, Cambridge UP-Past and Present Society, 2000. For the french historiography, see GARNOT, Benoît, *Histoire de la justice, France, XVIe-XIXe siècle*, Paris, Gallimard, 2009 ; BRIZAY, François, FOLLAIN, Antoine, SARRAZIN, Véronique (ed.), *Les justices de village. Administration et justice locales de la fin du Moyen Âge à la Révolution*, Rennes, Presses Universitaires de Rennes, 2002 ; PIANT, Hervé, *Une justice ordinaire. Justice civile et criminelle dans la prévôté de Vaucouleurs sous l'Ancien Régime*, Rennes, Presses Universitaires de Rennes, 2006.

12 FOUCAULT, Michel, in *Essential Works of Foucault : 1954–1984*, Paul Rabinow (ed.), vol. 3, *Power*, New York, The New Press, 2000, p. 339 and p. 343.

17th century –, until as long as 1674 and the *Édit de Réunion*, which centralized Parisian justice under the authority of the Châtelet.

The Mediating power of justice

The run-of-the-mill of the penal justice system was made of petty criminality, mainly minor acts of violence. Among the 554 criminal cases recorded between 1511 and 1610, assaults represented the great majority of charges (70% of the 724 prosecuted individuals), far ahead of moral violations of morality and good behaviour (16%), or property offences (9 %), and offences to power and justices (5 %).[13] They involved low levels of violence, mostly insults, provocations, threats and blows, most often without bloodshed.

Moreover, few suits were fought through to the bitter end, since half of the cases ended after the accused was interrogated. Only 14% were conducted to the confrontation between the witnesses and the accused. When they were issued, verdicts and punishments can be reconstructed from the prison registers of Saint-Germain-des-Prés, which are still available for the years 1537–1579.[14] Fines were favoured (55% of known sentences) whereas corporal punishments (including banishing) were less used (25 %) and reserved for delinquents deemed dangerous for the preservation of community values. Remaining prisoners were reprimanded and released or given suspended sentences. This use of the repertoire of penal responses reflected both the petty character of criminality and judicial practices based on conciliation more than repression. Far from representing the legacy of archaic legal procedures, this system of fines and pecuniary damages was part of a more general "pedagogy of obedience"[15] teaching, especially to young men, what it cost to beat one's neighbour or to sleep with his wife, and aiming at reconciling parties in conflict. In Saint-Germain-des-Prés, magistrates used their authority as arbiters of private interests and father-like figures. They scolded and threatened but only occasionally punished. By mending the social fabric instead of further ripping it apart, local justice perpetuated in the early modern period the medieval system of negotiated and appeasing justice of Northern European and Italian cities.[16]

Taking it to the court: complaints as a social resource

Because their honour was more often harmed than their bodies, victims mainly expected the judicial system to publicly repair their reputation. Formal prosecution was thus a way to settle disputes that had not been ended on the street. The judicial process in such an inherently local system as the court of Saint-Germain-des-Prés was initiated in more than two thirds of the cases (68%) by the litigants themselves, whereas actions initiated by the public prosecuting agency represented only a minority.

For the litigants it meant, however, stepping into a new configuration of power dictated by the magistrate and the formal operations of the law (judicial procedures, the writing techniques of the clerks, the legal definition of the facts)[17] that shaped but also predetermined the words and behaviour of litigants. As in the Parliament of Paris, across the gates of Paris, the bailiff or his penal lieutenant conducted the investigation along the lines of the inquisitorial procedure that had supplanted the adversarial system since the end of the Middle Ages. Far from the all-powerful, merciless and inhuman machine described for long by the historiography, the written and secret procedures still shaped the terms of judicial confrontation. Protagonists had thus very contrasted resources. The complainants were given the ability to impose their own version of the facts, to select witnesses and to run a game in which the accused had to play defence. This asymmetry was reinforced by the social selection ensured by the judicial process. Theoretically, all complainants who could afford to pay to initiate the process did have access to the court. In reality, however, going to court was unequally socially distributed. For established craftsmen (60% of the complainants) and office holders (14%), it was an instrument of social distinction, a badge of respectability testifying to one's membership in the cultural and civilized elite.[18] Judicial strategies were thus more likely to be used by the most established residents of the suburb.

Moreover, taking interpersonal disputes to the court meant accepting institutional codes and rituals and conforming one's discourse to the "grammar of the trial". Recorded tales of disputes show the use of stereotyped phrases and the endless repetition of the same narratives which probably had not only to do with the filter of administrative writing but also to the ability of the protagonists to meet institutional demands to win in court. The reiteration of legal and social norms, far from lessening their strength, was the cornerstone of the narrative and linguistic strategies of Parisian litigants. Like their English counterparts of the early modern period, in slander suits or in violence suits including slander, they knew which words were actionable in court. Quite commonly, the word "whore" was the most frequently used, revealing the importance of a gendered form of order based on the sexual reputation of women. Like for most western Europeans of the period, "the female body was a public affair, the target of official regulation, informal surveillance, and regular, intimate touch by women and men."[19] The judicial strategies of complainants therefore testify to the

[13] Criminal instructions, AN, Z^2 3405 à 3419.

[14] AN, Z^2 3393, 33318, 3394 et 3395 (années 1537 à 1579), inventory drew up by BIMBENET-PRIVAT, Michèle (ed.), *Écrous de la justice de Saint-Germain-des-Prés au XVIe siècle,* Paris, Archives nationales, 1995.

[15] MUCHEMBLED, Robert, *Une histoire de la violence de la fin du Moyen Âge à nos jours*, Paris, Seuil, 2008, p. 164–184.

[16] ROUSSEAUX, Xavier, "Politiques judiciaires et résolution des conflits dans les villes de l'Occident à la fin du Moyen Âge. Quelques hypothèses de recherche", in CHIFFOLEAU, Jacques, GAUVARD, Claude, ZORZI, Andrea (dir.), *Pratiques sociales et politiques judiciaires dans les villes d'Occident à la fin du Moyen Âge*, Rome, École française de Rome, 2007, p. 497–526.

[17] THOMAS, Yan, Introduction for "Histoire et droit", *Annales, Histoire, Sciences sociales*, n° 6, 2002, p. 1425–1427.

[18] PIANT, Hervé, "Vaut-il mieux s'arranger que plaider ? Un essai de sociologie judiciaire dans la France d'Ancien Régime", in FOLLAIN, Antoine (dir.), *Les Justices locales dans les villes et villages du XVe au XIXe siècle*, Rennes, Presses Universitaires de Rennes, 2006, p. 118.

[19] GOWING, Laura, *Common Bodies. Women, Touch and Power in Seventeenth-Century England*, Yale UP, 2003, p. 16.

"streetwise strategies that enabled plaintiffs and defendants to exploit these rules to their own advantage."[20] Far from being ignorant and frightened by an implacable and mysterious legal system, individuals in the *Ancien Regime* saw it as a resource they could tap in a familiar repertoire of actions. They were ready to "play justice like a musician plays an instrument,"[21] although not all of them were equally able, from a social and economic standpoint, to devise winning strategies. While the trial enabled parties in conflict to restore peace and to avoid a possible endless cycle of revenge, it was at the same time an "instrument of violence by proxy"[22] and an indication of social and gendered hierarchies.

Extra-justice: compromise and settling out of court

It is now accepted that in early modern France, as in England, ''judicial proceedings might sometimes be initiated, not as a means of furthering a dispute, but as a first step towards a settlement''[23]. It was therefore possibly meant less to obtain an actual indictment, than to create leverage by publicly humiliating one's opponent. It was also, and probably even more a warning to hasten and settle a compromise out of court and the initial step towards arbitration.[24]

Out-of-court mechanisms are, however, difficult to monitor for historians of early modern France since the judicial system was reluctant to mention them in its own records – even though it very probably admitted them in practice. Hence, unlike numerous references to arbitrations in the English law books and court records, legal documents of Saint-Germain-des-Prés rarely mention such agreements (called *''chevissances''*). The enormously high "evaporation rates" of inferior courts probably indicate the level to which justice was instrumentalized by the people to settle conflicts out of court.[25] To circumvent these silent archives, other records, especially notaries' records, must be mobilized.

In early modern Paris, private settlements for misdemeanours in the presence of a notary were common practice.[26] The records of Saint-Germain-des-Prés notary Jacques Legay, for the years 1609–1611[27], contain many examples of residents reaching a settlement for cases involving assault, insults and slander or even wounds, and thereby ending in legal proceedings. The terms of written transactions were meant to be acceptable by the two parties and included an admission of culpability and a reparation of honour which could include a financial compensation which varied according to the seriousness of the wounds. The opposite party was thus described as "a man of good esteem and without reproach"[28] and the offending words were said to have been said "inadvertently and out of passion."[29] The two parties then solemnly promised to abandon all legal proceedings, declaring them "null, without effect and void."[30] At the gates of Paris, artisans, merchants, office-holders found in the notary a mediator able to settle interpersonal conflicts in a way that paralleled the course of justice. According to Jean Nagle these agreements can even be called "para-judiciary" as they relied on the collaboration of judges to repair honour wounds.[31]

Litigation and arbitration must thus be considered as complementary rather than antagonistic and must be analysed within a dynamic and flexible process. Legal and non-legal proceedings stand among a repertoire of actions that could be used either successively or simultaneously to achieve the litigants' objectives according to the needs of strategy. There was both flexibility and continuity between lawsuits and arbitration proceedings.

That sergeants of the justice of Saint-Germain-des-Prés, i.e. seigneurial officers who held a delegation of public authority, did not hesitate to go before a notary to settle their personal conflicts is highly indicative of the frequency of the practice. In my sample, I found no less than five sergeants who initiated legal proceedings before obtaining a favourable settlement in the notary's office. In January 1609, André Mauroy found an agreement with a carter who not only had insulted him but had offended his official "status and charge" of sergeant. The guilty man agreed to paying four *livres tournois* and recognized him "a man of good life, good morals and good reputation."[32] Even if their duty was to serve official justice, sergeants had no contempt for devices that circumvented it. Arbitration was actually a practice that was already part of their everyday experience of public space.

---

[20] INGRAM, Martin, "Law, litigants and the construction of 'honour': slander suits in early modern England", in COSS, Peter (ed.), *op. cit.*, p. 134–160, quotation p. 135. For further analysis, see ROUSSEL, Diane, "Combattre en justice. Judiciarisation et mises en récits de l'affrontement dans les procédures criminelles au XVI^e siècle", in FAGGION, Lucien, REGINA, Christophe, RIBÉMONT, Bernard (dir.), *La culture judiciaire du Moyen Âge à nos jours. Rhétorique, représentation et arbitraire*, Dijon, Presses Universitaires de Dijon, 2014, p. 271–284.

[21] BILLACOIS, François, "Clio chez Thémis", *Droit et Cultures*, n° 19, 1990, p. 9.

[22] BOLTANSKI, Luc, "La denunciation", *Actes de la Recherche en Sciences Sociales*, 1984, p. 15.

[23] SHARPE, James A., "*Such Disagreement Betwyx Neighbours* : Litigation and Human Relations in Early Modern England", in BOSSY, John (ed.), *op. cit.*, p. 181.

[24] MUYSSON, Anthony, "Arbitration and the legal profession in late medieval England", in DYSON, Matthew, IBBETSON, David (éd.), *Law and Legal Process, Substantive Law and Procedure in English Legal History*, Cambridge, Cambridge UP, 2013, p. 56–57.

[25] GARNOT, Benoît, "Une réhabilitation ? Les justices seigneuriales au XVIII^e siècle", *Histoire, économie et société*, n° 2, 2005, p. 228–229.

[26] SOMAN, Alfred, "L'infra-justice à Paris d'après les archives notariales", *Histoire, économie et société*, n° 1, 1982, p. 369–375.

[27] AN, Minutier Central (MC), XCII, 6 to 11. Among the almost 1,500 minutes contained in the records between january 1609 and december 1611, I have found 55 settlements for cases of verbal and/or physical violence. This sample is part of a work in progress on settlements before notaries in the early modern period.

[28] AN, MC, XCII, 10, f. 486, 27 juin 1611.

[29] AN, MC, XCII, 6, f. 41 r°, 24 janvier 1609.

[30] AN, MC, XCII, 7, f. 730, 19 novembre 1609.

[31] NAGLE, Jean, "Présidial et justice seigneuriale au XVII^e siècle. Le Châtelet contre Saint-Germain-des-Prés", in BLANQUIE, Christophe, CASSAN, Michel, DESCIMON, Robert (dir.), *Les officiers "moyens" (II), officiers royaux et officiers seigneuriaux*, Cahiers du Centre de recherches historiques, n° 27, 2001, p. 16.

[32] AN, MC, XCII, 6, f. 12, 6 janvier 1609.

2. An embedded police? Sergeants on the street

Situated themselves at the interface between justice and the people, sergeants offer a window into examining the power relationship created by this interaction. Representing the arm of the law, sergeants were court auxiliaries who both acted as bailiffs and lent strong hand to the execution of judicial sentences ("*exploits*"). Moreover, they were increasingly receiving "police powers" (in the modern meaning of the word "police") that extended their authority to punishing breaches of the law, catching criminals and preventing crime.[33] However, the 12 active sergeants in Saint-Germain-des-Prés in the early 17th century, hardly made for a full-time police force and were thus unable to closely control the people and public space.

Nonetheless, it would be utterly anachronistic to conclude that sergeants were inefficient as the historiography – lauding at the same time the *Lieutenance générale de police de Paris* – did for so long. The logic behind this early police, or "police before the police" was far from the ulterior model of surveillance and occupation of the city, envisioned as early as 1667, but enforced only in the second part of the 18th century,[34] or from the "inoculation" model enforced by the creation of the uniformed patrol force in the early 19th century.[35] In the 16th century sergeants were embedded. Well inserted in the Saint-Germain-des-Prés suburb, well-known by local residents, they used this familiarity and their natural acquaintances to intervene in many ways within the social fabric of the city. As incomplete and partial as they are – they inform us more on incidents and crises than on the regular patterns of everyday life – legal records are necessary to reconstruct, through a micro-sociology of police action, how the experience of the street was actually made by sergeants and how power was expressed and experienced in face-to-face contexts.[36]

Constructing and Negotiating a flexible street order

Narratives of tumultuous arrests allow the reader to follow step by step, and from the standpoint of sergeants the modalities of police action. When they didn't execute judicial decisions ordered by a magistrate, the intervened on the streets, most often alone, and were first alarmed by "noises" signalling disorder. They reacted, for example, to the clamour caused by an unusual street gathering, as the one that attracted Martin Loret, in August 1605. As he was "passing by the street of said location", he "heard a great noise and popular emotion in the yard of said dwellings" and thereby "inquired to several women about what was going on."[37] Causing an outcry to call for help was the next necessary step for the sergeant eager to launch public action. The medieval community principle of urban defence still valid in the 16th century made the people deputies of the legal system who helped in the arrest of criminals.[38] Local residents went for the sergeants at the sergeants' gate, at the great crossroads of Saint-Germain, or even in their private homes. Calling sergeants for help was frequently heard on the streets: "Is there really no sergeant here?" cried someone on a Sunday of June 1606. When he heard it, sergeant Dimbert hurried to Saint-Sulpice Church to hear three wounded men.[39] As this example indicates, sergeants could respond to demands made by the people and not by the legal system.

Once there, sergeants acted sometimes as mediators. Even lacking officially the power to judge, they could, by their mere intervention, stop both symbolically and effectively the event that was tearing social bonds apart. In front of the sergeant, protagonists paused to show their wounds, report the insults received and accuse the culprits. Witnesses told their versions of the story. In this context the sergeant fully participated in the ordinary social regulation of neighbourhood life without necessarily invoking the law. This is what we can learn incidentally from an affair that took place on August 14, 1605 at the cabaret *Espée Royalle*. There, two sergeants, Edme Festeau and Simon Leproust, and a surgeon seated with a group of masons who had fought each other, leaving one of them seriously wounded.[40] They were participating in a traditional and oral form of pardon, based upon a ritual sharing of wine, described as "rustic" by historian Antonio Manuel Hespanha to distinguish it from the more sophisticated forms of written, official justice in Spain[41]. In this ritualized settlement, the sergeants acted as mediators, using in an informal way their formal powers. Even in serious cases involving blood spitting, they could combine several normative systems and restore peace thanks to their intermediary role between the legal system and the people.

Resistance and conflicting norms

Criminal records, however, ignore most of the time ordinary achievements and point out, on the contrary, the failed encounters between the legal system and the population. In these moments of conflict, the various normative systems seemed

[33] TOUREILLE, Valérie, "Les sergents du Châtelet ou la naissance de la police parisienne à la fin du Moyen Âge", in DOLAN, Claire (dir.), *Entre justice et justiciables : les auxiliaires de la justice du Moyen Âge au XX^e siècle*, Québec, Presses Universitaires de Laval, 2005, p. 76–80.

[34] MILLIOT, Vincent, "Le système policier parisien : réflexions sur une 'révolution permanente' ? (fin XVII^e-fin XVIII^e siècle)", in BELLEGUIC, Thierry, TURCOT, Laurent (dir.), *op. cit.*, t. I, p. 53–78.

[35] DELUERMOZ, Quentin, *Policiers dans la ville. La construction d'un ordre public à Paris, 1854–1914*, Paris, Publications de la Sorbonne, 2012.

[36] BRADDICK, Michael J., WALTER, John, "Introduction. Grids of power : order, hierarchy and subordination in early modern society", in *Negociating Power in Early Modern Society. Order, Hierarchy and Subordination in Britain and Ireland*, Cambridge, Cambridge UP, 2001, p. 11. MUCHEMBLED, Robert, "Pour une histoire des gestes (XV^e-XVIII^e siècle)", *Revue d'histoire moderne et contemporaine*, 34, 1987, p. 87-101. DELUERMOZ, Quentin, "Usages de Goffman au XIX^e siècle: policiers en tenue, institutions et ordres sociaux à Paris", *Carnets de bords,* n°14, 2007, p. 33–42, which inspired the following lines.

[37] AN, Z^2 3415, 20 septembre 1605, Marin Loret.

[38] GAUVARD, Claude, "Violence licite et violence illicite dans le royaume de France à la fin du Moyen Âge", *Violence et ordre public au Moyen Âge*, Paris, Picard, 2005, p. 278.

[39] AN, Z^2 3416, 4 juin 1606, Jehan Dimbert (pl.).

[40] AN, Z^2 3415, 14 août 1605, Nicolas Chalumeau.

[41] HESPANHA, Antonio Manuel, "Savants et rustiques. La violence douce de la raison juridique", *Ius Commune*, Francfort-sur-le-Main, n° 10, 1983, p. 1–48.

at odds. Sergeants who had failed in obtaining obedience and were compelled to defend themselves in front of their hierarchy tended to dramatize and essentialize what they presented as a conflict of opposite and even irreconcilable orders. Playing on their offended dignity as officers, they presented the judicial order as the only legitimate one and all those who opposed it as "rebels of all justice" and as dangerously seditious individuals whose motivations were not even examined. On the contrary, individuals refusing police intervention denounced the imposition of an order seen as exogenous and illegitimate by brutal, incompetent and even corrupt agents. Legal records therefore present a large repertoire of actions – "efforts", "excesses" and "rebellions" – committed against sergeants.

Because it physically put individuals out of the game, the act of arresting someone was perceived as a public and unbearable humiliation. Derision and mockery were therefore powerful weapons – the "weapons of the weak" in minor resistances as James C. Scott described them[42] – in the society of Saint-Germain-des-Prés that valued highly individual reputation. Addressing too familiarly a sergeant or sticking one's tongue out at him were serious offenses. Refusing to a sergeant the deference he was expected to receive was a major transgression of the informal rules that governed face-to-face encounters, a "ceremonial profanation", to use the words of Erving Goffman.[43] Being insolent aimed at abolishing the distance between the police and the policed, and depriving the former of their symbolic authority in order to fight on an equal footing without losing face.[44]

In some cases, resistance was more overt. Accusing sergeants of being "thieves", gesticulating, screaming, or even hitting them were ways to reverse roles, to make of the accused the victim and of the sergeant the offender. By creating a "tumult", and a "clamour", the accused who felt humiliated transformed the arrest into a "scandal". Sergeants feared the gathering of a potentially hostile crowd, which could easily turn into a popular and uncontrollable riot. "To avoid an even greater scandal" and the "fury of the people hereby present", fleeing was sometimes the best solution for unaccompanied sergeants who were in serious difficulty in front of "a large gathering of unruly people."[45] Arrest could also be completed by using constraint and violence. A sergeant killing someone on duty could hope to obtain a royal pardon.[46] However, the power of the poorly structured Saint-Germain-des-Prés police relied precisely on the ability of sergeants to impose their authority not simply by force but by ways that gained social compliance. The necessity of people's cooperation or complicity can be best measured by its absence when it was denied to the sergeant asking for it. Marin Loret found himself in serious difficulty when he requested several times help from citizens who refrained from cooperating.[47] Streetwise resistance testifies to the flexible and evolving nature of urban order. Without the consent and even the cooperation of citizens, judicial officers were powerless.

This shows that urban order relied mostly on forces out of the judicial and police orders. Criminal records unveil the existence of a larger and probably more pervasive community order that ensured forms of powerful social control.

3. Community order and the internal mechanisms of social control: the central role of sexual behaviour

In great cities, family links were often loosened by migrations. Supervising the population, especially the youth, and teaching them social values were thus functions transferred to father-like figures who fitted in the intertwining of traditional models of authority, those of the king, the magistrate and the father. In company of, or in competition with, or in replacement of biological fathers, master craftsmen were responsible for their fellow craftsmen, apprentices and servants. Then, at the scale of a building, the "main tenant" (*principal locataire*) served as an intermediary to the police in the control of dangerous groups. He was in charge of the morality of the household. Tenants appealed to him when they were furious "to live in a brothel and thieves' den" because of "disorderly" people that ought to be expelled.[48] Finally, the society of neighbours that generously provided help and solidarity, also represented a collective form of power that closely controlled everyday behaviour and denounced immorality or other reprehensible behaviour.

If the city could foster some degree of anonymity, it was above all an environment full of constraints. Walls were too thin to keep anything secret from neighbours' ears. Daughters in age to get married, the most vulnerable group of all, were the focus of a peculiarly anxious attention.[49] Therefore the neighborhood community maintained a social control that was powerful and supple, including a large range of graduated responses. Neighbours' tolerance varied according to the repetitive and irreversible nature of transgressions and to the degree of marginality of the offenders.

Scandal as a drama of dissimulation and exposure

Defamation, scandalous stories and rumours were instruments of enforcing conformity to community norms concerning gender norms and gender relations, particularly in the early modern period.[50] The case of Madeleine Guérin illustrates the

[42] SCOTT, James C., *Weapons of the Weak : Everyday forms of Peasant Resistance*, New Haven, 1985.

[43] GOFFMAN, Erving, *Interaction Ritual : Essays in Face to Face Behavior*, Chicago, Aldine, 1967, rééd. 2005, p. 86.

[44] As Michael J. BRADDICK also observes in hat conflicts, in "Introduction: the politics of gesture", *The politics of gesture: historical perspectives*, Oxford, 2009, p. 28–29.

[45] AN, Z^2 3409, 30 janvier 1564, Violet Judrel ; AN, Z^2 3412, 17 octobre 1583, Denis Moriset.

[46] In a corpus of 229 Parisian pardon letters ("lettres de remission") between 1523 et 1568, 21 of them did obtain pardon. For more details, see ROUSSEL, Diane, *Violences et passions dans le Paris de la Renaissance, op. cit*., p. 254–257.

[47] AN, Z^2 3415, 20 août 1605, Marin Loret.

[48] AN, Z^2 3418, 22 juin 1610, Gedeon Lenoble ; AN, Z^2 3413, 18 mars 585, Pierre Gamart.

[49] PITT-RIVERS, Julian, *The Fate of Shechem or The Politics of Sex. Essays in the Anthropology of the Mediterranean,* Cambridge-London-New York-Melbourne, Cambridge UP, 1977.

[50] GOWING, Laura, *Domestic Dangers. Women, Words, and Sex in Early Modern London*, Oxford, Clarendon Press, 1996 ; SHOEMAKER, Robert B., "The Decline of Public Insult in London, 1660–1800", *Past and Present*, 2000, 169, p. 97–131; CAPP, Bernard, *When Gossips Meet : Women, Family and Neighbourhood in Early Modern England*, Oxford UP, 2003.

role of rumour and gossip. According to rumour, this 18-year-old girl "badly governed herself."[51] Neighbours feared not only for the reputation of their dwelling – *les Trois Rois*, rue de Vaugirard – but also for their safety, because of the comings and goings of unknown men. Following their first impulse, they tried conciliation. As the mother of this fatherless young woman was busy working all day at the river as a washerwoman, married women of the building used sermons and reproaches to make up for the lack of paternal authority and to put Madeleine back on the right track. One of them reminded her that such company was not "honest" and that herself, while she was still a girl "would not have dared to speak to a man". These moralizing words were in vain, as Madeleine persisted and became pregnant. The coming of pregnancy operated the shift from rumour to scandal as the transgression became irreversibly visible.[52]

The guilty girl was though not excluded yet as, once again, there were attempts by the community to restore internal order and cover up the emerging scandal. Considering that the disorderly behaviour of the girl resulted "as it was said" from her mother's reluctance to find her a husband, neighbours did try to find her one. They organized in the house the necessary rituals to have her meet and get engaged to a horse-driver eager to get married quickly. The second evening, however, as a few malicious individuals were singing at the dinner table "*La vache et le veau*" ("The cow and the calf"), the naïve young man suddenly realized that he was being trapped and that the young woman had "quite broad hips". He left the house accusing the residents of having wanted to "betray him and get him to marry the cow and the calf". The failure of internal regulation led neighbours to distance themselves from the young girl, to reject her and to ask her to leave the building. Madeleine Guérin and her mother then tried a desperate gesture by accusing of paternity a gentleman who fought back by accusing the two women of defamatory slander.[53]

The way the neighbour's community enforced norms of behaviour appears thus as a complex process in which choosing between options depended on the ability of the group to maintain its reputation and cohesion. If Christian marriage remained a shared ideal and transgressions to it were disapproved of, the community acted pragmatically rather than trying to enforce rigid moral principles. The breaking out of scandal, this "drama of dissimulation and exposure"[54] represented the boundary of social tolerance. Threatening and revealing norms at the same time, scandal created emotions and collective behaviour.

Charivaris and public denunciations

Transgressions did not remain without response, as the permanence of charivari indicates. This raucous and playful device of regulation, operated by local young men, conformed to its traditional role by denouncing unconventional sexual and matrimonial behaviour. Few but precious indications in criminal records indicate that the practice was still existent in the late 16th century and had outlived religious and royal prohibitions. On September 26, 1610, on the rue de Bussy, for instance, around 10 PM, a dozen neighbors "were rejoicing and having a charivari on the street". To the magistrate who asked the reason for this peculiar charivari, one of them replied that it was because of "a servant named Gillaine", who was "rather old and [had] married a young boy."[55] The youth of Saint-Germain-des-Prés condemned the large age difference between the two spouses – an increasingly central motive in charivari practices. In other cases, guild members created an uproar in the middle of the night under the windows of a cuckold cutler[56], and a horse-seller by singing "dissolute songs" or by covering his door with derogatory graffiti.[57] "Misrule can have its own rigour", as Natalie Zemon Davis wrote, since charivari served to perpetuate marital values and community cohesion.[58]

Because they resorted to both collective mobilization and use of official justice, citizens' complaints against brothels constitute further evidence of how people adhered to matrimonial norms and rejected prostitution. Whereas the commerce of sex was still tolerated in the early 16th century, the closing of brothels in 1561 and the criminalization of prostitution were accompanied by heightened social reprobation.[59] By the end of the century, it was currently admitted that "with whores came a lot of evil."[60] Venereal diseases, the corruption of youth, the unhappiness of married couples, were closely associated to the presence of clandestine brothels that had found refuge in the outskirts of the capital. At the instigation of worried neighbours, the bailiff of Saint-Germain-des-Prés ordered several sergeants' raids to put prostitutes and pimps under arrest. During the summer of 1610 and the "Great Fear" atmosphere that followed the assassination of Henry IV, citizens lodged several collective complaints in the name of public order. Unable to suppress by itself a disorder perceived as exogenous and disruptive of social ties, the local community resorted to justice by emptying houses of ill-repute and bringing honesty and security back to the neighborhood. In Saint-Germain-des-Prés, the repression of prostitution was thus spurred by an increasingly organized

---

[51] AN, Z^2 3411, 2 mars 1583, Madeleine Guerin.

[52] CLAVERIE, Elisabeth, LAMAISON, Pierre, *L'impossible mariage. Violence et parenté en Gévaudan. 17e, 18e et 19e siècles*, Paris, Hachette, 1982, p. 213–237.

[53] About the damages of allegations of paternity for men, see SHEPARD, Alexandra, "Brokering Fatherhood : Illegitimacy and Paternal Rights and Responsabilities in Early Modern England", in HINDLE, Steve, SHEPARD, Alexandra, WALTER, John (ed.), *Remaking English Society. Social relations and Social Change in Early Modern England*, Studies in Early Modern Cultural, Political and Social History, vol. 14, 2013, p. 41–63.

[54] LEMIEUX, Cyril, DE BLIC, Damien, "Le scandale comme épreuve. Éléments de sociologie pragmatique", *Politix*, n° 71, 2005, p. 15.

[55] AN, Z^2 3419, 27 septembre 1610, Toussaint Veillart.

[56] AN, Z^2 3419, 10 septembre 1610, Jehan Gille.

[57] AN, Z^2 3412, 9 juillet 1583, Pasquier Villain.

[58] ZEMON DAVIS Natalie, "The Reasons of Misrule : Youth Groups and Charivaris in Sixteenth-Century France", *Past &Present*, n° 50, february 1971, p. 41–75, quotation p. 41.

[59] ROSSIAUD, Jacques, *La prostitution médiévale*, Paris, Flammarion, 1988.

[60] AN, Z^2 3412, 4 novembre 1583, Benjamin Rigot.

social demand in search of heightened morality, order and security. Informal controls thus put pressure on more formal forms of control, therefore compelling it to enforce ideal norms.

4. Conclusion

In the early modern period, at the gates of Paris, a mosaic of intertwined controls ensured the maintenance of public order. Working in continuance with forms of inner community regulation, the legal system was but a part of a *continuum* of social and moral controls. The relation between official and legal controls on one hand, and informal and extrajudicial controls on the other hand was thus a more complex process than simply the linear and irreversible victory of the former over the latter, as it has long been told. Choosing between "sophisticated" or "rustic" means, or their combination, to solve conflicts was influenced by social constraints and the social positions of the protagonists, as much as by their interests and resources. Sources that recorded social practices have thus recently led scholars to a reversal of perspective. Rather than a body to be disciplined, the population should be considered as an agent on its own in the construction of norms and public order. Because it was inserted in a traditional system of social regulation, based on transactions and the settlement of conflicts, local justice functioned less as a disciplining instrument than as one of acculturation. In ordinary practices, negotiation and consent played in this respect a probably more important role than coercion.

This familiarity between the citizens and the legal system at the local level went along with the long-term and more general transformations of Parisian justice imposed from above in the early modern period. The institutional reforms of justice and policing implemented under Louis XIV accelerated an older process aiming at downgrading and even suppressing the traditional structures of urban order. The creation of the *Lieutenance générale de police de Paris* in 1667 did not, however, eliminate overnight older practices. The *commissaires-examinateurs* of the Châtelet maintained for long a participative, judicial – thus non purely administrative – and paternalistic conception of public order[61], before the new "police style" was implemented in the 18th century. Moreover, the strong ties of neighbourly society made sure that informal mechanisms of social and moral control did not disappear.[62]

[61] PIASENZA, Paolo, "Juges, lieutenants de police et bourgeois à Paris aux XVII^e^ et XVIII^e^ siècles", *Annales ESC*, n° 45, 1990, p. 1188–1215.

[62] FARGE, Arlette, *Vivre dans la rue à Paris au XVIII^e^ siècle*, Paris, Gallimard, 1979, rééd. 1992 ; GARRIOCH, David, *Neighbourhood and Community in Paris, 1740–1790*, Cambridge, Cambridge University Press, 1986 ; COHEN, Déborah, "Sur la scène du délit dans le Paris populaire du XVIII^e^ siècle : témoin ou acteur ?", in GARNOT, Benoît (dir.), *Les témoins devant la justice. Une histoire des statuts et des comportements*, Rennes, Presses Universitaires de Rennes, 2003, p. 333–351.

Crime and Justice in Georgian Cheshire
The Chester Court of Great Sessions, 1760–1830

John Walliss[*]

Abstract

The criminal justice system of Georgian England and Wales has generated a great deal of interest from historians of crime for several decades. To date, however, the majority of research has focused on the south east of England and, in particular, The Old Bailey. Consequently, outside of a growing body of work on the Courts of Great Sessions in Wales, there has been little work focusing on the operation of justice in the north of England during the period. This article aims to contribute towards a refocusing of the historiography towards the north of England by presenting a quantitative analysis of the administration of justice in Georgian Cheshire, focusing on the operation of the Chester Court of Great Sessions between 1760 and its abolishment in 1830. The article will argue that analysis of the Chester Court of Great Sessions reveals a system in which, if the accused was successfully indicted, he or she faced a strong likelihood of being found guilty. More than likely, they would have been indicted for a property offence, most commonly larceny, for which they would receive a brief period of imprisonment. The sex of the accused would appear not to have influenced the verdict of the jury, although it would appear to have impacted on the severity of sentence passed. Crucially, if they were a woman and had been convicted of any other crime than murder then it was highly unlikely that, even if capitally convicted, that they would die on the gallows. Men, in contrast, could find themselves on the gallows after being convicted of a far wider range of offences.

Key words*: Bloody Code; courts; crime history; eighteenth century; great sessions; legal history.*

Introduction

The criminal justice system of Georgian England and Wales has generated a great deal of interest from historians of crime for several decades. To date, however, the majority of research – most notably the magisterial work of John Beattie and Peter King – has focused on the south east of England and, in particular, The Old Bailey.[1] Consequently, outside of a growing body of work on the Courts of Great Sessions in Wales, there has been little work focusing on the operation of justice in the north of England during the period.[2] This is a particular notable omission in the historiography because, as Peter King has noted, "… the justice delivered by the courts was shaped and remade as much from below, from within and from the margins as it was from the centre."[3] There is therefore a need to refocus the historiography away from the Metropolis and the Old Bailey and towards the provinces.

This article aims to contribute towards this refocusing of the historiography by presenting a quantitative analysis of the administration of justice in Georgian Cheshire, focusing on the operation of the Chester Court of Great Sessions between 1760 and its abolishment in 1830. Previous research on the administration of justice in Cheshire has focused primarily on

[*] John Walliss, Senior Lecturer in Criminology, Faculty of arts and Humanities, Liverpool Hope University, United Kingdom.

[1] John M. Beattie, *Crime and the Courts in England 1660–1800* (Oxford: Clarendon Press, 1986 [2002]); Peter King, *Crime, Justice and Discretion in England 1740–1820* (Oxford: Oxford University Press, 2005).

[2] The notable exception here being Gwenda Morgan and Peter Rushton, *Rogues, Thieves and the Rule of Law: The Problem of Law Enforcement in North-east England, 1718–1820* (London: Routledge, 1998). On Wales, see John Minkes, 'Wales and the "Bloody Code": the Brecon Circuit of the Court of Great Sessions in the 1750s', *Welsh History Review*, 22 (2005), 673–704; David J.V. Jones, 'Life and Death in Eighteenth Century Wales: a note', *Welsh History Review*, 10 (1981), 536-48; Nicholas Woodward, 'Infanticide in Wales, 1730–1830', *The Welsh History Review*, 23.3 (2007), 94-125; Nicholas Woodward, 'Seasonality and sheep-stealing: Wales, 1730–1830', *Agricultural History Review*, 56.1 (2008), 25-47; Nicholas Woodward, 'Burglary in Wales, 1730–1830: Evidence from the Great Sessions', *The Welsh History Review*, 28.2 (2008), 60-91; Nicholas Woodward, 'Horse-stealing in Wales, 1730–1830', *Agricultural History Review,* 57.1 (2009), 70-108; Katherine D. Watson, 'Women, violent crime and criminal justice in Georgian Wales', *Continuity and Change* 28.2 (2013), 245-72; John Walliss, 'Wales and the "Bloody Code": The Courts of Great Sessions, 1805–30', *Welsh History Review* 27.1 (2014), 28-52. For recent discussions of this state of affairs see Sharon Howard, 'Bloody Code: reflecting on a decade of the Old Bailey Online and the digital futures of our criminal past', *Law, Crime and History* 5,2 (2015), pp. 12-24; Richard W. Ireland, 'Why everything we know about criminal justice history is wrong', *Law, Crime and History* 5,2 (2015), pp. 130-42.

[3] Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* (Cambridge: Cambridge University Press, 2009), 2.

the Quarter Sessions records, and to date there has been little analysis of the Great Sessions.[4] While not suggesting that Cheshire represents a distinct case, it will use the county as a case study in the operation of justice during the period away from the South East. The article will argue that analysis of the Chester Court of Great Sessions reveals a system in which, if the accused was successfully indicted, he or she faced a strong likelihood of being found guilty. More than likely, they would have been indicted for a property offence, most commonly larceny, for which they would receive a brief period of imprisonment. The sex of the accused would appear not to have influenced the verdict of the jury, although it would appear to have impacted on the severity of sentence passed. Crucially, if they were a woman and had been convicted of any other crime than murder then it was highly unlikely that, even if capitally convicted, that they would die on the gallows. Men, in contrast, could find themselves on the gallows after being convicted of a far wider range of offences.

To this end, the article will be structured in four sections. The first will briefly introduce the Chester Court of Great Sessions, focusing particularly on the reasons for the abolition in 1830. The second will then introduce the sources and outline the methodology that will be used. The third section will present the quantitative analysis and will be structured so as to trace the criminal justice process, beginning first by examining the patterns of indictments per year and by crime over the period. Having done this, it will then move on to examine the outcomes of prosecutions, the different verdicts passed for different offences and the sentences handed down. Finally, the analysis will narrow down to sentences of death, exploring the impact of the sex of the offender and the type of offence on whether or not a capitally convicted felon hanged. The conclusion will then summarise the research findings.

The Chester Court of Great Sessions

Beginning in the twelfth century, England was divided into six judicial circuits (Home, Midland, Norfolk, Northern, Oxford and Western), with Justices visiting each circuit twice a year to preside over assize courts. Wales and Chester, however, differed from this arrangement, the latter as a consequence of its status as a county Palatine.[5] In place of the assize circuit, they had instead four circuits of Courts of Great Sessions (Brecon, Carmarthen, North Wales, and Chester), the Chester circuit encompassing the counties of Cheshire, Flintshire, Montgomeryshire and Denbighshire. From the late eighteenth century, a number of parliamentary complaints were made regarding the operation of the Great Sessions, and in 1829 a Parliamentary Report on the Common Law recommended that the Great Sessions be abolished, and both areas be brought into the assize circuit. The reaction in Cheshire was mixed. On the one hand, the Report noted "the prevailing wish of gentleman resident in the different counties of Wales and Chester, that the benefit of English judicature should be extended to those counties".[6] While acknowledging that not all "opinions entitled to respect" in the counties concurred with this view, the report went on, those opposing the change were "professional persons, who may be supposed to feel partiality for the system in which they are, or have been, personally engaged".[7]

Opposition to the manner in which the Great Sessions operated was expressed perhaps most strongly in the Report in the written evidence provided by Ralph Leycester, Esq., resident of Toft Hall, Cheshire, and Member of Parliament for Shaftesbury. According to Leycester, he had never met anyone, even among those who were "very great enemies of innovation, expressly fond of every thing that is established" who supported the status quo.[8] For himself, he stated,

> I certainly do not think that the constitution of the courts of Great Sessions in Wales and in the county palatine of Chester such as to afford the inhabitants of that part of the United Kingdom a judicature equal in authority and efficiency to that enjoyed in England.[9]

Leycester's objection to the Great Sessions, couched in a number of caveats, rested on two main interlinked points. The first concerned how officials were appointed not from Westminster, but on the basis of political considerations. This, he claimed, could possibly lead to cronyism, such as in the appointment of Sheriffs where "that power may be used either in excusing persons, or putting persons on for political purpose".[10] He also questioned the caliber of the appointments themselves, observing that most appointments came with little experience, and did not gain sufficient experience however long they stayed due to the brief length of the Sessions each year. In contrast, eminent men who were appointed only stayed in post for a brief period of time, using the position as a stepping-stone to more eminent positions.

On the other hand, leading dignitaries within the city of Chester petitioned against discontinuing the Great Sessions. Joseph Hemmingway, for example, the author of *History of the City of Chester* (1831) and *Panorama of the City of Chester* (1836) and onetime editor of both the *Chester Courant* and *Chester Chronicle* excoriated against "this obnoxious act", claiming that "this ungracious proceeding" would disadvantage both the legal profes-

[4] The sole analysis of the Chester Court of Great sessions, covering the period 1580 to 1709, is John A. Sharpe, *Crime in Early Modern England, 1550–1750* (London: Longman, 1999). On the Chester Quarter Sessions, see Garthine Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge: Cambridge University Press, 2003); Abby E. Lagemann, 'A Decade of Disorder? The Performance of Justice in Cheshire in the 1590s', *Journal of the Wooden O Symposium*, 10 (2010), 49-59; Andrew A. Barrett, *The System of Justice in Cheshire, 1820–75* (PhD Thesis, University of Keele, 1996).

[5] For a discussion of the background to Chester's Palatine status, see Brian E. Harries, *A History of the County of Chester*, vol. II (London: Victoria County History, 1979).

[6] *Copy of the first Report made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law*, Parliamentary Papers, 1829 (46) IX.1, p. 38.

[7] *Copy of the first Report*, *ibid.*

[8] *Copy of the first Report,* p. 369.

[9] *Copy of the first Report*, p. 370.

[10] *Copy of the first Report*, p. 370.

sion of Chester, as well as members of the county who would find it harder to recover debts.[11] Similarly, a petition drawn up by local magistrates in April 1830 expressed alarm at the Bill, again noting "the great advantage" that the inhabitants of the county and its commercial districts had obtained from having justice administered locally without having to be referred to the Courts at Westminster. Going further, they alleged that the authors of the Report had misunderstood the "Principles and Practice of the Palatine Courts" and had "confounded [them] with the Judicature of Wales, from which they are and always have been totally distinct". Thus, they recommended, "that further and more careful inquiry ought to be made into the subject before the destruction of antient [sic.] institutions, in which so great a population is interested". The magistrates also pointed out the unfairness that the Palatine Courts of Durham and Lancaster would remain unchanged, observing with chagrin;

> That the courts of the County Palatine of Chester are no less beneficial to or valued by their suitors, than the Courts of those other Counties Palatine. And the inhabitants of the former County deprecate the unnecessary sacrifice of their privileges, whilst those of Lancaster and Durham are allowed to remain.[12]

Nevertheless, despite these objections, the views of the authors of the Report were upheld, and under the Law Terms Act of 1830 the Courts of Great Sessions of Wales and Chester were abolished and brought within the assize circuit.[13]

Sources and Methodology

The historian is almost inevitably at the mercy of the primary sources that are available to them, and this is certainly the case when attempting to construct a picture of the operation of justice at the Chester Great Sessions from the mid-eighteenth century onwards. In contrast to the Wales Courts of Great Sessions, there is no one set of sources that cover the entire period, and it is necessary to consult several different sources in order to fill gaps in the chronology of the Court's operations. The Crown Books held at the National Archives contain details of prisoners tried, the verdicts, and sentences handed down, as well as notations as to whether capitally convicted felons were executed or received a pardon, alongside Crown Side rules, presentments, Inquisitions and recognizances.[14] Although the National Archives hold the Crown Books for Chester covering the period 1560 to the abolition of the Sessions in 1830, there are gaps from between 1717 to 1757 and 1794 to 1822. The former gap is partially filled by a Crown Book held at the Cheshire Record Office, although this document only covers the period 1713 to 1740.[15] There are thus no surviving records for the Sessions for almost two decades from 1740 to 1757, hence the starting point of this article of the year 1760.

After 1794 there is another gap in Court records until the commencement of the Criminal Registers for the Sessions in 1805. This, however, may be reconstructed using trial reports in the *Chester Chronicle* and *Chester Courant*. These have been digitized by the British Library and are available through a paid subscription to the British Newspaper Archive.[16] Both newspapers reported trials, typically providing a basic list of prisoners to be tried before the Sessions commenced and then reporting the sentences handed down at their close. In some cases the lists are more detailed than others, containing, for example, details of what was stolen in a larceny case or the name of the victim in a murder case, although there are no detailed trial reports *per se* until the 1810s. By using these basic pre- and post-trial lists and cross-referencing between the two newspapers, it is possible to continue the chronology of the Court's operation until the commencement of the Criminal Registers.

The Criminal Registers cover the final quarter of a century of the Chester Sessions. These are held at the National Archives but have also been digitized and are available through a paid subscription to Ancestry.co.uk.[17] They contain a basic record of the Court in a standardized form, showing the name of the person indicted, the crime for which they were indicted, the sentence, and verdict and whether the felon was subsequently executed. More contextual information, such as the Addresses delivered by the Justices at the opening of the Sessions, evidence and statements delivered in Court and sentencing statements are provided again in news reportage from the *Chronicle* and *Courant*.

Historians have long cautioned against both the uncritical reading of judicial records as a measure of crime in the past (what Douglas Hay has referred to as 'uncritical criminology'), as well as highlighting problems with the accuracy and reliability of some of the information they contain.[18] Mindful of this, this article will make no claims about general levels of crime in Cheshire during the period, and will restrict its analysis to information that can be obtained with some degree of certainty

[11] Joseph Hemmingway, *History of the City of Chester, from its Foundation to the Present Day, vol. II* (Chester: J. Fletcher, 1831), 181.

[12] Chester, Cheshire Archives and Local Services, Reference: QCX 1/3-5, *Statement on Behalf of the Inhabitants of the County Palatine of Chester, in Respect of the Proposed Alterations in the Administration of the Law* (1830).

[13] One consequence of abolishment of the Great Sessions was a dispute in 1834 between the Sherriff of the County Palatine and the Sheriffs of the City and County of the City of Chester over who had the responsibility for executing condemned felons. For a discussion, see R. Stewart Brown, 'The Execution of Criminals in Cheshire', *Journal of the Chester and North Wales Archaeological and Historic Society*, 22 (1918), 91-116.

[14] London, The National Archives, Reference: CHES 21/7, *Palatinate of Chester: Courts of Great Sessions of Chester and Flint: Crown Books* (1757–1794)

[15] Chester, Cheshire Archives and Local Studies, Reference: CR 580, *Crown Book of the Court of Session 1713–40*.

[16] Thebritishnewspaperarchive.co.uk. *The Chester Chronicle* and *Chester Courant* have been digitized from 1775–1893 and 1794–1831 respectively.

[17] 'Criminal Registers: Cheshire' http://www.ancestry.co.uk/cs/uk/criminal (accessed 20 November 2014)

[18] Douglas Hay, 'War, Dearth and Theft in the Eighteenth Century: the Record of the English Courts', *Past and Present*, 95 (1982), 117-60. John S. Cockburn. 'Early-Modern Assize Records as Historical Evidence', *Journal of the Society of Archivists*, 5.4 (1975), 215-31; John M. Beattie, 'Judicial Records and the Measurement of Crime in Eighteenth-Century England', in *Crime and Criminal Justice in Europe and Canada*, ed. by Louis A. Knafla (Waterloo, ON: Wilfred Laurier Press, 1981), 127-45; Robert B. Shoemaker, 'Using Quarter Sessions Records as Evidence for the Study of Crime and Criminal Justice', *Archives* 20.90 (1993), 145-57. For a recent review of the parallel debate over the reliability of information contained in nineteenth century criminal statistics, see John Walliss, 'Lies, Damned Lies and Statistics? Nineteenth-Century Crime Statistics for England and Wales as a Historical Source', *History Compass*, 10.8 (2012), 574-83.

from the official sources; namely the year in which the trial took place, the sex of the convict, the crime for which they were indicted, the verdict and the sentence, and, in the case of capitally convicted felons, whether they were executed or reprieved. This information was drawn from the above outlined sources and coded via the statistical software package SPSS v.21, generating 3102 cases and six variables. Three of these variables, the year of trial, sex, and whether a felon was executed or pardoned are self-explanatory, but the variables coded as crime, verdict, and sentence require some explanation.

To simplify the analysis, the crimes for which persons were indicted were classified into twenty-four broad offence groups. For example, murder, attempted murder, accessory to murder, and murdering an infant were all grouped together as 'murder', while attempts to steal cattle, cows, or heifers were classified as 'cattle stealing'. Any attempt to steal a sheep or lamb, or kill one with the intention of stealing was similarly classified as 'sheep stealing'. Crimes that were presented as 'cutting with intent to murder', 'cutting and maiming', 'stabbing with intent to murder', 'assault' and the like were classified as 'stabbing, cutting, wounding and assault', while a distinction was made between, on the one hand, rape and attempted rape, and other sexual crimes. Just under two-thirds of the crimes for which persons were indicted between 1660 and 1774 were recorded in the Crown Books under the broad term of 'Felony', and, in the absence of any more detailed information, were thus classified in the dataset. Similarly, where a person was indicted for one offence but found guilty of another (such as when indicted for burglary or murder but found guilty of the lesser offences of larceny and manslaughter respectively), they were classified under the latter offence. These are broad categories, and it is acknowledged that there may be some cases, such as, for example, an attempted rape that also involved robbery, or where a horse thief shot at his pursuers, in most cases individuals were indicted for one clear offence that may be easily classified under one of the twenty four offence groups.

The outcomes of each indictment were classified as either 'guilty', 'not guilty', 'no true bill', 'no prosecution', 'discharged by proclamation' or 'other'. The first two require no explanation, but a 'no true bill' was recorded when a person had their indictment dismissed by the Grand Jury who, after interviewing the witnesses to the alleged incident, were satisfied that there was no *prima facie* evidence of guilt. In the instances where an indictment was returned as a 'true bill' and went forward to trial but the prosecutor failed to attend court to prosecute, the outcome was recorded as 'no prosecution'. Discharged by Proclamation was a term used in the Court documents to describe either when an indictment had been dismissed as a 'no true bill' and, where the prosecutor failed to attend the court or, in some cases, where a person was found not guilty. Finally, 'other' covered the other outcomes of the trials, such as where judgment was respited, the person pleaded guilty and was discharged or was discharged on condition of joining the army or navy.[19]

The different sentences passed by the Sessions again require little clarification except in three issues. Where a person was sentenced to receive another punishment alongside a period of imprisonment (such as being whipped, fined or burned in the hand), the outcome was classified on the basis of the length of the prison term they received. Thus, John Pott, who was sentenced to be publically whipped and be kept to forced labour in the House of Correction for three calendar months at the Spring 1788 Session had his sentence classified as 'imprisonment for three months'.[20] Similarly, where a person was indicted for two offences, but only found guilty of one, the sentence that was classified was for the guilty verdict. Finally, 'other' referred to sentences such as being whipped, burned in the hand, fined, or branded.

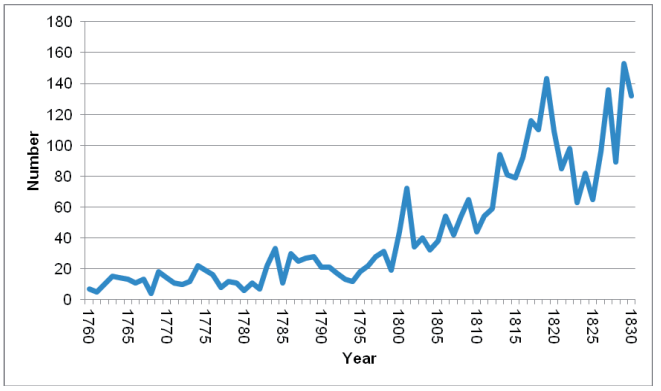
Before turning to the analysis of the data, three issues, however, need to be highlighted. First, although the total number of indictments for the period was 3102, 3101 indictments are shown in figure 2 because the crime for which one person was indicted at the Spring 1798 Session was not listed in the newspaper reports of the Session. Second, the outcomes of thirty-four trials also cannot be ascertained, with twenty showing no verdict, thirteen where the indicted person was not in custody and one where person was released until the next Session but no verdict is shown there. Finally, it is also not possible to ascertain the sex of three persons who were indicted for rioting at the Spring 1804 Session as the newspaper report of the Session lists them simply as "and 7 others".[21]

Analysis

Patterns of Indictments

Between 1760–1830, 3102 persons were indicted at the Chester Court of Great Sessions:

Figure 1: the number of persons indicted at the Chester Court of Great Sessions, 1760–1830.



The number of persons indicted increased eighteen-fold over the period, from seven in 1760 to 132 in 1830. Between 1760 and 1799 the number of indictments trebled to nineteen, although the annual number remained at or below thirty-one, an average of seventeen per year. The years 1784 and 1786 saw

[19] For an overview of the operation of the courts during the period, see David Bentley, *English Criminal Justice in the Nineteenth Century* (London: The Hambledon Press, 1998).

[20] *Crown Book*, p. 120.

[21] *Chester Courant*, 24 April 1804, p. 3.

a peak in the number of indictments, with thirty-three and thirty respectively. The number of indictments then began to rise sharply for the remainder of the period, averaging eighty per year. Between 1800 and 1830, the peak years for the number of indictments were 1827 (136), 1819 (143), and 1829 (153), with more persons being indicted in just these three years than in the period 1760 to 1788 inclusive. In the absence of any changes in the administration of the law that would impact significantly on the number of persons indicted, two broad reasons may be speculated upon to explain this rapid growth; population increase and the impact of war and dearth.[22]

As a centre of burgeoning industrialization, the population of Cheshire more than doubled from 140,794 in 1761 to 316,672 in 1831.[23] The population of the district of Stockport, for example, a centre of silk and cotton manufacturing from the 1730s onwards, grew more than fivefold from an estimated 12,833 in 1754 to 82,187 in 1831.[24] Similarly, that of Macclesfield, another centre of silk spinning and weaving, increased almost threefold from an estimated 6,000 in 1754 to 23,129 in 1831.[25] The City of Chester saw a more modest 57% increase in population, from an estimated 14,713 in 1774 to 23,029 in 1831, with more persons leaving the city than settling in it for most of the period.[26] This population increase, however, cannot provide a complete explanation for the growth in the number of indictments. Between 1760 and 1801, for example, the number of indictments increased tenfold. The population of Cheshire, in contrast, only increased by just over a third (34%), from 140,794 to 189,431. Similarly, between 1801 and 1830 the number of indictments almost doubled, while again the population increase was more modest (increasing by two thirds to 316,672). Indeed, the period that witnessed the largest increase in indictments (a 225% increase between 1810–1819), was accompanied by only a 20% increase in population (1811–21). The growing population obviously increased the potential number of persons who could possibly be indicted in the county, but it cannot alone account for the growth in the number of indictments during the period.

Two other, often inter-related, factors that provide a stronger explanation for the growth are the impact of dearth and war. In two influential articles published in the 1970s and 1980s, John Beattie and Douglas Hay highlighted the relationship between the price of food, poor harvests and war and peace on both levels of indictments generally and for particular types of crime.[27] Beattie concluded his analysis of patterns of indictments in Surrey and Sussex from the mid-to-late eighteenth century by observing how the number of indictments for property crime rose and fell in tandem with the price of wheat. Moreover, such offences peaked following the end of war and the demobilization of soldiers. On this basis, he concluded that property crime during the eighteenth century arose from a combination of problems of employment, low wages and high prices. The cessation of hostilities (which in themselves had removed many men from the labour market and provided work for those who remained) exacerbated these problems, with returning soldiers seeking work in an economy that was shifting from a war- to a peace-footing. Developing this thesis in relation to Staffordshire between 1740 and 1805, Hay argued that not only did the number of indictments for property crime fall and rise during periods of war and peace, but that less serious property crime were affected more by the price of wheat than more serious, capital forms of crime, such as burglary or highway robbery. On this basis, he concluded that there were two broad kinds of theft during the period: on the one hand, "organized and/or violent offences, committed with regularity by men and women able and willing to do so…[and which]…do not appear to be related to the cost of living", and on the other, "less serious offences committed apparently in direct response to the pressure of want and apparently involving people who otherwise did not run the risk of appearing before the courts".[28]

Turning first to war, Britain was at war for half of the seventy-one year period under examination, the country fighting in the Seven Years War (1756–63), the American War of Independence (1775–83) and the French Revolutionary and Napoleonic Wars (1793–1815).[29] The number of indictments fell in the five years following the end of the Seven Years War, falling from fourteen in 1664 to four in 1768. Similarly, although there was a rise in the number of indictments at the end of the American War of Independence from twenty-two to thirty-three, not only had this increase begun during the period of hostilities, but within a year there was a fall to just 11 indictments. The link

[22] Cf John M. Beattie, 'The Pattern of Crime in England 1660–1800', *Past and Present*, 62 (1974), 47-95.

[23] Any attempt to state the population of England and Wales prior to the first census in 1801 must be made with caution. There is debate among historians over the size of the population at both the national and county level – see Roderick Floud & Donald McCloskey, *The Economic History of Britain since 1700* (Cambridge: Cambridge University Press, 1983), chapter 2 for a discussion. The 1761 estimate is taken from a recent analysis of marriage rates by Anthony Wrigley and the Cambridge Group for the History of Population and Social Structure –Edward Anthony Wrigley, 'English county populations in the later eighteenth century', *Economic History Review*, 60 (2007), 35-69. Table 5. The county population figures for 1801 to 1831 are taken from the census data available at visionofbritain.org.uk. GB Historical GIS / University of Portsmouth, Cheshire RegC through time | Population Statistics | Total Population, A Vision of Britain through Time. http://www.visionofbritain.org.uk/unit/10054813/cube/TOT_POP (accessed 7th July 2014).

[24] Robert Glen, *Urban Workers in the Early Industrial Revolution* (London: Croom Helm, 1984).

[25] Gail Malmgreen, *Silk Town: Industry and Culture in Macclesfield 1750–1835* (Hull: Hull University Press, 1985).

[26] Lewis, C.P and A.T. Thacker (eds.), 'Late Georgian and Victorian Chester 1762–1914: Economy and society.' A History of the County of Chester: Volume 5 part 1: The City of Chester: General History and Topography, (2003): 171-172. British History Online. http://www.british-history.ac.uk/report.aspx?compid=19208 (accessed 20 November 2014)

[27] Beattie, 'The Pattern of Crime in England'; Hay, 'War, Dearth and Theft'. See also Beattie, *Crime and the Courts*; Frank McLynn, *Crime and Punishment in Eighteenth-Century England* (London: Routledge, 1989), chapter 17 and Thomas Plint, *Crime in England: its Relation, Character and Extent as Developed from 1801 to 1848* (London: Charles Gilpin, 1851), 41-81.

[28] Hay, 'War, Dearth and Theft', 135.

[29] For a discussion of the role of the 22nd Foot (retitled The 22nd (Cheshire) Regiment of Foot in 1782) in these hostilities, see Richard Cannon, *Historical Record of the Twenty-Second or the Cheshire Regiment of Foot* (London: Parker, Furnivall & Parker, 1849).

between a rise in the number of indictments and the demobilization of soldiers would appear to be clearer in the period after the end of the Revolutionary and Napoleonic Wars, where the number of indictments rose by 81% from seventy-nine in 1815 to 143 in 1819.

This latter pattern mirrors trends across England and Wales, where the end of hostilities coupled with the shift in the economy from a war footing to peacetime production lead to a period of social and economic disruption, rising prices and indictments for property offences.[30] The Justices that oversaw the Chester Sessions between 1816 and 1819 regularly commented with alarm during their opening address on the increase in the number of persons that appeared before them, offering their own theories on its cause. When he opened the summer 1816 Sessions, Chief Justice Garrow, for example, observed that "it is with deep regret…[that]…I perceive that in the Calendar which the Sherriff has put into my hands, there are so many names".[31] For Garrow, this was symptomatic of the transition from peace to war;

> We are yet in the very infancy of Peace; and it must be expected after the dreadful convulsions which we, in common with the world, have experienced, and the influx of so many persons which the war employed that the country cannot immediately return to a state of quiet and prosperity. The good sense, however, of the people of Great Britain, will no doubt compete against distress unavoidable, as it did against the late dangers of protracted war.[32]

An alternative interpretation was offered by Mr Justice Marshall at the opening of the Spring 1818 Great Session, who posited the cause of the continuing increase in size of the Calendar as "…the decline of moral rectitude, and the subversion of the foundations of honor, virtue and religion". Warming to this theme, the following year Marshall embarked on a long discourse, in which he argued that "the Calendar which now lies before me, affords a melancholy proof of the rapid growth of vice and depravity in this country".[33] Rejecting the claim that the increase could be ascribed to the disbanding of soldiers or stagnation in trade, he put the blame instead at the feet of radicals who wished to overthrow the existing order.

An examination of the number of persons indicted provides support for Hay's thesis, with clear differences being observable between the average number of persons indicted during periods of peace and war. During the thirty-six years of war an average of thirty-three persons were indicted per year compared to forty-three during times of peace. The average number of persons indicted for larceny were identical during both periods (fifteen per year). In contrast, an average of two persons per year were indicted for burglary during times of war compared to six in times of peace. The numbers indicted for horse-stealing, however, saw little variation with an average of one and two persons indicted in each period respectively. A statistical Mann-Whitney U Test indicated that there were significant differences between both the average number of persons indicted during peace and war in general and for burglary in particular (at the 0.10 and 0.25 level of significance). While it should be borne in mind that a great deal of the lower levels of larceny would have been dealt with in the Quarter Sessions, the evidence thus supports the conclusion that indictments at the Great Sessions for low level forms of larceny remained relatively constant in times of war and peace, but that more people were indicted for the more serious property crime of burglary during times of peace. It would also appear that, whether as a reflection of a genuine crime wave or because heightened concern over demobilized soldiers led to an increase in the number of indictments, this was particularly the case in the immediate years following the end of the Revolutionary and Napoleonic Wars.

An even clearer link may be observed between periods of dearth and the number of persons indicted for property offences. Like every other English county, Cheshire experienced periods of dearth during the period, witnessing a series of food riots between 1762 and 1812. The year 1795, in particular, witnessed food riots in five Cheshire market towns; Stockport, Chester, Nantwich, Northwich and Congleton, the latter lasting three days before dragoons restored order.[34] The industrial towns of the county also experienced cycles of economic slump and boom. Stockport, for example, experienced a decade of boom from the 1780s to the 1790s before experiencing slumps in 1792–3 and 1797–8, although according to a historian of the district in the early industrial period, Robert Glen, these slumps did not adversely impact the working class because there was not a concomitant rise in food prices during these periods. The first two decades of the nineteenth century, however, were ones of severe economic problems, with major slumps in 1807–8, 1811–12, 1816–17 and 1819, the latter two being exacerbated by the return of demobilized soldiers to the workforce. The first half of the 1820s were, according to Glen, 'a veritable boom period' for the district, although this, again, was quickly followed by a slump between 1825 and 1826 and a period of industrial unrest in 1829 that saw 10,000 factory workers involved in a lengthy strike.[35]

Macclesfield also experienced a period of economic boom through the latter half of the eighteenth century, particularly during the periods of war with France. The French silk manufacturers were the largest competitors with those in England, and so when French silks were difficult to obtain, the English silk industry expanded. In contrast, during times of peace and competition with French producers, it contracted, leading to periods of economic depression. Again, this downturn was experienced particularly acutely at the end of the Revolutionary and Napoleonic Wars in 1815, although this was in turn followed by a boom between 1819 and 1826; a period that saw twenty new factories for silk throwing being built in the town. In the latter

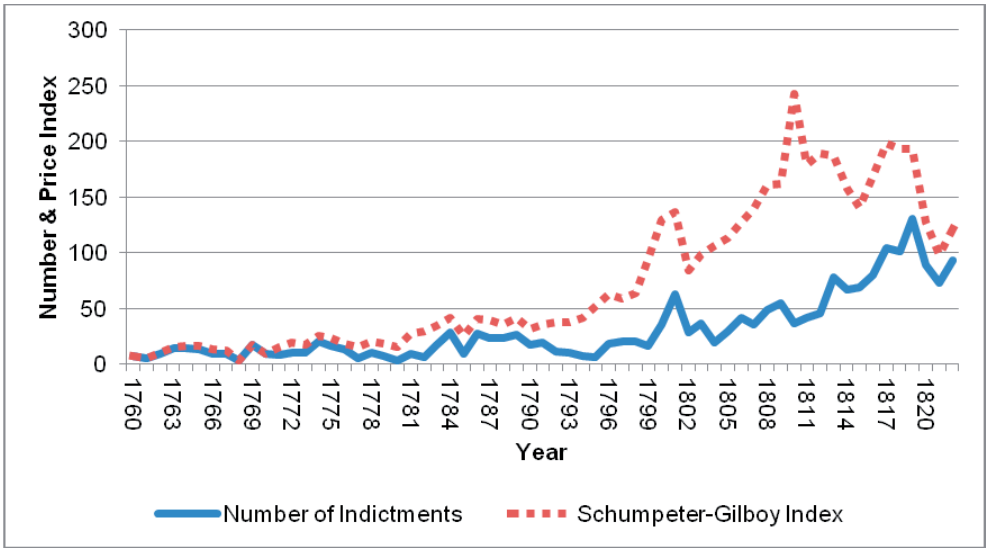
[30] See King, *Crime, Justice and Discretion;* King, *Crime and Law.*
[31] 'Cheshire Summer Assize', *Chester Chronicle*, 6 September 1816, 3
[32] 'Cheshire Summer Assize', 3.
[33] 'Cheshire Spring Assize', *Chester Chronicle*, 16 April 1819, 1.
[34] S. Ian Mitchell, 'Food Shortages and Public Order in Cheshire, 1757–1812', *Transactions of the Lancashire and Cheshire Antiquarian Society,* 81 (1982), 42-66, 49.
[35] Glen, *Urban Workers.*

half of the decade, however, boom was rapidly followed again by depression, with the number of workers in the silk industry falling dramatically from over ten thousand to under four thousand during the period.[36]

The fortunes of Chester during this period were less mixed; the city experiencing a period of almost uninterrupted economic decline that had begun at the start of the eighteenth century. Chester had once been one of the major ports on the north-west coast of England, but had declined over several centuries due to an accumulation of silt in the River Dee. Large ships could no longer reach the wharves and Chester found itself increasingly eclipsed by other ports in the region, most notably Liverpool. Although several attempts were made to reverse the fortunes of the port by improving the Dee and, in 1779 and 1805, constructing a canal to connect Chester to the Trent and Mersey canals, these were ultimately failures. Chester's traditional industries – glove-making, the manufacture of clay tobacco pipes and clock-making, also declined, although brewing and milling remained viable industries during wartime, as did ship building; the city's ship yard benefiting from demand during the periods of war. There was also two lead works in the city as well as a small iron foundry. However, newer industries such as cotton manufacturing failed to find a home in the city, and the city became more reliant on administration and leisure as well as high-skill crafts such as silver-smithing. The city's importance as a trading hub, particularly for Irish linen, also declined from the 1760s onwards and by 1830 was non-existent. These economic problems were accompanied by, and indeed, exacerbated social problems, most notably increasing polarization between, on the one hand, a prosperous gentry and, on the other, a large working class living in appalling slums and dependent on fewer and fewer jobs in declining industries.[37]

The impact of periods of dearth on the level of indictments for property crime can be seen in figure 2:

Figure 2: the number of persons indicted for property offences at the Chester Court of Great Sessions, 1760–1823 in comparison with consumer prices[38]



As can be seen from Figure 2, there is a clear relationship between the levels of indictments for property offences during the period and the price of consumer goods, particularly between 1760 and 1790. The two trends diverge somewhat between 1802 and 1815, with consumer prices growing at a faster rate than indictments (particularly in 1810), but this could be explained by the impact of war on the price of consumer goods.[39] A Pearson R Correlation Test indicated a highly significant correlation between the number of annual indictments for property offences and the cost of living ($r=0.583$ $p<.001$). The correlation was stronger during times of war ($r=0.770$) and even more so during times of peace ($r=.841$). In other words, the number

[36] Clarice S. Davies, *A History of Macclesfield* (Manchester: Manchester University Press, 1968).

[37] Simon Harrison, 'Port', in *Chester: Nineteen Hundred Years of History*, ed. by Annette M. Kennett (Chester: Council of the City of Chester, 1979), 19-22; John Herson, 'Victorian Chester: A City of Change and Ambiguity', in *Victorian Chester: Essays in Social History 1830–1900*, ed. by Roger Swift (Liverpool: Liverpool University Press, 1996), 13-51; Jon Stobart, 'County, Town and Country: Three Histories of Urban Development in Eighteenth-Century Chester', in *Provincial Towns in Early Modern England and Ireland: Change, Convergence and Divergence*, ed. by Peter Borsay and Lindsay Proudfoot (Oxford: Oxford University Press, 2002), 171-94; 'Late Georgian and Victorian Chester 1762–1914'.

[38] The price of consumer goods during the period is based on the Schumpeter-Gilboy Index of the prices of consumers' and producers' goods from 1695–6 to 1822/3 – Elizabeth W. Gilboy, 'The Cost of Living in Eighteenth Century England', *The Review of Economics and Statistics*, 18.3 (1936), 134-43; Elizabeth Boody Schumpeter, 'English Prices and Public Finance, 1660–1822', *The Review of Economics and Statistics*, 20.1 (1938), 21-37. The red dotted line shows the average for both types of goods in a given year. The Schumpeter-Gilboy Index uses 1700 as a base figure (I=100), but for the sake of visual comparison in the figure the base figure of 100 was set to 0. Property offences included any form of larceny (including those of animals), those offences classed as felony, burglary or housebreaking, and any forgery or monetary offences.

[39] See Kevin H. O'Rourke, 'The worldwide economic impact of the French Revolutionary and Napoleonic Wars, 1793–1815', *Journal of Global History*, 1.1 (2006), 123-49.

of persons indicted for property crime at the Chester Great Sessions rose and fell in relation to the cost of living, particularly so during times of peace for the reasons discussed above.

The crimes for which men and women were indicted before the Great Sessions are shown in figure 3:

Figure 3: the number and percentage of each crime type indicted at the Chester Court of Great Sessions, 1760–1830.

Crime Type	Number of Indictments	% of Indictments
Larceny	1237	39.9
Burglary	339	10.9
Other	171	5.5
Manslaughter	134	4.3
Monetary Offences	123	4.0
Receiving Stolen Goods	111	3.6
Housebreaking	110	3.5
Horse Stealing	105	3.4
Felony	103	3.3
Larceny from the Person	97	3.1
Highway Robbery	76	2.5
Sheep Stealing	68	2.2
Murder	59	1.9
Game Offences	59	1.9
Fraud & Forgery	53	1.7
Larceny in a Dwelling House	44	1.4
Rape	39	1.3
Cattle Stealing	36	1.2
Robbery	35	1.1
Shooting at	34	1.1
Other Sexual Crimes	31	1.0
Stabbing, Cutting, Wounding & Assault	21	0.7
Concealing the Birth of a Child	7	0.2
Arson	9	0.3
Total	**3101[40] (100%)**	

The vast majority of persons (2596 persons or 84%) were indicted for property offences. Indeed, indictments for larceny and burglary combined comprised just over half of all those during the period. This state of affairs was hardly peculiar to Cheshire, and reflected patterns across England and Wales during the period. 88% of all indictments at the Old Bailey during the same period, for example, were for forms of theft, and across England and Wales property crime accounted for around 80% of all indictments until the late 1850s.[41] While this may be interpreted as evidence for high levels of larceny, it may also reflect the relative ease by which this type of offence, compared with some others such as sexual crimes or infanticide, could be detected and prosecuted.[42] Potential prosecutors would also know that it would be highly unlikely for a person to be executed for larceny and may thus have been more willing to pursue an offender for legal redress. A similar explanation may be offered for the low levels of indictments for sheep and cattle theft. Burglary was in contrast taken much more seriously by the courts and, as shall be seen below, those convicted of this offence stood a good chance of being executed. The relatively large numbers of persons indicted for this crime may thus be seen as evidence of both the fear that it generated for contemporaries and the concomitant antipathy felt for those who engaged in the crime.[43] Indeed, as the majority of burglaries took place during times of peace, it may also reflect a heightened concern among contemporaries about a crime wave committed by hardened bands of demobilized soldiers; a crime wave that could only be reduced by pursuing those apprehended through the courts as far as the gallows if required.

In contrast, only 10% (318 persons) were indicted for crimes against the person (twenty persons less than were indicted for the single crime of burglary). Only 59 persons (or just over one a year) were indicted for murder, while indictments for rape were even rarer at less than one every two years. Indictments for those offences classified as stabbing, cutting, wounding and assault were rarer still, with around one indictment every four years. The number of indictments for one crime against the person, manslaughter, was, however, relatively high with 134 indictments over the period. This arguably reflected in some cases reluctance by juries to return guilty verdicts in murder cases, with them preferring to return a guilty verdict for the non-capital crime of manslaughter instead. Both Thomas Clarke and George Sumner who were indicted before the spring 1790 Session for murder, the former of murdering his wife Sarah Clarke, were found guilty of the lesser offence, consequently receiving a brief period of imprisonment.[44] More broadly, it may also be seen as a reflection of the high level of interpersonal violence during the period that will be discussed further below.

The sex of the persons indicted for the different crime types are shown in figure 4:

[40] One indictment is missing (for William Deane, who was indicted but found not guilty at the Spring 1798 Session).

[41] www.oldbaileyonline.org. V. A. C. Gatrell and T. B. Hadden, 'Criminal statistics and their interpretation', in *Nineteenth Century Social History: Essays in the Use of Quantitative Methods for the Study of Social Data,* ed. by Edward A. Wrigley (Cambridge: Cambridge University Press, 1972), 336–96.

[42] Morgan & Rushton, *Rogues.* On the problems of identifying cases of infanticide, see Woodward, 'Infanticide in Wales'.

[43] Beattie, *Crime and the Courts*; Woodward, 'Burglary in Wales'.

[44] *Crown Book*, 132, 134.

Figure 4: the number and percentage of each sex indicted by crime type at the Chester Court of Great Sessions, 1760–1830.

Crime Type	Sex	
	Female	Male
Larceny	185 (47.9%)	1052 (38.8%)
Burglary	24 (6.2%)	315 (11.6%)
Other	14 (3.6%)	150 (5.5%)
Manslaughter	6 (1.6%)	128 (4.7%)
Monetary Offences	42 (10.9%)	81 (3%)
Receiving Stolen Goods	34 (8.8%)	77 (2.8%)
Housebreaking	14 (3.6%)	96 (3.5%)
Horse Stealing	0	105 (3.9%)
Felony	18 (4.7%)	85 (3.1%)
Larceny from the Person	8 (2.1%)	89 (3.3%)
Highway Robbery	0	76 (2.8%)
Sheep Stealing	1 (0.3%)	67 (2.5%)
Murder	20 (5.2%)	39 (1.4%)
Game Offences	0	59 (2.2%)
Fraud & Forgery	5 (1.3%)	48 (1.8%)
Larceny in a Dwelling House	4 (1%)	40 (1.5%)
Rape	0	39 (1.4%)
Cattle Stealing	1 (0.3%)	35 (1.3%)
Robbery	1 (0.3%)	34 (1.3%)
Shooting at	0	34 (1.3%)
Other Sexual Crimes	0	31 (1.1%)
Stabbing, Cutting, Wounding & Assault	1 (0.3%)	20 (0.7%)
Concealing the Birth of a Child	7 (1.8%)	0
Arson	1 (0.3%)	8 (0.3%)
Total	386 (12.5%)	2708 (87.5%)
	3094 (100%)	

Not surprisingly, the majority of persons indicted during the period were men. Men constituted 87.5% of those indicted (2708), the number increasing twenty-fold from six in 1760 to 122 in 1830 (an average of thirty-nine per year). In contrast, women only constituted 12.5% of those indicted (386), an average of around six per year. Again unsurprisingly, the majority of men were indicted during times of peace (64%); the peak years for indictments being 1829 (148) and 1819 (129). In contrast, an equal number of women were indicted during both periods of peace and war (193); the peak years for women being 1816 (22) and 1827 (18). It is, of course, highly possible that the number of women who appeared before the courts represented only a fraction of those who could have been indicted. While it is possible that either though lack of motivation or opportunity women did indeed commit less crime than men, it is equally likely, if not perhaps more so, that victims of crime were reluctant to prosecute females, particularly for the forms of larceny with which women were typically associated, believing instead that they were better dealt with informally within the family or wider community than being pursued through the courts.[45]

The majority of both men and women were indicted for larceny, with just under half of all the women indicted being so for this one crime type. Broadly speaking, the majority of men were indicted for either crimes against the person or property crimes that involved some degree of physical strength (or, in the case of burglary, the potential for physical violence). Indeed, it is notable that no women were indicted for horse stealing or highway robbery and only one was indicted for robbery during the period compared to 34 men. A higher percentage of men were also indicted for manslaughter, shooting at a person or stabbing, cutting, wounding or assault than women (6.7% compared with 1.9%). Women, in contrast, tended to be indicted for those crime types that they undertook either with or on behalf of men, such as monetary offences or receiving stolen goods. Women were, however, over-represented among those indicted for the most serious crime that the Sessions dealt with – murder – with 5.2% of women being indicted compared with 1.4% of men. Indeed, in absolute numbers, women represented a third of those indicted for murder over the period. On one level, this state of affairs may be explained as a consequence of the low numbers of women indicted generally. If, in other words, the same percentage of men had been indicted for murder as females, then 141 would have been indicted rather than the thirty-nine who actually were. Another explanation, linking back with the previous point about the reluctance to prosecute women, is that prosecutors would arguably have been much less likely to believe that women (and, indeed, men) who murdered should be dealt with via informal communal or familial sanctions. Put differently, while prosecutors may have been reluctant to pursue legal sanctions against a woman for a lesser offence that could possibly result in a capital conviction, believing that the punishment did not fit the crime, they would feel no such reluctance when a life had been taken in cold blood.

[45] Cf. Beattie, *Crime and the Courts*; King, *Crime, Justice and Discretion*. On the problems facing a would-be female horse thief see Woodward, 'Horse-stealing in Wales'.

Outcomes of Prosecutions

The majority of those indicted before the Chester Court of Great Sessions (62.5%) were found guilty, with only 21% and 7.5% being found not guilty or discharged as No True Bill respectively. Of the remainder, 3% were discharged as 'no prosecution', 2% were discharged by proclamation, 2% turned King's evidence against their former criminal compatriots and 2% received another outcome (such as being discharged on condition of joining the army or navy). There were no marked differences in the verdicts handed down to men and women, with roughly similar percentages of each sex being found guilty (male 63%/female 61%) and not guilty (male 21%/female 20%). That said, women were slightly more likely to be discharged as No True Bill (9%/7%), by proclamation (3%/2%) or as No Prosecution (4%/3%) than men. There were, though, no real difference in the percentage of men and women turning King's evidence. Juries would thus seem not to have been swayed significantly by the sex of the alleged offender in the verdicts that they handed down, although, as will be discussed below, there were marked differences in the sentences that were handed down to men and women at the Sessions.

The verdicts that were handed down for crimes against the person and property crimes are shown in figure 5:

Figure 5: The verdicts handed down for crimes against the person and property at the Chester Court of Great Sessions, 1760–1830 (other offences and verdicts of Discharged by Proclamation, Admitted Evidence or other not shown).

Crime Type	Verdict			
	Guilty	Not Guilty	No Prosec.	No True Bill
Crimes against property	1660 (64.5%)	512 (19.9%)	78 (3%)	193 (7.5%)
Crimes against the person	157 (50.2%)	103 (32.9%)	11 (3.5%)	16 (8.9%)

Property crimes were successfully prosecuted more often than crimes against the person. While both types of offence received roughly equal percentages of No True Bills and No Prosecutions, around two thirds (64.5%) of those indicted for a property crime received a guilty verdict compared to half (50.2%) of those indicted for a crime against the person. A Chi-Square statistical test indicated that there was a significant relationship between the type of crime and the verdicts handed down (X^2 1, N2432=32 p <.000); those indicted for property crimes were significantly more likely to be found guilty than those indicted for a crime against the person. There was, however, no difference in the percentage of guilty verdicts passed during times of peace or war: 76% of those tried during times of peace were found guilty compared to 73% during wartime. The verdicts handed down for the different crime types are shown in figure 6:

Figure 6: The verdicts handed down for the different crime types at the Chester Court of Great Sessions, 1760–1830 (verdicts of Discharged by Proclamation, Admitted Evidence or Other not shown).

Crime Type	Verdict			
	Guilty	Not Guilty	No Prosec.	No True Bill
Cattle Stealing	29 (85.3%)	3 (8.8%)	0	1 (2.9%)
Larceny in a dwelling house	35 (79.5%)	5 (11.4%)	0	3 (6.8%)
Horse Stealing	76 (72.4%)	17 (16.2%)	3 (2.9%)	7 (6.7%)
Stabbing, Cutting, Wounding & Assault	13 (68.4%)	5 (26.3%)	0	0
Larceny	841 (68.4%)	208 (16.9%)	28 (2.3%)	92 (7.5%)
Housebreaking	72 (66.7%)	20 (18.5%)	3 (2.8%)	9 (8.3%)
Burglary	224 (66.1%)	69 (20.4%)	5 (1.5%)	21 (6.2%)
Sheep Stealing	42 (63.6%)	14 (21.2%)	2 (3%)	4 (6.1%)
Monetary Offences	77 (62.6%)	17 (13.8%)	16 (13%)	10 (8.1%)
Fraud and Forgery	31 (62%)	12 (24%)	2 (4%)	3 (6%)

Larceny from the person	59 (60.8%)	24 (24.7%)	2 (2.1%)	8 (8.2%)
Game Offences	34 (57.6%)	0	6 (10.2%)	3 (5.1%)
Concealing the Birth of a Child	4 (57.1%)	0	1 (14.3%)	2 (28.6%)
Manslaughter	75 (56.4%)	38 (28.6%)	0	14 (10.5%)
Other	92 (56.1%)	22 (13.7%)	12 (7.3%)	13 (7.9%)
Shooting at	18 (54.5%)	13 (39.4%)	1 (3%)	0
Other Sexual Crimes	16 (53.3%)	8 (26.7%)	1 (3.3%)	0
Highway Robbery	38 (50.7%)	25 (33.3%)	2 (2.7%)	7 (9.3%)
Felony	49 (49%)	39 (39%)	0	7 (7%)
Robbery	15 (44.1%)	14 (41.2%)	3 (8.8%)	1 (2.9%)
Rape	17 (43.6%)	9 (23.1%)	9 (23.1%)	4 (10.3%)
Receiving Stolen Goods	38 (34.5%)	45 (40.9%)	6 (5.5%)	17 (15.5%)
Murder	18 (30.5%)	30 (50.8%)	0	4 (6.8%)
Arson	2 (22.2%)	6 (66.7%)	0	1 (11.1%)
Total	1915 (62.5%)	643 (21%)	102 (3.3%)	231 (7.5%)

Of the various crime types, cattle stealing and larceny in a dwelling house were the most successfully prosecuted, with 85% and 79.5% of those indicted for these crime types receiving a guilty verdict. Similarly, just under three-quarters of those indicted for horse stealing were found guilty, with only 3% having their indictments dismissed because the animal's owner did not attend court to prosecute. Just over two-thirds of those indicted for larceny, housebreaking and burglary also received a guilty verdict (68.4%, 66.7% and 66.1% respectively). In contrast, only around half of those indicted for highway robbery and 44% of those indicted for rape were successfully prosecuted. Indeed, a third of those indicted for the latter offence never stood trial, either having their indictments dismissed as No True Bill or because their alleged victim did not attend the court to prosecute their case. Such a state of affairs was not unusual to Chester and, indeed, the record of successful prosecutions in the Palatinate was superior to other areas of the country; none of those indicted at the Wales Great Sessions between 1730 and 1830 were found guilty, with over half of those charged with the crime not coming to trial, and in London only 17% of rape cases over the same period resulted in a conviction.[46]

Several reasons can be offered to explain the low prosecution rates for rape. On one level, Grand juries may have been reluctant to return a True Bill and petty juries to return a guilty verdict in rape cases, believing that the severity of punishment that awaited those found guilty demanded a higher standard of evidence than other crimes.[47] Turning next to the victim herself, a woman may have been unwilling to face her alleged attacker(s) in court, particularly given both the unsympathetic hearing she, as an unchaste (and therefore discredited) woman, would receive in court and, as correlative, the relatively low likelihood of her winning a conviction. She may also have blanched from recalling the incident in front of strangers in the courtroom, the majority of whom would have been men, and facing a hostile cross-examination intended to further undermine her character and credibility as a prosecutor.[48] A number may also have been persuaded by family and friends or even the alleged attacker themselves to settle out of court in exchange for a financial settlement

[46] Watson, 'Women'.

[47] See *Report of the Select Committee appointed to consider so much of the Criminal Law as relates to Capital Punishment in Felonies*, Parliamentary Papers, 1819, VIII.1, *passim*

[48] McLynn, *Crime and Punishment*; Kim Stevenson, '"Most Intimate Violations": Contextualising the Crime of Rape', in *Histories of Crime: Britain 1600–2000*, ed. by Anne-Marie Kilday and David Nash (Houndmills: Palgrave Macmillan, 2010), 80-99; Morgan and Rushton, *Rogues*, 56-8.

and an apology. As Anna Clark has observed in her discussion of sexual assault in England from the late eighteenth to mid-nineteenth century, magistrates would often encourage victims to pursue this avenue of redress rather than formal legal sanctions.[49] In other cases, women may have been persuaded (or opted themselves) to pursue their alleged attacker for attempted rape. Indeed, according to Katherine Watson, contemporaries would have expected for an accusation of rape to either be settled out of court or downgraded to this lesser offence.[50] Indeed, women were more likely to succeed in securing a conviction for attempted rape than rape because by fighting off her attacker and preserving her chastity, she thus, in the eyes of a patriarchal legal system, retained her credibility as a prosecutor. The evidence from the Chester Court of Great Sessions would support this conclusion to an extent; of the twenty-three persons indicted for crimes such as assault to ravish, attempted rape or sexual assault against a child, ten were found guilty. The highest conviction rate was for those who were indicted for sexual offences against children, with all but one of the eight men thus indicted of being found guilty. This again would support Clark's assertion that the credibility of the witness played a crucial role in securing a conviction, as it would have been the parents and not the child themselves who brought the indictment.

It is noteworthy that the most serious crime that the Sessions dealt with, murder, was only successfully prosecuted in less than a third of cases, with half of those indicted of this crime being found not guilty. Again, it is possible that the severity of the fate that awaited those found guilty led both Grand and petty juries to demand a higher standard of evidence; not indicting or acquitting respectively where they had a shadow of doubt on the merits of the evidence. Other crimes against the person were, however, successfully prosecuted more often, with 68.4% and 56.4% of those indicted for stabbing, cutting, wounding and assault and manslaughter respectively receiving a guilty verdict. A number of historians have discussed the high levels of interpersonal violence during the period, noting a hardening of attitudes against such behaviour from the early nineteenth century onwards.[51] In his work on the Essex Quarter Sessions, for example, Peter King has highlighted how those found guilty of assault were more heavily punished between 1819–21 than between 1748–52, with the majority receiving periods of imprisonment rather than nominal fines. More broadly, he argues, assault came to be seen as a public rather than a private concern, and as something that was rightly dealt with through formal legal sanctions rather than through private settlements between attacker and victim.[52] The evidence from the Chester Great Sessions is summarised in figure 7:

Figure 7: The number of indictments for forms of interpersonal violence[53], as well as the number of persons found guilty and receiving a prison sentence at the Chester Court of Great Sessions, 1760–1830.

Years	Number of Indictments	% of Total Indictments for Period	Number & % Found Guilty	Number & % Receiving a Prison sentence
1760–69	0	0	0	0
1770–79	4	3%	3 (75%)	2 (67%)
1780–89	16	8%	11 (69%)	7 (64%)
1790–99	17	8%	12 (70.5%)	9 (75%)
1800–09	21	4%	14 (67%)	12 (86%)
1810–19	40	5%	10 (25%)	10 (100%)
1820–30	57	5%	38 (67%)	28 (74%)

Although the number of persons indicted for crimes of interpersonal violence increased over the period from none (1760–69), four (1770–79) to fifty-seven between 1820–30, the percentage of such crimes to the total number in each decade remained relatively stable (ranging between 3% and 8%). The percentage of indictments for these crimes reached a peak in the last two decades of the eighteenth century, when they comprised almost one-in-ten of all indictments, before dropping between 4% and 5% for the remainder of the period. There was, however, a slight decline in the percentage of persons being found guilty, falling from three-quarters of those indicted in 1770–9 to just over two-thirds between 1820–30. The percentage of persons receiving a prison sentence, however, increased over the period from 67% (or two of the three persons found guilty) between 1760–9 to 74% between 1820–30, the latter also seeing three persons receiving a period of transportation. All of those found guilty between 1810–19 received a prison sentence, a state of affairs that may be explained by the fact that these persons had been convicted of manslaughter and not a non-fatal wounding. The evidence from the Great Sessions in regard to attitudes towards crimes of interpersonal is therefore ambiguous at best. On the one hand, the percentage of persons indicted compared to other crimes rose over the period, suggesting that the victims of such acts considered them sufficiently serious as to warrant formal legal redress rather than an informal settlement or extra-legal sanctions. However, on the other, the percentage of persons found guilty fell, although those who were found guilty were increasingly likely to receive a prison sentence (if not one of transportation).

[49] Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora, 1987).

[50] Watson. 'Women'.

[51] See, for example, Martin J. Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge: Cambridge University Press, 2006); John Carter Wood, 'Criminal Violence in Modern Britain', *History Compass*, 4.1 (2006), 77-90; John Carter Wood, 'A useful savagery: the invention of violence in nineteenth-century England', *Journal of Victorian Culture*, 9.1 (2010), 22-42.

[52] King, *Crime and Law*, chapter 7. See also Drew D. Gray, 'The Regulation of violence in the Metropolis: the prosecution of assault in the summary courts, c. 1780–1820', *The London Journal* 32.1 (2007), 75-87.

[53] Comprising those indicted for the crime types 'stabbing, cutting, wounding and assault' and 'manslaughter'.

The sentences that were passed at the Chester Court of Great Sessions are summarised in figure 8:

Figure 8: the sentences passed by the Chester Court of Great Sessions, 1760–1830.

Sentence	Number & Percentage	Number & Percentage for Punishment Type
Death and Executed	80 (4.1)	651 (33.2)
Death and Reprieved	571 (29.1)	
Transportation for Life	15 (0.8)	409 (20.9)
Transportation for 14 years	75 (3.8)	
Transportation for 7 years	319 (16.3)	
Imprisonment for 24 months and over	147 (7.6)	775 (39.7)
Imprisonment for 12-18 months	200 (10.2)	
Imprisonment for less than a year	428 (21.9)	
Other	124 (6.3)	124 6.3
Total	1959	100%

The majority of convicted felons received a period of imprisonment, most often for less than a year. Of the sentences passed at the Chester Great Sessions over the period, just over a fifth were for a period of less than a year. A third of those found guilty received sentence of death, although, as will be discussed below, only 12% of those condemned to death were subsequently executed. Finally, sentences of transportation were passed in a fifth of cases, the vast majority being transported for seven years. The different sentences that were passed during periods of peace and war are summarised in figure 9:

Figure 9: The total number and yearly average of sentences of death, transportation and imprisonment passed at the Chester Court of Great Sessions, 1760–1830.

Sentence	Years of Peace (n=35)		Years of War (n=36)	
	Total	Average No. Per Year	Total	Average No. Per Year
Death	452	13	199	5.5
Transportation	299	8.5	108	3
Imprisonment	433	12	341	9.4

There was a marked relationship between the average annual number of sentences of death and transportation passed during times of peace and war. Over double the number of convicted felons received a sentence of death or transportation on average in years of peace than in years of war. In contrast, there was no real relationship in the average annual number of those receiving a sentence of imprisonment. A Chi-Square statistical test indicated that there was a significant relationship between the type of sentence passed during times of peace and times of war (X^2 2, N1832=46 p <.001); sentences of death and transportation were significantly more likely to be passed in times of peace than during times of war. This may be explained by the higher proportion of persons indicted during times of peace for more serious offences that would receive a sentence of death or transportation (such as burglary, robbery, larceny from the person and horse theft) and the almost identical proportion of persons indicted for low level crimes (most notably larceny) that would have resulted in a period of imprisonment.

The different sentences that were passed on men and women are summarised in figure 10:

Figure 10: the sentences passed of males and females by the Chester Court of Great Sessions, 1760–1830.

Sentence	Female	Male
Death and Executed	8 (3%)	72 (4%)
Death and Reprieved	39 (17%)	532 (31%)
Transportation for Life	0	15 (1%)
Transportation for 14 years	9 (4%)	66 (4%)
Transportation for 7 years	15 (6%)	304 (18%)
Imprisonment for 24 months and over	14 (6%)	133 (8%)
Imprisonment for 12-18 months	41 (18%)	159 (9%)
Imprisonment for less than a year	94 (40%)	334 (19%)
Other	13 (6%)	104 (6%)
Total	233 (100%)	1719 (100%)

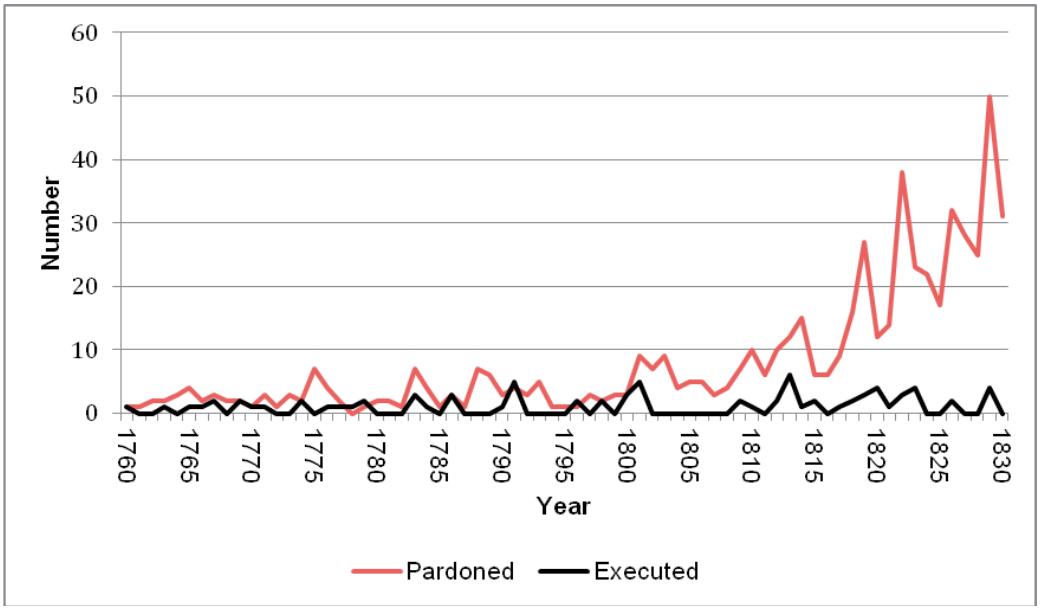
In broad terms, women tended to receive lighter sentences than men. Double the percentage of women, for example, received a sentence of imprisonment for less than a year or twelve to eighteen months than men. Similarly, only 10% of women received a sentence of a period of transportation, compared to almost a quarter of men. Finally, one fifth of women were condemned to death, compared with just over a third of men. However, as will be discussed further below, there was little difference between the percentages of both sexes that were subsequently executed. The operation of justice at the Chester Great Sessions thus finds many parallels with that at the Old Bailey and on the Home Circuit where, according to King, men were subject to a harsher range of penalties than women. As in Chester, women convicted in the Capital typically received a sentence of impris-

onment for less than a year, with men most often being sentenced to transportation. These differences in sentences largely reflected the different types of crime for which men and women tended to be indicted. As discussed previously, men tended to be indicted most often for those serious property offences which caused most concern among contemporaries and which consequently attracted the heaviest sentences, such as burglary, housebreaking, robbery and horse stealing.[54] Of the 589 persons indicted for these four offences, only seven per cent were females. Similarly, males comprised 91.5% of those indicted for crimes against the person. That said, however, there is evidence to suggest that even when convicted of the same crime, women tended to receive lighter sentences than men. In the case of larceny, for example, almost three-quarters of women received a prison sentence compared to 56% of men, with only 10% receiving a sentence of transportation compared to 36% of men. Women were more likely than men to be condemned to death for larceny (11% compared to 4%), although no woman was executed for the crime. Similarly, 10.5% of women convicted of burglary were sentenced to a period of imprisonment compared to 3% of men. Moreover, no women were transported for this crime, compared to one-in-ten of the men who were similarly convicted. A similar percentage of both sexes (84% women, 85% men) were sentenced to death for burglary, although, again, no women were subsequently executed. Several reasons may be suggested for why this was the case. Primarily, the relatively few females who appeared before the Great Sessions were typically tried for low- level forms of property crime, and not for crimes against the person or those forms of property crime that generated concern. They were thus, as King suggests, less likely to be seen as 'troublesome', and more likely to be seen as 'troubled': 'as more vulnerable and more motivated by economic difficulties not of their own making'.[55] More broadly, again following Watson and King, female offenders may have benefitted from what the latter terms 'a distinctly gendered set of attitudes and policy decisions' during this period, characterized by an increasing sensitivity to the use of physical punishment and concomitant increase in sympathy towards the accused; this latter trend 'manifest[ing] itself particularly early and particularly strongly in relation to female offenders'.[56]

Death Sentences

Only around one-third of the persons convicted at the Chester Great Sessions between 1760 and 1830 received a sentence of death, with 12% of these being subsequently executed. The number of persons sentenced to death or pardoned by year is shown in figure 11:

Figure 11: the number of persons capitally convicted at the Chester Court of Great Sessions who were subsequently executed or pardoned, 1760–1830.



The number of capital convictions grew from two in 1760 to thirty-one in 1830. With the exception of two years (1783 and 1801), the annual number of capital convictions remained in single figures until 1810, when they began to increase rapidly. Between 1810 and 1830 the annual number of capital convictions then trebled, doubling in the final decade of the period (1820–1830). There was not, however, a concomitant rise in the number of convicted felons dying on the gallows. Between 1760 and 1830, only one person on average was executed in Chester per year, with thirty-four years of the period seeing no executions at all. Indeed, even in the peak years of capital convictions (1822 and 1826) there was no significant

[54] King, *Crime and Law*, chapter 5. John M. Beattie, 'The criminality of women in eighteenth-century England', *Journal of Social History*, 8.4 (1975), 80-116.

[55] King, *Crime, Justice and Discretion*, 283.

[56] King, *Crime, Justice and Discretion*, 286; Watson, 'Women'. See also Shani d'Cruze and Louise A Jackson, *Women, Crime and Justice* (Houndmills: Basingstoke, 2009) and for an examination of how these attitudes formed over a longer period, Martin J. Wiener, 'Alice Arden to Bill Sikes: changing nightmares of intimate violence in England, 1588–1869', *Journal of British Studies*, 40.2 (2001), 184–212.

related rise in the proportion of those subsequently executed, with only three and two persons being executed respectively in each year. Moreover, as can be seen in figure 12, while the number of capital convictions grew rapidly over the period, the proportion of these that resulted in an execution fell dramatically:

Figure 12: the number of persons receiving a capital conviction and the number and percentage of these that were subsequently executed by decade at the Chester Court of Great Sessions, 1760–1830.

Decade	Number persons receiving a capital conviction	Number and Percent of persons Executed
1760–69	30	8 (27%)
1770–79	33	9 (27%)
1780–89	41	7 (17%)
1790–99	36	10 (28%)
1800–09	66	10 (15%)
1810–19	135	18 (13%)
1820–30	310	18 (6%)

The number of persons receiving a capital conviction at the Chester Great Sessions increased more than tenfold from thirty in the 1760s to 310 between 1820 and 1830, the largest increase being in this latter eleven-year period (130%). The proportion of persons who were subsequently executed, however, fell by 400% from just over a quarter between 1760–69 to just 6% between 1820 and 1830. Between 1760 and 1799, the proportion of persons executed remained relatively stable with the exception of one decade (1780–89), before beginning to fall rapidly for the remainder of the period.

These two trends – the low levels of persons executed and the retreat from executions over the period – were in no way peculiar to Cheshire and, in many ways, reflected trends across England and Wales over the period. V.A.C. Gatrell has estimated that between 1770 and 1830, 35,000 persons were sentenced to death in England and Wales, although only 7,000 of these were subsequently executed (20%). At the Old Bailey, the proportion of those who died on the gallows fell between 1761–70 from 48% to 10% between 1826–30. Between 1718 and 1820, 19% of those capitally convicted in the north-east of England were subsequently executed, while the percentage of those persons capitally convicted on the Essex Assize Circuit fell from 40% in 1742 to around 10% in 1814.[57] Likewise, while the number of capital convictions across England and Wales increased over two-fold from 1874 in 1806–10 to 6679 between 1826–30, the percentage of persons executed fell from 15% to 5%.[58] Indeed, at both the national level and in Cheshire, the majority of capital convictions took place after Robert Peel began to rationalise the Bloody Code in 1822.[59]

Focusing on the period 1805–1830 where there is more reliable national data, it can be seen that Cheshire was not significantly out of step with pardoning practices across England and Wales. Between 1805–1830, around 9% of capitally convicted felons expiated for their crimes on the gallows, the estimated number of pardons across England and Wales increasing from 81% to 95%.[60] Over the same period, Cheshire similarly executed 9% of those capitally convicted, while Cornwall and Kent pardoned 10.5% and 10% respectively. Pardoning rates, however, in Norfolk and Northumberland were slightly lower, at 5% and 8.5% respectively.[61] The percentage of felons pardoned at the Old Bailey also increased slightly over a similar period (1805–30 inclusive) from 88% to 90%, while in Wales, 92% of those sentenced to death between 1805 and 1830 were pardoned.[62] This would suggest that while there was a degree of regional variation in pardoning rates, it was by no means a stark one and would appear to have narrowed significantly between the mid-eighteenth century and 1830. Indeed, it could be argued that the centre was coming to align with the practice of high pardoning rates found in the periphery. Thus, as Gatrell has shown, between 1701 and 1725, around a third of capitally convicted felons at the Old Bailey were executed. By 1801–5, this had fallen to just 11% and by 1826–30 inclusive, only one in ten expiated for their crime on the gallows.

The crimes for which capitally convicted felons were either executed or pardoned are shown in figure 13:

Figure 13: the number and percentage of those executed or pardoned for different crime types at the Chester Court of Great Sessions, 1760–1830.

Crime Type	Executed	Pardoned	Total
Arson	2 (100%)	0	2 (0.3%)
Murder	15 (88%)	2 (12%)	17 (2.6%)
Rape	6 (43%)	8 (57%)	14 (2.2%)
Shooting etc.	6 (35%)	11 (65%)	17 (2.6%)
Larceny from the Person	2 (25%)	6 (75%)	8 (1.2%)
Monetary Offences	5 (18.5%)	22 (81.5%)	27 (4.1%)
Highway Robbery	7 (18%)	31 (82%)	38 (5.8%)
Larceny	7 (16%)	36 (84%)	43 (6.6%)

[57] Morgan & Rushton, *Rogues*; King, *Crime, Justice, and Discretion*, fig. 8.4.

[58] V.A.C. Gatrell, *The Hanging Tree: Execution and the English people 1770–1868* (Oxford: Oxford University Press, 1996).

[59] For a discussion, see Leon Radzinowicz, *A History of English Criminal Law and its Adminiatration from 1750: Vol. 1 – The Movement for Reform* (London: Stevens & Sons Ltd, 1948).

[60] Antony E. Simpson (ed.) *Witness to the Scaffold: English literary figures as observers of public executions* (Lambertville, NJ, The True Bill Press, 2009); 51-3: Table of Executions in England and Wales, 1805–45; Gatrell, *The Hanging Tree*, appendix 2.

[61] Based on the author's unpublished dataset for these counties.

[62] Gatrell, *The Hanging Tree*, appendix 2; Walliss, 'The Bloody Code in Wales'.

Other	1 (11%)	8 (89%)	9 (1.4%)
Burglary	21 (11%)	170 (89%)	191 (29.3%)
Fraud & Forgery	1 (8%)	12 (92%)	13 (2%)
Robbery	1 (8%)	12 (92%)	13 (2%)
Housebreaking	4 (6.5%)	58 (93.5%)	62 (9.5%)
Sheep Stealing	1 (2%)	41 (98%)	42 (6.5%)
Horse Stealing	1 (1%)	75 (99%)	76 (11.7%)
Felony	0	9 (100%)	9 (1.4%)
Game Offences	0	1 (100%)	1 (0.2%)
Larceny in a Dwelling House	0	31 (100%)	31 (4.8%)
Receiving	0	1 (100%)	1 (0.2%)
Cattle Stealing	0	29 (100%)	29 (4.5%)
Other Sexual Crimes	0	1 (100%)	1 (0.2%)
Stabbing, Cutting, Wounding & Assault	0	7 (100%)	7 (1.1%)
Total	80 (12%)	571 (88%)	651 (100%)

For Marxist historians such as Douglas Hay and his colleagues, the Bloody Code was an instrument of terror used by the elite to maintain order and protect property. By tempering justice (the gallows) with mercy (the pardon), Hay argued, the elite were able to maintain their hegemonic position, by hanging only those deemed to be irredeemable or whose crimes warranted an example being made.[63] On one level, the evidence from the Chester Great Sessions seems to support Hay's claims. Not only were the vast majority of indictments for property crimes but, such indictments were also more likely to result in a guilty verdict. Those found guilty of crimes against the person, however, typically received harsher sentences. Of those convicted of a capital crime against the person, 91% were executed compared with 52% of those convicted of a capital crime against the property. Moreover, of the 80 felons executed over the period, 62.5% were executed for a capital crime against the person. A Chi Square statistical test indicated that there was a highly significant relationship between the type of crime and whether the convicted felon was executed or pardoned (X_{ϵ} 1, N640=76 p <.001); those convicted of crimes against the person were significantly more likely to expiate for their crime on the gallows than those convicted of a property crime. Murder, in particular, was an offence that the Chester Great Sessions, like courts across England and Wales, showed little mercy. All but two of the seventeen persons found guilty of murder expiated for their crime on the gallows: John Grattan and Thomas Heasall. Gratton was indicted in 1826 for the wilful murder of one John Milburne in April 1824 by throwing him into the Huddersfield Canal near Stayley Bridge. Found guilty, his execution was respited and he then received a sentence of transportation for life because of issues with the evidence on which he had been convicted.[64] Four years later, Thomas Heasall's conviction for murder was similarly commuted to transportation for life on the grounds of his youth (he was aged 19) and previous good conduct.[65] Just over half of those found guilty of rape and shooting at a person also received a pardon.

That said, however, the majority of persons who were executed after being capitally convicted at the Chester Great Sessions had been convicted of a single property offence: burglary. Between 1760 and 1830, a quarter of those who were executed after being sentenced to death at the Chester Great Sessions had been found guilty of burglary. It is clear, not least from reading the addresses made to those whom they had sentenced to death for this crime, that the Justices wished to make an example of them to deter others. Sentencing William Ricklington to death in the Summer 1820 Great Sessions for breaking into the house of Unwin Clarke, Archdeacon of Chester, the Hon. Charles Warren bemoaned how "it is truly painful to see so many cases of burglary committed in this county", adding that "a more cruel case, a case in which were combined more circumstances of malice, and barbarity, never before was inquired into by a Court of Justice".[66] Donning the black cap, he concluded by telling Ricklington that, "the cruelty of your offence is almost without parallel" and that "it would be trifling with Justice, we should be sitting here in vain were a crime of such enormous magnitude to escape the deserved and well merited punishment of DEATH.[67] Almost a decade later, sentencing John Leir to death, Mr Justice Johnson observed;

> …that he and the Chief Justice had long since made up their minds, that whenever a conviction for [burglary] attended with circumstances of personal violence, should take place before them, they would certainly inflict the extreme penalty of the law upon the culprit.[68]

Likewise, in the same year, Justice Warren told John Proudlove that the aggravated nature of his crime "imposes upon the Court the painful duty of making a public example of you – not so much for the punishment of the individual, but for the prevention of crime".[69]

[63] Douglas Hay, 'Property, Authority and the Criminal Law', in Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow, *Albion's Fatal Tree* (London, Verso, 2011), 17–73.
[64] 'Case of John Grattan', *Chester Courant*, 22nd August 1826, 2.
[65] 'Cheshire Summer Assizes', *Chester Chronicle*, 10th September 1830, 4.
[66] 'Cheshire Summer Assizes', *Chester Chronicle*, 1st September 1820, 20
[67] 'Cheshire Summer Assizes'
[68] 'Cheshire Summer Assizes', *Chester Chronicle,* 17th April 1829, 1
[69] 'Cheshire Spring Assizes', *Chester Chronicle*, 24th April 1829, 4.

Those burglars, such as Proudlove and Ricklington, that were hanged nevertheless only comprised a small proportion of those capitally convicted of this crime. The vast majority of those sentenced to death for burglary (89%) received a lesser sentence. Put another way, if the same proportion of convicted burglars had been hanged as convicted murderers, then around 168 would have been executed, or around two per year. More broadly, if the same proportion of those convicted of any form of property crime had been hanged as those convicted of a crime against the person, then Cheshire would have had to execute 281 felons, rather than the fifty that it did over the period. While burglary, then, was taken very seriously by juries and Justices, the latter being keen to pass sentences of death where the crime had involved violence or where an execution would serve as an example, crimes against the person were taken much more seriously, and where a life had been taken was punished to utmost extent.

The sex of the felons executed or pardoned for each crime type is shown in figure 14:

Figure 14: The number and percentage of men and women executed or pardoned by crime type at the Chester Court of Great Sessions, 1760–1830.

Crime Type	Men		Women	
	Number and % Executed	Number and % Pardoned	Number and % Executed	Number and % Pardoned
Arson	1 (100%)	0	1 (100%)	0
Murder	9 (82%)	2 (18%)	6 (100%)	0
Rape	6 (43%)	8 (57%)	0	0
Shooting etc	6 (35%)	11 (65%)	0	0
Larceny from the person	2 (25%)	6 (75%)	0	0
Monetary Offences	4 (16%)	21 (84%)	1 (50%)	1 (50%)
Highway robbery	7 (18%)	31 (82%)	0	0
Larceny	7 (24%)	22 (76%)	0	14 (100%)
Other	1 (11%)	8 (89%)	0	0
Burglary	21 (12%)	154 (88%)	0	16 (100%)
Fraud & Forgery	1 (8%)	12 (92%)	0	0
Robbery	1 (8%)	12 (92%)	0	0
House-breaking	4 (2%)	56 (98%)	0	2 (100%)
Sheep Stealing	1 (1.4%)	41 (7.7%)	0	0
Horse Stealing	1 (1%)	75 (99%)	0	0
Felony	0	7 (100%)	0	2 (100%)
Game Offences	0	1 (100%)	0	0
Larceny in a dwelling house	0	29 (100%)	0	2 (100%)
Receiving	0	1 (100%)		0
Cattle Stealing	0	28 (100%)	0	1 (100%)
Other Sexual Crimes	0	1 (100%)	0	0
Stabbing, Cutting, Wounding & Assault	0	6 (100%)	0	1 (100%)
Total	72 (12%)	532 (88%)	8 (17%)	39 (83%)

While more men than women were executed during the period, there was little difference in the percentage of both sexes executed. Indeed, if anything, men stood a slightly better chance of being pardoned than women (88% compared with 83% of women). This disparity, however, reflects that of the eight women who were executed, six had been convicted of murder; a crime for which an offender, irrespective of gender, stood little chance of receiving mercy. Men were not only executed in larger numbers but, more importantly, for a much larger range of crimes than women. Thus, whereas all but two women were executed for murder, only nine (or 12.5%) of the seventy-two men executed during the period were convicted murderers. Similarly, none of the women convicted of burglary or larceny were executed; crimes that saw twenty-one and seven men respectively die on the gallows. Indeed, the last woman to be executed in Cheshire for a capital crime other than murder was Mary Lloyd, who was executed in October 1800 for uttering counterfeit Bank of England notes. Again, such a state of affairs was in no way peculiar to Cheshire. For example, in his work on the Home Circuit in the late eighteenth century, Peter King concluded that whereas more than half of men convicted of property offences were executed, only 20% of women were similarly dispatched. Similarly, only one female property offender

condemned to death at the Old Bailey between 1791 and 1822 was executed compared to eighty-nine men. John Beattie has shown that a quarter of women sentenced to death in Surrey between 1660 and 1800 were subsequently executed compared to 43% of men. Indeed, only five women were executed in the county for a crime other than murder over that whole period.[70] As Beattie notes,

> …the effectiveness of hanging as an exemplary punishment depended on the offender who was providing the example. It was plainly more advisable to execute those whose death would confirm the wisdom and justice of the law rather than those whose suffering might excite pity, perhaps even hostility.[71]

Executing murderers, whether male or female, served as both an effective example and it was unlikely that their deaths would generate any large degree of public sympathy. In contrast, executing a woman for lesser offence could be counter-productive, not only failing to serve as an effective example, but potentially undermining the 'lesson of the scaffold' where the crowd felt some degree of sympathy for the woman and her plight.

Conclusion

The dominant image of the operation of justice during the eighteenth and nineteenth century is without doubt the gallows. Nevertheless, as both previous research and the present article have shown, this was a punishment that was meted out to only a small number of offenders. Although, as one commentator observed in the 1850s of the period under examination, 'every page of our statute-book smelt of blood', in practice death was only reserved for a limited number of offenders who had committed the most serious crimes and/or where the authorities believed that an example needed to be made.[72] The gallows were, in other words, the punishment that awaited relatively few, and the vast majority of offenders were filtered out at various stages of the criminal justice process, if not beforehand. To summarise the findings of this article, five distinct stages of filtering may be described. The first occurred before indictment, where an unknowable, but presumably large, number of potential indictments were dealt with informally between victim and offender within the community. This would have filtered out many less serious offences, particularly those committed by the young and women. However, is it also highly that one capital offence – rape – was also filtered out at this stage. As discussed previously, many victims may have been either unwilling to prosecute their alleged attackers or have been persuaded against doing so. They may also have opted for a private settlement with their attacker or pursued formal sanctions through the court, but for the lesser crime of sexual assault. Nevertheless, the rise in the number of indictments over the seventy-one year period – a rise that outpaced population growth – might be read as evidence that during the second decade of the nineteenth century contemporaries increasingly came to see formal sanctions, rather than informal communal ones, as the most appropriate way to receive justice. At the start of each session, a small number of offenders had their indictments dismissed by the Grand Jury, or did not stand trial because the victim did not attend court to prosecute. A small number also agreed to join the forces or turned evidence against their former criminal compatriots and were discharged. Again, at this stage, more women were filtered out of the criminal justice process.

Once indicted and tried, the funnel potentially leading to the gallows narrowed further. Two-thirds of those indicted were found guilty, with 64.5% and 50% of those tried for a property crime or a crime against the person being found guilty respectively. At this stage, gender ceased momentarily to play a role, with a roughly equal percentage of guilty verdicts being handed down to men and women. Of those found guilty, the majority (40%) received a sentence of imprisonment, typically for less than a year, compared with 21% receiving a sentence of transportation and 33% a sentence of death. Here again, gender would appear to have played a role, with women typically receiving more lenient sentences than men, even when convicted of the same types of offence. In contrast sentences of transportation and death were reserved more often for men. This state of affairs, however, arguably had less to do with gender *per se* than the nature of the crimes for which such men had been convicted, namely serious crimes of violence or property offences that involved some degree or threat of violence.

At the final stage of filtering, then, only around a third (and a quarter of those who stood trial) remained facing the gallows. Here the nature of the offence largely determined who hanged, with all of those convicted of arson and all but two of those convicted of murder being executed. It was also for the crime of murder that all but two of the women executed during the period died on the gallows. Those convicted of rape and burglary stood a greater chance of receiving a pardon, although the majority of those who were executed in Cheshire over the period had been convicted of the latter offence. Here again, the issue of whether actual or threatened violence had been involved would seem to have played a significant role in the decision of who would hang. Thus, of the fifty-two persons who were sentenced to death for a property crime, thirty-three had been convicted of one that involved real or threatened violence such as larceny from the person, highway robbery or burglary.

The evidence from the Chester Court of Great Sessions thus paints a picture of a system in which, if the accused was successfully indicted, he or she faced a strong likelihood of being found guilty. More than likely, they would have been indicted for a property offence, most commonly larceny, for which they would receive a brief period of imprisonment. The sex of the accused would appear not to have influenced the verdict of the jury, although it would appear to have impacted on the severity of sentence passed. Crucially, if they were a woman and had been convicted of any other crime than murder then it was highly unlikely that, even if capitally convicted, that they would die on the gallows. Men, in contrast, could find themselves on the gallows after being convicted of a far wider range of offences, the Justices presumably believing that the execution of these men would both serve as a salutary lesson and have a degree of public support that the execution of women would not.

[70] King, *Crime, Justice and Discretion*; King, *Crime and Law*; Beattie, *Crime and the Courts*, Table 8.9
[71] Beattie, *Crime and the Courts*, 436.
[72] Charles Phillips, *Vacation thoughts on capital punishment* (London: W & F.G. Cash, 1857), 2.

Institutional Imperialism
Extraterritoriality and the British Consular Court System in Japan

*Scott Gilfillan**

Abstract

This essay will examine the development and imposition of the system of extraterritoriality imposed in East Asia by Western imperial powers, especially Great Britain, during the mid-nineteenth century with a specific focus on the 1860 trial of Michael Moss at a British consular court in Japan. The establishment of legal institutions such as consular courts will be classed as a form of 'institutional imperialism' and identified as an important aspect in the study of Western informal empire in Asia and beyond.

Key words: *British Empire; consular courts; extraterritoriality; informal empire; institutional imperialism; Japan; Ottoman Empire; Qing Dynasty; Rutherford Alcock.*

1. Introduction

On 12 December 1860 a trial commenced at the British Consulate in Kanagawa, Japan. 'The Queen v. Moss', largely overlooked in historical studies of the period, was a landmark event for Anglo-Japanese relations.[1] Although the defendant, an English merchant named Michael Moss, had been charged with breaking Japanese laws and committing a crime against Japanese nationals on Japanese territory, he was to be tried by the conventions of British law in a British consular court. The British consular authorities had been granted the right to try Moss for his alleged crime through an extraterritoriality clause included in the 'unequal' commercial treaty the British government had concluded with its Japanese counterpart in 1858. Japan also signed similar treaties with four other Western powers that year, which lead to the establishment of three international trading enclaves, or treaty ports, within the country to facilitate Western trade. The 'unequal treaties' exempted nationals of each signatory power from the authority of the Japanese judiciary. Instead, foreigners were made accountable to their own country's legal system through the construction of judicial institutions such as consular courts. These instruments of Western informal empire operated independently of Japanese laws, conventions and cultural practices and were in no way answerable to the authority of the Japanese government. In addition to Japan, they were also introduced to China, Siam, Turkey, Persia and Egypt during the nineteenth century.[2]

The enforced construction of Western legal and regulatory institutions on the territory of non-Western states is most accurately described by the term 'institutional imperialism'. To fully explain what 'institutional imperialism' means, this essay will first chart the historical development of the mechanism that made it possible: extraterritoriality, from its earliest beginnings in human history until its arrival in East Asia. It will then analyse the controversial Moss case in Japan in order to understand what impact 'institutional imperialism' had on the societies in which it was imposed. Primary source analysis relating to this case will be based on Moss's own personal account and contemporary British archival sources held at the Public Record Office in London. It has unfortunately not been possible to include Japanese material in this short essay.

2. The Ancient Origins of Extraterritoriality

Diplomatic messengers have always been granted some form of special protection to assure their safety and good treatment. Diplomats in Ancient Greece enjoyed special rights of personal safety and certain immunities from local law, while ambassadors in the Byzantine Empire (*c.*330–1453) became important foreign intelligence agents. Byzantium's sophisticated diplomatic

* Scott Gilfillan, Doctoral candidate, Department of International History, London School of Economics and Political Science, United Kingdom.

1 It was mentioned anecdotally in CORTAZZI, Hugh, *Victorians in Japan: in and around the Treaty Ports*, London, 1987, p. 291, as an example of the hazards of clandestine shooting in Japan; and briefly discussed in Cortazzi's biographical chapter on Sir Rutherford Alcock (Consul-General in Japan at the time) in CORTAZZI, Hugh, 'Sir Rutherford Alcock 1809–1897' in NISH, Ian, ed., *Britain and Japan: Biographical Portraits, Volume II*, Richmond, 1997, pp. 3–4, as evidence of his tumultuous relationship with the foreign merchant community in Japan.

2 CHANG, Richard T., *The Justice of the Western Consular Courts in Nineteenth-Century Japan*, Westport, 1984, p. 3.

culture eventually spread to medieval Europe through its close links with Venice. But in a Europe united under Christendom until around 1400 there was little understanding of the modern concept of sovereignty or statehood. The diplomatic envoys of European monarchs were merely 'living letters', with no plenipotentiary power to negotiate or conclude agreements. They were simply offered whatever protection and immunity was necessary to carry out their temporary missions before returning home. This changed during the later Middle Ages, when the establishment of a permanent system of diplomatic relations became the most effective means to maintain security between the militarily powerful but evenly matched city-states of northern Italy. By 1454, the resident ambassador – a well-connected and well-informed permanent diplomatic representative – had become a firmly established position in many of these cities. Over the following two centuries the role of resident ambassador gradually spread across Europe. By the mid-sixteenth century, following the collapse of Christendom and the emergence of the fully sovereign state brought about by the Reformation, resident ambassadors had not only become responsible for all the duties formerly assumed by special ceremonial diplomatic missions, but also for managing military alliances and gathering information to send back home.

The establishment of permanent resident embassies in place of ceremonial missions rendered many former legal conventions unfit for purpose. Previously, a series of Roman and canon laws had established the inviolable principle of diplomatic immunity and protection for diplomatic residences, while reciprocal agreements to guarantee the safe passage of diplomatic missions were a practical necessity due to the difficulty of medieval travel. Ambassadors abroad were legally protected from indictment for civil or criminal offences or from reprisals or liabilities relating to any debt contracted before the embassy began. For the duration of their visit they were also exempt from all local taxes, tolls or customs duties. But these conventions had been designed to cater for short-term, ad-hoc embassies that would sooner or later depart. The creation of permanent embassies led to numerous abuses of the old arrangements, as underpaid and indebted ambassadors became targets for local creditors or, in acts of political expediency, were subjected to civil or criminal legal proceedings by host governments. Given the need to protect resident embassies, ambassadors were soon made legally accountable to their sovereign alone and granted perpetual immunity from local civil and criminal law. By 1700, the vague and unreliable guarantees of safety offered to foreign envoys in ancient times had been replaced by an internationally agreed system of immunity that granted resident ambassadors full and permanent legal protection.[3]

3. The Ottoman Empire and Extraterritoriality

Diplomatic immunity is an important characteristic of what historians have termed 'new diplomacy' – the modern Western diplomatic system of resident embassies, reciprocity, extraterritoriality and intelligence gathering. Historians traditionally argued that 'new diplomacy' resulted exclusively from the complex system of diplomatic relations that developed between individual Italian city-states during the Renaissance. Daniel Goffman rejected this view and contended that the city-states made innovations and adapted their diplomatic practice in response to external threats, such as that posed by the Ottoman Empire. According to Goffman, the rapid expansion of the Ottomans into the Eastern Mediterranean compelled the Venetian and Genoese states trading there to adapt their commercial and diplomatic conventions, especially after the settlements they had established in the former Byzantine Empire were absorbed into the Ottoman one. Since this process provided the "antecedents, precedents, and prototypes for the rise of the system of diplomacy that we generally associate with the West",[4] relations between the Ottoman Empire and the Italian city-states were key to the development of extraterritoriality in Europe.

The Italians had been trading in Constantinople long before the Ottoman conquest of the city. In fact, Venice and Genoa started to develop commercial empires in the eastern Mediterranean during the latter days of Byzantium, when the emperor permitted the establishment of Italian trading settlements within his borders. Many of these settlements were free to develop independently of local law. For example, the Genoese colonies in the Byzantine territory of Gazaria, along the southern tip of the Crimean peninsula, were granted sole responsibility for the administration of local government – a very valuable benefit for any trading nation. Venice later managed to establish similar trading settlements in Constantinople and other cities, in addition to ports on the Dalmatian coast. But following the collapse of the Byzantium Empire in 1453, these maritime empires were soon threatened by Ottoman expansion across the eastern Mediterranean and Black Sea. Although the defensive wars fought by Venice and Genoa against the Ottoman Empire have been well documented, historians have overlooked the fact that the Italian city-states also cultivated commercial, diplomatic and political relations with the Ottomans throughout the fifteenth and sixteenth centuries in order to prevent the Ottoman conquest of Italy. 'New diplomacy', therefore, developed as a result of "the ambiguities, the flexibility, and the porosity of an emerging Ottoman world".[5]

Within this context, a new form of non-diplomatic extraterritoriality arose out of the confused status of nationality within the Ottoman Empire. The empire's rapid expansion had absorbed many different civilizations into Ottoman society within a short space of time. Ottoman attempts to separate those who were foreigners and those who were subjects created confusion over the legal status of foreign commercial settlements, while the pragmatic application of a mixture of sultanic and Islamic law across the empire created further ambiguities. To attempt to remedy this situation, the Ottoman authori-

[3] This is a short summary of HAMILTON, Keith and LANGHORNE, Richard, *The Practice of Diplomacy, Its Evolution, Theory and Administration*, London, 1995, pp. 7–46.

[4] GOFFMAN, Daniel, 'Negotiating with the Renaissance state: the Ottoman Empire and the new diplomacy', in AKSAN, Virginia H. and GOFFMAN, Daniel, eds., *The Early Modern Ottomans: Remapping the Empire*, Cambridge, 2007, pp. 61–2.

[5] Ibid., pp. 62–3.

ties issued documents known as *ahidname-ihumayan* ('imperial pledges') to confirm in writing the subjection of the foreign individual, community or state to the sultan's protection by way of a contractual pact.[6] These inexact pledges were the means by which the Ottoman rulers hoped to eventually absorb all subjects into their empire, regardless of cultural heritage. The first was issued after the Genoese merchant community in Galata declared neutrality before the sack of Constantinople in 1453. Sultan Mehmed II's response was to guarantee protection for the community's council, grant their district legal and political autonomy and exempt Genoese citizens from taxes, forced conversion and trade bans.[7] Following the Ottoman conquest of Constantinople, an *ahidname* was also issued for the Venetian resident in the city, who was appointed Consul, commercial agent and ambassador for the Venetian colonies, as well as being made responsible for the protection of Venetian citizens within the city walls.[8]

Ahidnames were commonly translated as 'capitulations' in the West, where they were considered more as treaties than pledges of allegiance to Ottoman authority.[9] In 1458 the city-state of Dubrovnik, a former Venetian possession that had gained independence as the Republic of Ragusa in 1358, was granted an *ahidname* that allowed it to remain almost entirely independent in return for paying tribute to the Ottoman regime. The authorities in Dubrovnik were able to create a type of extraterritoriality in the city by manipulating this privilege in order to shield it from Ottoman taxes and other administrative levies.[10] This tactic was soon copied within Italian settlements as well. In the long term, the conferral of legal freedoms to foreign settlements did little to encourage Europeans to integrate into Ottoman society. In fact, it probably had the opposite effect. By the seventeenth century, the attractive open markets in the Ottoman Empire contrasted starkly with the rigid border controls and import limits prevalent across the European continent. Since capitulations granted foreign merchants the freedom to enter and trade in the Ottoman interior, obtaining one became a commercial priority for the emerging mercantilist powers of England, France and the Netherlands. Their desire for access to Ottoman markets resulted in the widespread dissemination of capitulatory agreements across the courts of Europe.[11] Instead of assimilating into the empire, many of the European commercial enclaves (or factories) established within Ottoman borders were able to exploit capitulatory advantage to undercut local traders and bypass local laws entirely.[12]

Although the extraterritorial freedoms granted to foreigners in the Ottoman Empire were not identical to the 'new diplomacy' concept, the diplomatic traditions and legal practices developed from the manipulation of *ahidnames* contributed to its adoption into the framework of European diplomacy. By the seventeenth century extraterritoriality had become the means to guarantee freedom to worship across Europe, an issue that had hitherto paralyzed diplomatic relations between the Catholic and Protestant states of Europe.[13] It was then linked permanently to the concept of national sovereignty following the rationalisation of Europe's system of international relations during the Enlightenment era of the late seventeenth and eighteenth centuries. This process was characterised by Emer de Vattel's influential 1758 work, *The Law of Nations*, which made sovereignty central to international law.[14] Extraterritoriality's importance increased further after the emergence of five evenly balanced powers in Europe following the Seven Years War in 1763. After the 1789 French Revolution and the Napoleonic Wars destroyed France's *ancien régime*, Austria, Great Britain, Prussia, Russia and France met at the 1814–1815 Congress of Vienna determined to find a means to avert future war in Europe and prevent the spread of revolutionary ideology. Their solution was the creation of a new system of diplomacy – the 'Congress System' – that formally acknowledged the equal distribution of power across the continent and cooperatively managed its diplomatic relations.[15] Extraterritoriality was incorporated into this system as the legal guarantor of national sovereignty for individuals and bodies operating out of the jurisdiction of their home states. It also became a symbolic acknowledgement of the equilibrium in power and status that existed between Europe's great powers by guaranteeing each sovereignty equal rights and legal protections.

4. Imposing Extraterritoriality in East Asia

The diplomatic ideology of Enlightenment Europe contrasted starkly with that encountered over the same period by European merchants when they expanded their maritime trade into Asia. There the undisputed hegemon was the Qing dynasty, which had conquered China in 1644. In lieu of the foreign ministries that had become commonplace in Europe, the Qing government used a variety of bureaus and agencies for the conduct of foreign affairs that "implied or stated the cultural inferiority and geographical marginality of foreigners, while also defending the state against them".[16] It also made no effort to stand up for the rights of Chinese who had left its territory for trade or travel. It did, however, reserve the absolute right to regulate foreigners trading within China. Restrictions introduced during the late seventeenth and eighteenth centuries culminated in the

6 PANAITE, Viorel, *The Ottoman Law of War and Peace: The Ottoman Empire and Tribute Payers*, Boulder & New York, 2000, p. 239.
7 GOFFMAN, op.cit., p. 64–8.
8 CROWLEY, Roger, *City of Fortune: How Venice Won and Lost a Naval Empire*, London, 2012, p. 320.
9 PANAITE, op.cit., p. 240.
10 GOFFMAN, op.cit., p 65–6.
11 CIZAKCA, Murat, 'The Ottoman government and economic life: Taxation, public finance and trade controls,' in FAROOQHI, Suraiya N. and FLEET, Kate, eds., *The Cambridge History of Turkey, Volume II: The Ottoman Empire as a World Power, 1453–1603*, Cambridge, 2013, pp. 260–1.
12 GOFFMAN, op.cit., p. 67.
13 Ibid., pp. 70–3.
14 KAYAGLU, Turan, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China*, Cambridge, 2010, p. 24.
15 HAMILTON and LANGHORNE, op.cit., p. 79.
16 SPENCE, Jonathan D., *The Search for Modern China*, New York NY, 1990, p. 117.

creation of the 'Canton System', which after 1760 limited all European trade to the port of Canton. Qing attitudes towards crime committed by foreigners on Chinese soil also hardened. After previously accepting cash payments as compensation for the accidental deaths of Chinese, foreigners were no longer exempted from the Chinese penal system.

The determination of the Qing government to assert its right to intervene in legal cases involving foreigners was exemplified by a number of increasingly controversial incidents. In 1773, for example, Qing authorities executed an Englishman in Macao who had been previously found innocent by the Portuguese of killing a Chinese. Seven years later a Frenchman was publicly strangled for killing a Portuguese sailor. Then, in 1784, a gunner on the British private trading vessel the *Lady Hughes* accidentally killed two Chinese when firing a cannon salute near Canton. The ship's captain told the Qing authorities he could not tell who had fired the fatal shot. However, the Qing legal code upheld Confucian principles of collective responsibility, whereby associates of one who committed an illegal act could be equally liable for it. In the absence of any clear culprit the ship's business manager was therefore arrested instead. Multilateral efforts to force the Chinese to back down proved fruitless and resulted in a severe disruption of trade. With the execution of the business manager imminent, the gunner responsible was eventually handed over and strangled in January 1785. Another serious incident occurred in 1821, when a Chinese fruit seller drowned after a crewman on the United States merchant ship *Emily* accidentally dropped an earthenware pitcher on her head. When the Americans refused to surrender the culprit China ceased all trade with the United States in the Canton region. Again, the perpetrator was eventually handed over, tried and executed.[17] Foreigners in China were outraged by these executions and put increasing pressure on their governments to protect them from the Qing penal system. Many in the predominantly Christian and European foreign community believed Chinese justice to be morally abhorrent. Lacking an independent judiciary, the Qing legal code was very different to that of Europe. Beatings and torture were regularly used to extract confessions, while 'barbaric' execution methods such as public strangulation, beheading and slow slicing were commonly employed. The inability of foreigners to understand the complex Qing legal code only exacerbated the problem. With foreign trade in China expanding rapidly towards the end of the eighteenth century, the public execution of foreigners for offences unlikely to warrant capital punishment in Europe became a pressing issue for Western governments.

At the same time, China was also unwilling to accept the application on its territory of so-called 'international law', which was largely a product of Western legal codes and conventions. When, for example, Royal Navy Commodore George Anson put into Canton harbour in 1741 after his flagship suffered severe storm damage, he expected that he would be treated hospitably according the international laws of the sea. He was instead ignored by the local authorities, overcharged for supplies and prevented from making many necessary repairs. A few years later in 1759, a British East India Company envoy dispatched to the imperial capital in Beijing to protest about trade restrictions in Canton was arrested and imprisoned for three years for sailing to northern ports, improperly presenting petitions and for learning Chinese. Such incidents heightened tensions over trade restrictions and the treatment of foreigners residing in China. Britain's burgeoning tea and opium trade was most at risk from this unstable situation, not to mention its prestige as a new world power. In 1793 the British East India Company decided to send Lord George Macartney to China on behalf of the British government to open official diplomatic relations with the Qing dynasty and end the restrictions of the 'Canton System'.[18]

Historians traditionally portrayed the encounter between Maccartney and the Qing emperor as a clash between traditional and modern civilizations. This narrative depicted the Qing dynasty as a stagnant, almost moribund, power and the Chinese system of international relations as an anachronism, unable or unwilling to conform to the diplomatic rules laid down by its sophisticated British counterpart due to the absence of a centralised body for co-ordinating diplomatic affairs.[19] This interpretation of Qing diplomacy remains prevalent – Maccartney's overtures were described as recently as 1995 as encountering "the response of a diplomatic dinosaur".[20] Its origins date from the mid-twentieth century, when John K. Fairbank produced his traditional synthesis on China's tributary system of foreign relations. Fairbank explained how, for millennia, China had required visiting rulers to acknowledge the undisputed cosmological supremacy of the Chinese emperor by presenting ritual tribute and performing a full kow-tow in the emperor's presence. He argued that this system of political submission and arbitrary fiscal extraction resolutely defined Chinese attitudes and practices with regard to foreign relations. China did not therefore develop the economic and legal rationality that in Europe replaced tribute with the concept of the nation state, establishing in time the accepted rules of behaviour by which all 'civilised' nations abided. Instead, Chinese culture dominated and dictated the way in which law and economics developed. In Fairbank's interpretation, China was unable to accept the arrival of Britain on equal diplomatic terms, as within its 'cultural' (as opposed to 'rational') system of international relations there existed no equality between states.

James Hevia strongly disputed this assessment in his postcolonial study of Sino-Western diplomatic relations. He argued that Fairbank and his adherents were wedded to the idea of the tributary system as a dualistic phenomenon. This had resulted in the flawed theory that diplomacy, pragmatism and practicality were only possible in China when outsiders accepted the tributary system as China defined it, and that when they did not the Qing court invariably fell back on ritual, ideology and culture as part of an inflexible defence strategy. He pointed out

[17] Ibid., pp. 123–128.
[18] Ibid., pp. 117–122.
[19] HEVIA, James L., *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793*, Durham, 1995, pp. 7–8.
[20] HAMILTON and LANGHORNE, op.cit., p. 8.

that, as highly successful empire builders, it was inconceivable that Qing officials were unaccustomed or unprepared for external resistance to their system of international relations. It is also difficult to explain why Qing diplomats were able to treat rationally with foreigners on certain occasions (such as during the border negotiations with the Russians in the seventeenth century), but unable to do so with Britain at the beginning of the nineteenth century. According to Hevia, historians had been blinded by the rational approach they took to understanding ritual, which was narrowly based around the Western historical association with pagan or pre-modern religious beliefs and ceremonies. As such, they had portrayed the symbolic ritualism of the tributary system as no match for sophisticated Western statecraft. The enduring impression was of a hopelessly imbalanced encounter between a crumbling Qing dynasty, clinging desperately to its rigid traditions, and a powerful Western rival, confident in its superiority and modernity. Hevia argued instead that ritual in China was not merely the practice of ancient rites to disguise power, but actually the means by which international power relations and negotiations took place – a complex, strategic process that defied simple definition. Rather than drawing a distinction between rites based around cosmological imperatives and those used to react to practical necessities, Hevia reasoned that all practices classified as ritual involved both. The skilful manipulation of cosmology and practicality through the system of imperial rites provided the source of Qing sovereignty and legitimised their rule. Thus, ritual within the tributary system actually played a similar role to that of ceremony in the Western system of international relations, for although the diplomatic practice followed by Lord Maccartney in 1793 ostensibly operated under the 'rationalised' set of rules, laws, conventions and codes known as the 'Law of Nations', it was also still fundamentally underpinned by the importance of ritualistic ceremony (for establishing mutual recognition of sovereignty), and religious cosmology (in its frequent references to God). Therefore, when Maccartney asked the Qing emperor to open diplomatic relations with Britain, he did not so much receive the response of a diplomatic dinosaur than that of a sovereign acting entirely in accordance with a completely different system of diplomacy.

For Hevia, the struggle that erupted between the Qing and British Empires was not merely a clash between traditional and modern civilizations, but "one between two imperial formations, each with universalistic pretensions and complex metaphysical systems to buttress such claims".[21] Both systems of international relations legitimised their respective sovereigns as supreme leaders of a global hegemony each desired to maintain and expand. Since such discourses were inherently coercive, neither could tolerate the existence of the other, and both understood that "at stake were competing and ultimately incompatible views of the meaning of sovereignty and the ways in which relations of power were constructed".[22] To establish an imperial presence in China, Hevia argued that the British could not negotiate with the Qing emperor on his own terms because to do so would undermine the sovereignty of the British monarch and the empire he personified. Equally, the Chinese refusal to negotiate on the premise of diplomatic equality had nothing to do with any antiquated cultural traditions; in fact, the equality of sovereigns could not exist within a system that was specifically designed to uphold the legitimacy of the Qing emperor (and the Manchu ruling class) as the paramount rulers of China, and thus the world.[23]

There can be no doubt that China's determination to regulate foreign trade on its own terms, its refusal to yield up the legal jurisdiction over foreigners on its soil and its total rejection of the European principles of 'international law' threatened British trade in China. But did Britain impose extraterritoriality on Chinese territory purely because of these practical and commercial exigencies? Hevia's theory of imperial rivalry suggests that there were also ideological motivations; the British were locked in an existential imperial conflict with the Qing, and it would take more than a demonstration of military might to overcome a much larger, more powerful and more unified political unit than the British Empire had ever encountered before. Victory would require the complete destruction of the Chinese tributary system of diplomacy, at least in so far as relations with Western countries were concerned. To achieve this, Britain would have to undermine the Qing emperor's legitimacy and authority within that system. It is certainly seductive, therefore, to perceive ideological impulses as well as practical ones in Britain's imposition of extraterritoriality following the Qing dynasty's ignominious military defeat in the First Opium War in 1842. However, documentary evidence relating to decisions taken by individuals or to any specific policy adopted by the British government with regard to China has never definitively established that such a plot existed, no matter how plausible it may seem given attitudes at the time. Moreover, unilateral British dominance in China would have been extremely difficult because Western commercial rivals also coveted China's lucrative markets and the 'Congress System' guaranteed that any rights or privileges secured by Britain would sooner or later also be granted to them.

What is clear is that the extraterritorial regime established in China following the First Opium War was extensive. The 'unequal' Treaty of Nanjing concluded in 1842 ceded Hong Kong to Britain and created five treaty ports on the Chinese mainland. The supplementary Treaty of the Bogue signed the following year bestowed extraterritorial protection upon British subjects in these ports, regulated British trade and residences in China and granted Britain most favoured nation status. When the United States obtained further extraterritorial rights through the more detailed 1844 Treaty of Wanghia, Britain automatically obtained the same privileges through its most favoured nation clause. Chinese resistance to these concessions led to a string of military humiliations culminating in capitulation to an Anglo-French allied force during the Second Opium War. As a result, China was forced to sign the punitive Treaty of Tientsin in June 1858, which created a further eleven

[21] HEVIA, op.cit., p. 25.
[22] Ibid., p. 28.
[23] These arguments can be explored in much greater detail in HEVIA, op.cit., pp. 9–28.

treaty ports where foreigners were placed under extraterritorial jurisdiction. The Chinese government was also forced for the first time to permit foreign diplomatic residents to reside in Beijing, where they would be granted all the requisite legal protections universally afforded to diplomats in the West. The old unilateral grants of merchant legal self-governance in the Ottoman Empire had been transformed into extraterritorial rights allowing British consular representatives to administer justice in all civil and criminal cases involving British subjects in China.[24] But, whether intentional or not, the enforced removal of the Qing emperor's sovereign control over law and order within his borders did become a potent symbol of his weakness. Subjugation to (but exclusion from) the 'civilised' Western diplomatic system of international relations not only undermined his legitimacy within China but also made him a second-class sovereign on the international stage. China's humiliation also proved to other governments in the region that it was wiser to acquiesce to Western demands for commercial treaties than to attempt to resist. Soon, extraterritorial regimes had been created in Siam and Japan as well, in both countries without any recourse to military conflict or occupation. The British Bowring Treaty introduced extraterritoriality to Siam in 1855 and the 1858 American Treaty of Amity and Commerce started the process in Japan. By the time Michael Moss's trial opened in Kanagawa in 1860, five powers (Great Britain, France, the United States, Holland and Russia) exerted extraterritorial rights on Japanese soil.

5. The Case of Michael Moss

The right for Britain to establish consular courts in Japan was stipulated in Article V of the Anglo-Japanese Treaty of Amity and Commerce, signed on 26 August 1858. It stated that: "British subjects who may commit any crime against Japanese subjects, or the subjects or citizens of any other country, shall be tried and punished by the Consul, or other public functionary authorized thereto, according to the laws of Great Britain."[25] Not long afterwards, in the early afternoon of 27 November 1860, Michael Moss strolled through the recently opened treaty port of Kanagawa. Behind followed his Japanese servant carrying a goose – Moss's prize from two days of shooting in the surrounding countryside. Moss had almost reached the landing stage for boats to the nascent foreign settlement of Yokohama that lay further around the bay when he heard cries from behind. Turning to see a group of armed Japanese men approach, he grabbed his hunting gun from the servant, stepped back and asked the men what they wanted. When they continued to advance, Moss cocked the gun and pointed it at the group leader. Suddenly, he was grabbed from behind and a scuffle ensued, during which the gun went off and hit one of the Japanese men in the arm. Moss was bound, beaten and quickly thrown into a Japanese jail. He was liberated in the early hours of the following morning by the British Consul in Kanagawa, Captain F. Howard Vyse, who had assembled a coalition of Prussian marines, consular officials and armed merchants to force the Japanese authorities to release him into British custody. But Moss's woes were far from over; the Japanese government accused him of deliberately shooting one of their officers, and Vyse only secured his release on the condition he remain under arrest at the British Consulate until an investigation was conducted.[26] On 1 December a Court of Inquiry was opened and five days later Moss was indicted for trial at the British Consular Court at Kanagawa on three counts: breaking the law of Japan in having shot game; assaulting and resisting Japanese officials in discharge of their duty; and shooting at a Japanese officer with intent to do grievous bodily harm.[27]

The Moss trial was the first at a British consular court in Japan to call Japanese witnesses to give evidence against a British defendant. It was therefore an important test case for the newly created British consular court system in the country, from which some tentative conclusions can be drawn on its effectiveness both as a mechanism to uphold British justice in the treaty ports and as a manifestation of 'institutional imperialism' in Japan. Although one case cannot be entirely indicative, other studies have already examined many of the later Japanese controversies concerning extraterritoriality, all of which arose after the establishment of the British Supreme Court for Japan and China in 1865 and the 1868 Meiji Restoration (a civil war that resulted in the replacement of Japan's feudal government of Tokugawa shoguns with one in favour of implementing widespread Western-style reform).[28] The Moss trial, however, took place during the earliest days of the British consular courts when British Consuls, not professional judges, presided over trials and dispensed verdicts. Those early days were dogged by practical difficulties. Communication was a particularly time-consuming problem. Since no one could effectively translate English into Japanese, every question put to a Japanese witness at Moss's inquiry and trial had to be translated from English into Dutch by one interpreter, and then from Dutch into Japanese by another.[29] This tedious process at least allowed Moss the time to transcribe the court proceedings word for word. It is clear from his transcripts that the Japanese officers who arrested him resented being called to testify and, understandably, had very little concept or appreciation for the procedure of a British court. As a result the inquiry almost did not take place at all. When called to state their charge against Moss on its first day, the officers refused to cooperate while the defendant was present. Despite repeated warnings and admonitions by Consul Vyse they persisted in their protests, stating that the Governor of Yokohama had been promised Moss would not be present. Exasperated, Vyse threatened to report them to the Japanese

[24] KAYAGLU, op.cit., p. 42–3.
[25] FOX, Grace, *Britain and Japan, 1858–1883*, Oxford, 1969, 'Appendix I: The Treaty of Yedo', p. 557.
[26] This narrative is based on the account given by Moss in his book about the incident: MOSS, Michael, *Seizure by the Japanese of Mr. Moss, and his Treatment by the Consul-General*, London, 1863, pp. 8–24.
[27] Ibid., 'Appendix V: Copy of Indictment', p. 129.
[28] See for example: CHANG, op.cit.; and HONJO, Yuki Allyson, *Japan's Early Experience of Contract Management in the Treaty Ports*, London, 2003.
[29] MOSS, op.cit., p. 31.

government in Edo (now Tokyo), and curtly informed them that "no laws but English laws are to be used in an English Consular Court".[30] Eventually, having also requested Moss at least be put behind a screen, the officers accepted Vyse's suggestion to pretend he was not there! They were clearly deeply uncomfortable giving evidence against a defendant while in his presence, which was certainly not common practice at Japanese trials.

There were other problems related to Japanese incomprehension with the British judicial system. When asked what oath he could swear by to bind his conscience, one Japanese officer replied that he did not even understand the premise of the question. After the Consul explained that British people swore on the Bible as a pledge to be honest, it was eventually decided that the officer's stamp would suffice. On one occasion, the Consul had to admonish a man for trying to listen to proceedings through the glass door of the court. On another, the Japanese officers interrupted proceedings by asking if they could stop and go to lunch! The Consul also faced an uphill task to control the Japanese witnesses as they testified; one was cautioned for the use of hearsay evidence, another for making signs to other witnesses during testimony. On the third day of the inquiry a Japanese policeman was thrown out of court for refusing to answer any questions and for attempting to reason with the Consul on points of law. The Consul then rebuked the officers later the same day for prepping one of theirs servants prior to his giving evidence, but the superior officer protested that neither he nor his men understood English law, that it was very different to the law in Japan and that it was customary in Japan for the master to answer for his servant. The very next day the same officers turned up over five hours late, leading Vyse to lodge an official protest with the Yokohama Governor. During the subsequent trial, which ran from 12 to 17 December, the Consul again cautioned witnesses for their dishonesty and in the end was forced to throw out two entire testimonies.[31] The Japanese reaction to cross-examination was utter bafflement:

> Their puzzled faces, on hearing the translation to a cross-question leading to other portions of their evidence, their doubt as to what kind of answer ought to be given, and their glance of inquiry at their head officer, or the look of pain and surprise when that head officer's interruption stopped or altered the interpreter's translation of the answer, might under other circumstances have been absurdly grotesque and comic.[32]

In his statement of defence, Moss argued that the only consistent assertion by the Japanese witnesses was that he had deliberately shot the wounded officer, for which there was little tangible proof. The prosecution had not established the existence of any Japanese law prohibiting shooting, and in any case no consular restriction had been placed upon it. There had been good reason to fear the approach of a group of armed Japanese men, especially as they were not clearly identifiable as policemen. It was common knowledge that brutal assassinations had been carried out against foreigners since trade had opened in Japan, so he had cocked the gun to warn them away, not to cause harm. He argued that his subsequent seizure and imprisonment had violated Britain's treaty with Japan, which stipulated that any British subject arrested by Japanese authorities should be brought immediately before the Consul.[33] Far from being guilty of an offence, therefore, Moss believed that his harsh treatment at the hands of the Japanese officers warranted compensation of $30,000 in damages from the Japanese government![34]

The trial ended on 17 December 1860, when Moss was found guilty on all three counts of the indictment. He was sentenced to a fine of one thousand dollars and deportation from Japan.[35] But the defendant was not informed of this verdict right away. A stipulation in Article XX of the Queen's Order in Council for 23 January 1860 (the prerogative legislation that empowered British Consuls in Japan to act on the Queen's behalf) stated that charges of the magnitude of those laid against Moss, and any subsequent inquiry or trial related to them, required the Consul to appoint two to four assessors of "good repute" for his assistance. Although the assessors had no authority to decide upon the innocence or guilt of the accused, or on the amount of punishment to be issued upon conviction, any or all could state their dissent from the Consul's conviction, or punishment, in the minutes of the court proceedings.[36] In Moss's case all the assessors were fellow merchants and probably knew the defendant well. This was inevitable in a small community like Yokohama, where merchants were often the only viable candidates. It was little surprise, then, that all of them dissented from the Consul's verdict. They disputed whether Moss had known that he was breaking a Japanese law by going out shooting, if he could have known that the Japanese men who approached him were police officers on duty and that he deliberately shot one of them thereafter.[37] According to the Order in Council, when the assessors dissented against the Consul's conviction or punishment, all depositions and proceedings relating to the case were to be passed to the Consul-General so that he could consider the court's verdict. Moss was therefore made to wait a further three days while Britain's Envoy Extraordinary and Consul-General in Japan, Rutherford Alcock, deliberated on his case in Edo.

Alcock's verdict was clear, if not exactly to the point. Taking into account the likely possibility of collusion and dishonesty amongst the Japanese witnesses, he believed that their testimo-

30 Ibid., 'Appendix IV: Preliminary Inquiry', p. 95.

31 All of these incidents are detailed precisely in the proceedings of the Court of Inquiry transcribed in MOSS, op.cit., 'Appendix IV: Preliminary Inquiry', pp. 93–129 and 'Appendix VI: The Trial', pp. 130–152.

32 Ibid., p. 38.

33 Ibid., 'Appendix VII: My Defence', pp. 152–6.

34 Ibid., 'Appendix III: Letter of Claim against the Japanese Government', pp. 92–3.

35 Public Record Office, Foreign Office 46 – Foreign Office: Political and Other Departments: General Correspondence before 1906, Japan, Volume 30 – Case of Mr Moss (hereafter F.O. 46/30), No. 81, Rutherford Alcock to Lord John Russell, 27 December 1860, Enclosure 1.

36 The Queen's Order in Council of 23 January 1860 is recorded in full in *The London Gazette*, No. 22355, 10 February 1860, pp. 468–75. Articles XIX and XX concerning the trial of crimes committed by British subjects can be found on pages 471 and 472.

37 F.O. 46/30, No. 81, Alcock to Russell, 27 December 1860, Enclosure 1.

ny still proved that Moss was guilty on all three counts. In any case, and regardless of the reliability of the Japanese testimony, Moss stood self-convicted by the affidavit he had read out in court in his defence (against the recommendation of Consul Vyse). In it Moss had sworn under oath that he had gone out shooting and cocked and pointed the gun at the officers when they approached. This menacing behaviour made him liable for the injuries sustained by the Japanese office after the gun went off, since English law stated that he who committed an unlawful act was responsible for whatever happened thereafter, intentional or otherwise. Given the gravity of the offence and the reckless manner in which Moss had acted, Alcock decided that a $1,000 fine and deportation would be insufficient punishment. He also sentenced Moss to three month's imprisonment in Hong Kong following deportation.[38] In doing so, Alcock believed he was acting in accordance with Article XX of the Order in Council, which conferred him the power to: "confirm or vary, or remit altogether, as to the Consul-General may seem fit, the punishment awarded to the part accused."[39]

The repercussions of Alcock's verdict were deep and far-reaching. On 21 January 1861 Moss was placed on board a smallpox-infested British frigate and transported to Hong Kong to begin his jail sentence.[40] Back in Japan, tensions that had simmered between the British merchant community and the British consular authorities since the opening of trade exploded into open animosity. The rancour stemmed from their very different interpretations of the statutes regulating the behaviour of British subjects in Japan. The merchants believed they were protected from the violation of what were perceived to be opaque and arbitrary Japanese laws by Article XXX of the Order in Council. This stated that British subjects in Japan were not liable to criminal punishment if they had committed any act that was not considered a crime, misdemeanour, or offence in England.[41] Alcock maintained that British subjects were not entirely unaccountable to Japanese laws and customs, especially if they had been brought to public attention via consular notification (which had been the case for shooting game – on 4 November 1859, in response to a complaint by the Governor of Kanagawa, Consul Vyse had issued a consular notification requesting that British subjects refrain from shooting while the matter was discussed in Edo[42]). It was this notification that Alcock believed proved not only that Moss had deliberately violated the law of Japan but that he had also willingly ignored an official consular prohibition. The assessors argued that this notification was merely a request, that it had been respected for the entire shooting season that year and that it was only after consular officials were seen going out the following season that others followed suit. In an outraged letter to Alcock, they reiterated their belief that Moss had broken no official law, Japanese or British, by going shooting. Alcock clearly disagreed, sardonically writing in the letter's margin: "a request officially made stating the objections of the government ought to be sufficient."[43]

When news reached Japan that the Hong Kong Chief Justice had freed Moss after only a few days' incarceration, suspicions were raised among the merchants that Alcock had acted improperly. Moss certainly believed so: after his release he immediately sued Alcock at the British Supreme Court for Hong Kong for illegal imprisonment and $30,000 in damages. It turned out that a litany of legal errors had been committed in Moss's case, any of which could have secured his early release on 28 January 1861. The one that led to Moss's immediate liberation occurred when a Hong Kong clerk endorsed Consul Vyse's warrant of committal by referring to the Order in Council of 3 March 1859.[44] This was the first Order in Council promulgated for Japan, but it had been repealed by the 1860 Order. Two other technical legal errors would also have given valid grounds for release: Vyse committed the first by inadvertently dating Moss's warrant of committal 1860 instead of 1861; Alcock made the second by adding the term of imprisonment to Moss's sentence. This exceeded the legal limits of the powers granted him by the 1860 Order in Council, which only allowed him to impose one punishment or the other.[45] To make matters worse, there was a great deal of legal confusion over the two Orders in Council in Hong Kong. The Hong Kong Chief Justice's concurrent and appellate jurisdiction over civil suits arising in Japan derived from legal documents known as Letters Patent that had been dated 30 January 1860. They had been issued according to stipulations in Article XXVIII of the Order in Council for 3 March 1859. But that Order had been revoked and cancelled by the second Order of 23 January 1860 (seven days earlier than the date on the Letters Patent). This meant that Consuls in Japan were acting under the authority of one Order, while the jurisdiction of the Chief Justice to hear appeals resulting from their court judgements derived from another that had already been repealed! The Chief Justice refused to consider Moss's suit against Alcock until this issue was resolved and the Letters Patent were amended.[46] Despite not knowing when these technical informalities would be corrected, on the 28 February Moss sent a notice of action summoning Alcock to appear in Hong Kong. Alcock was perplexed as to how he could possibly be answerable to any action. As far as he knew, Moss had been freed on a technical informality committed by a clerk in Hong Kong. He was very worried about the justice a public servant would be afforded at Hong Kong by a jury formed exclusively of merchants, which he considered would be "the consummation of all evil".[47] Upon arrival at Hong Kong Alcock

[38] F.O. 46/30, No. 81, Alcock to Russell, 27 December 1860, Enclosure 3.
[39] Queen's Order in Council, 23 January 1860, Article XX, quoted from *The London Gazette*, op.cit., p. 472.
[40] MOSS, op.cit., pp. 42–59.
[41] Queen's Order in Council, 23 January 1860, Article XXX, *The London Gazette*, op.cit., pp. 473–4.
[42] F.O. 46/30, No. 81, Alcock to Russell, 27 December 1860, Enclosure 2.
[43] F.O. 46/30, No. 5, Alcock to Russell, 27 January 1861, Enclosure 1.
[44] The Queen's Order in Council of 3 March 1859 can be found in *The London Gazette*, No. 22236, 4 March 1859, pp. 989–995.
[45] F.O. 46/30, Frederic Rogers to Edmund Hammond, 21 March 1861, Enclosure 1.
[46] Ibid., Enclosure 2.
[47] F.O. 46/30, Alcock to Hammond (Private), 5 April 1861.

was informed of the legal error he had committed with regard to the Order in Council, but since there was still a question as to whether the Hong Kong courts had jurisdiction to try the case at all, he could do nothing but return to Japan and await the Chief Justice's decision.[48]

News of the Moss incident reached London in February 1861, where it caused enough excitement to warrant discussion in the House of Commons. The Foreign Secretary, Lord John Russell, explained to the House that the case had been referred to the Law Officers of the Crown for their judgement. He regretted the apparent rift that had opened between Alcock and British merchants in Japan, but agreed with the Consul-General that British subjects should not engage in leisure pursuits in defiance of Japanese laws or customs.[49] However, the Foreign Secretary made it clear in a letter to Alcock that the responsibility for any legal uncertainties relating to the violation of Japanese laws laid at the Consul-General's door. Russell reminded him that both Article III of the 1859 Order in Council and Article IV of the 1860 Order granted Consuls the right to issue regulations for the "peace, order and good government of Her Majesty's subjects being within the dominions of the Tycoon of Japan".[50] Russell pointed out that all of the regulations Alcock had so far communicated to the Foreign Office related to the conduct of commerce and the Consul-General was told to immediately issue whatever rules were necessary to control British subjects in Japan and maintain good relations with the Japanese government.[51]

Alcock's failure to issue these regulations proved crucial to the Law Officers' verdict on the Moss case, which was delivered in May. In their opinion, the question of Moss's guilt or innocence centred upon Article XXX of the 1860 Order in Council (that relating to acts committed by a British subject in Japan not constituting crimes if they were not deemed to be crimes in England). If Alcock had officially prohibited British subjects from going shooting, as he was empowered to in Article IV of the Order, then Article XXX would not have applied. In the absence of any such regulation the Law Officers ruled that, since neither the act of going out to shoot nor that of shooting without a licence were considered to be criminal acts in England, Moss had not committed any crime as defined by the Order in Council. Therefore, the wounded Japanese officer had not been engaged in a legal attempt to apprehend a criminal and consequently Moss could not be guilty of an aggravated assault. To Alcock's chagrin, this was the same argument the British merchant community had used to defend their right to go shooting. Alcock was instructed to remit Moss's fine at once and to inform him that his conviction had been deemed illegal and there was no legal impediment to his returning to Japan.[52] Alcock was also warned that Britain's entire trade with Japan was at stake if he did not act immediately to end the animosity that had developed between British subjects and the Japanese in the treaty ports.[53]

Although Moss received news that his conviction had been quashed during the summer of 1861, he continued to pursue Alcock for damages. On the question of jurisdiction, the Chief Justice had decided he could only try the portion of the case related to Moss's term of imprisonment as it alone had taken place in Hong Kong. He thought it impossible to consider the verdicts passed by Vyse and Alcock in Japan because his jurisdiction was concurrent with the consular courts there.[54] Moss was outraged, especially when the jury indicated that, had they been permitted to, they would have awarded him between $15,000 and $20,000 for the treatment he endured and injuries he sustained in Japan.[55] Alcock was equally incandescent that there was still to be a trial at Hong Kong at all. He could not understand how the judge could sever his act of passing verdict on Moss's case into two, the first part not covered by the Supreme Court's jurisdiction and the second answerable to it. After much delay, however, the trial of 'Moss v Alcock' eventually opened on 23 December 1861. Despite efforts by the British Attorney General (who by then had been officially placed at Alcock's disposal[56]) to nonsuit the plaintiff on technical grounds, on 27 December the jury found Alcock guilty of an illegal misreading of the Order in Council. He was ordered to pay Moss $2,000 compensation plus legal costs.[57] Still dissatisfied, Moss set sail for London to submit his claim for compensation directly to the Foreign Office. He was informed in August 1862 that his repeated appeals for compensation had been rejected and that, if he still wanted to seek damages, he would have to take his case to an English court.[58] At the same time, he was warned privately that the government was prepared to defend Alcock against any such action.[59] Dismayed, Moss turned to the court of public opinion and published a detailed account of the affair the following year in order to seek sympathy for "the oppression, the cruelty and tyranny" he had endured.[60] But, although he made a further appeal to the then Conservative Foreign Secretary Lord Stanley in 1868, he never received another penny in compensation.[61]

[48] F.O. 46/30, Alcock to Hammond (Private), 1 May 1861.
[49] *Hansard Parliamentary Debates*, House of Commons, 21 March 1861, vol. 162, cc. 155–7.
[50] See Queen's Order in Council, 3 March 1859, Article III, *The London Gazette*, op.cit., p. 990; and Queen's Order in Council, 23 January 1860, Article IV, *The London Gazette*, op.cit., p. 468.
[51] F.O. 46/30, Russell to Alcock, 26 March 1861.
[52] F.O. 46/30, No. 63, Russell to Alcock, 31 May 1861.
[53] F.O. 46/30, No. 64, Russell to Alcock, 31 May 1861.
[54] F.O. 46/30, No. 6, Alcock to Russell, 10 February 1862, Enclosure 2.
[55] MOSS, op.cit., pp. 72–3.
[56] F.O. 46/30, Russell to Alcock, 26 August 1861.
[57] F.O. 46/30, No. 6, Alcock to Russell, 10 February 1862.
[58] F.O. 46/30, Henry Layard to Moss, 30 August 1862.
[59] MOSS, op.cit., p. 83.
[60] Idem.
[61] F.O. 46/30, Moss to Lord Stanley, 14 December 1868.

In retrospect, the Moss case highlighted a number of serious flaws in the early incarnation of the British consular court system in Japan. The first was that, as presiding judge, it had been impossible (or at least very difficult) for Alcock to reconcile his diplomatic obligations with his legal ones. The Consul-General had faced a dilemma that was rooted in political, not legal, exigencies: on the one hand he felt compelled to restrain British subjects like Moss who, given Japanese resistance to the very presence of a foreign trading community, were putting the security of the entire port at risk with their wanton and reckless disregard for *any* Japanese law or custom; on the other he needed to placate a Japanese government that believed the violation of *all* Japanese laws, regardless of whether they were compatible with the terms and spirit of the treaty, should be punished by the British authorities. Both attitudes threatened Britain's trade with Japan, the protection of which was Alcock's primary duty. He had therefore found it considerably difficult to protect the legitimate rights and interests of both parties at the same time. He had hoped that a prompt and proper demonstration of British justice would send a powerful message to the Japanese government, who had frequently employed dilatory tactics following his own demands for the arrest and punishment of Japanese who attacked foreigners.[62] Although at first Alcock believed that the outcome of the trial did make the Japanese government friendlier towards him,[63] Moss's release and the eventual annulment of his sentence soon mitigated any improvement in relations. Meanwhile, Alcock's attempt to make an example of Moss had exposed him to accusations of judicial prejudice by British merchants, who already believed that the Consul-General's efforts to enforce Japanese laws were putting the lives of every foreigner in Japan at risk.[64] The case opened such a deep rift between Alcock and the merchants in China and Japan that he would later publicly brand them "the scum of Europe".[65]

Another major flaw in the consular court system was that the Consul-General was insufficiently qualified in the law.[66] Despite this lack of legal expertise, Alcock had no means to access professional legal advice or counsel in the far-flung port of Kanagawa. He had been forced to rely on his own knowledge, which had led him to believe that he had been on solid legal ground when he decided to augment Moss's sentence. He made this decision to ensure that Moss was actually punished for his actions because he knew that the sanctions imposed by Vyse were effectively meaningless. Deportation was no punishment at all, since Moss would not have dared to remain in Japan after inciting the hostility of the Japanese in any case. Any fine, no matter the amount, would also most likely have been subscribed and paid for by other merchants (as indeed it was immediately after the verdict). Imprisonment, therefore, was the only punishment Alcock believed would really have an affect. It would also send a powerful message to the rest of the merchant community that the British authorities would not tolerate any more reckless behaviour.[67] But Alcock had been misled by the fact that in England offences were often punishable by fine *and* imprisonment, while the power granted him by the Order in Council was *alternative*, and not, as he had thought, concurrent or cumulative.[68] Although this error was a complicated technical one, there was no guarantee that the system in place would protect him against lawsuits arising from it. Not only had he been exposed to potentially ruinous litigation, but before he arrived in Hong Kong he also did not know whether he even had the right to receive legal advice from the British Attorney General there. Alcock warned Russell of the dire consequences that would arise in Japan if Consuls there were not granted the same access to legal advice and assistance as their Chinese counterparts.[69] Furthermore, since many other consular judges in East Asia were similarly under-qualified in the law and much more inexperienced in its practice than he was, something had to be done to protect them from the invariable bias of Hong Kong juries towards the plaintiff in civil cases relating to consular court judgements. He recommended two important changes: first, one or more judges should be appointed to the Supreme Court of Hong Kong in order to hold trials in all the treaty ports in China and Japan, relieving Consuls of their onerous legal responsibilities; second, all Consuls in China and Japan should be granted the same legislative protection against litigation and damages as magistrates in England.[70]

Alcock's recommendations initially fell on deaf ears and the continued violation of Japanese laws by foreigners contributed to a rapid deterioration in political relations between Britain and Japan. When news arrived in London during the summer of 1863 that war between Britain and Japan seemed imminent, critics of the government in the House of Commons blamed extraterritoriality for giving British subjects the freedom to provoke, insult and cheat the Japanese with impunity. The Earl of Carnarvon cited the Moss case as proof that British subjects were partly responsible for the decline in relations.[71] Earl Grey denounced the extraterritoriality clause in Britain's treaty with Japan as "barbarous" and accused the British government of reneging on its treaty obligations to preserve the peace by failing to force its subjects to respect the laws of Japan. He blamed the recklessness of foreigners like Moss for provoking Japanese attacks on British subjects and accused Russell of exploiting such incidents to extract punitive concessions from the Japanese government. The aim, Grey believed, was to weaken the Tokugawa regime to the extent that it became dependent on Britain for its very existence, as had happened in China. Instead of pursu-

[62] F.O. 46/30, No. 81, Alcock to Russell, 27 December 1860.
[63] F.O. 46/30, No. 34, Alcock to Russell, 5 April 1861.
[64] F.O. 46/30, No. 5, Alcock to Russell, 27 January 1861, Enclosure 5.
[65] *Hansard Parliamentary Debates*, House of Commons, 10 July 1863, vol. 172, c.532.
[66] F.O. 46/30, No. 31, Alcock to Russell, 3 April 1861.
[67] F.O. 46/30, Alcock to Hammond (Private), 5 April 1861.
[68] F.O. 46/30, Alcock to Hammond (Private), 1 May 1861.
[69] F.O. 46/30, No. 31, Alcock to Russell, 3 April 1861.
[70] F.O. 46/30, No. 6, Alcock to Russell, 10 February 1862.
[71] *Hansard Parliamentary Debates*, House of Commons, 10 July 1863, vol. 172, c. 513.

ing this imperialistic course, Grey recommended that extraterritoriality be abandoned so that British and Japanese people alike were made subject to the authority of the Japanese government.[72] *The Times* newspaper agreed that the merchants had to be controlled, although strongly rejected Grey's recommendation to cancel the extraterritorial clauses in the treaty. Instead, it advocated strengthening the powers of the consular courts and abolishing the jurisdiction of the Supreme Court of Hong Kong. This court, *The Times* argued, was "the greatest nuisance in the East", since any Consul who dared take measures against the merchant community was immediately sued there. Britain had therefore no right to talk of civilization or courts of equal justice while such an institution maintained jurisdiction over Chinese and Japanese consular cases.[73]

The British government thus faced a stark choice: it could abolish extraterritoriality entirely and restore jurisdiction to the local government; or reform the consular court system into a more effective mechanism to exert control over British subjects in the treaty ports. In the end, the government decided to go further than either Alcock or *The Times* had suggested. In 1865 it established in Shanghai a Supreme Court for China and Japan. This immediately resolved many of the problems that had arisen during the Moss case. Composed of an experienced and qualified judge, an assistant judge and a legal secretary, the Supreme Court became the exclusive court of appeal for cases where the assessor in a consular court had expressed dissent over a conviction or punishment, and also for appeals by any party aggrieved by the judgement of a consular court in a civil case involving $250 or more. Anyone convicted of a criminal offence could also have the consular court that convicted him send his case to the Supreme Court to consider any point of law relating to that conviction. The complexity of Britain's extraterritorial regime in Japan expanded further in 1879 with the establishment of a Court for Japan in Kanagawa to replace the old consular court.[74] Despite concerted attempts by the new Japanese government to undermine extraterritoriality in the treaty ports after the 1868 Meiji Restoration, Britain maintained extraterritorial rights in Japan until July 1899. The Chinese Supreme Court lasted much longer: British extraterritoriality was not abolished in China until 1943. By the time of its dissolution, the court in Shanghai had exerted jurisdiction over British subjects in China for 78 years.

6. Conclusions – Institutional Imperialism

The trial of Michael Moss was an important early example of 'institutional imperialism'. The testimony of Japanese witnesses who were deeply unfamiliar with the British legal code and justice system unsurprisingly resulted in some farcical courtroom scenes. Nonetheless, a precedent had been set as to how law and order would be upheld in Japan's treaty ports. British consular authorities, and not the Tokugawa government, would henceforth deal with crimes committed by British subjects against Japanese. The evidence of a single trial cannot provide definitive conclusions as to whether or not the Japanese henceforth accepted the British consular courts as legitimate legal institutions, but the Moss case did prove that the British consular court system of the early 1860s was far from perfect. Although Rutherford Alcock as presiding judge set out to provide a demonstration of swift and fair British justice to both the Japanese government and the foreign merchant community, his efforts backfired spectacularly. Alcock's legal deficiencies not only allowed Moss to escape any form of punishment but also put the Consul-General himself in the dock. Moss's subsequent award for damages made further mockery of a system whose merits Alcock had hoped to exhibit and proved that the consular court system in Japan needed fundamental reform if it were to serve its purpose.

The British government's response was more 'institutional imperialism', not less. The establishment of the Supreme Court for China and Japan marked the beginning of a more complex and formalised extraterritorial regime, one that would endure for decades – in China's case for the best part of a century. Historical research on the impact of extraterritoriality on Japan, China and other countries where extraterritoriality was introduced, has tended to focus on this era. But the historical contexts that preceded it were also important. The consular court system of the nineteenth and early twentieth centuries was the product of the evolution and development of extraterritoriality over human history. What started as a means to protect vulnerable ambassadors in Europe evolved into capitulations granted to European communities in the early Ottoman Empire. These were then manipulated for commercial advantage and exported back to Europe, where extraterritoriality became a cornerstone of the Europe's rationalised system of international relations and synonymous with Western concepts of sovereignty, law and civilization. Later, as a practical and possibly an ideological response to the radically different diplomatic culture encountered by Western imperial powers in China, extraterritoriality was transformed into a tool of informal empire and imposed on Asian countries through 'unequal treaties'.

I have chosen the term 'institutional imperialism' to describe this process for a number of reasons. First, because the imposition of Western law in non-Western states was a physical process as much as a legal one. Judicial institutions such as the consular courts were housed in physical buildings for all in the treaty ports to see. Second, because the consular courts were not the only institutions of Western judicial practice that were built. Many other institutions were equally fundamental to the creation of a Western informal empire in the treaty ports, including churches, banks, social clubs, newspapers, theatres and more, all of which were regulated by the rule of Western law. Third, over the long period of their existence these institutions and the laws that controlled them became *institutionalised* within the societies in which they had been constructed, to such an extent that they became synonymous with modernity. Indeed, in his comprehensive study of British extraterritoriality in China, Japan and the Ottoman Empire, Turan Kayaglu states that the abolition of extraterritoriality was not achieved until the

[72] Ibid., cc. 523–532.
[73] *The Times*, No. 24609, 13 July 1863, p. 8.
[74] CHANG, op.cit. pp. 8–9.

states subjected to it "integrated themselves into Westphalian international society as formal equals" by codifying rules and instituting legal reforms that met with Western standards.[75] A state could not therefore be considered modern until it had institutionalised Western concepts of sovereignty, practices of law and standards of civilisation into its government, judiciary and society in general.

'Institutional imperialism' forced non-Western governments to accept the establishment of independent Western-style legal, political, religious and commercial institutions on their soil. It freed Western politicians, diplomats, merchants and missionaries from the clutches of 'barbaric' judicial systems and the officials who upheld them. It gave all the Western imperial countries, but in particular Britain, the power to control and direct the path to modernisation within a foreign state. This process was crucial to ensuring the stability and prosperity of Britain's maritime trade in the treaty ports, which became increasingly important during the nineteenth century. Whether inadvertently or by design, 'institutional imperialism' also gradually undermined the sovereignty and independence of foreign governments and contributed to their eventual collapse. It was ironic that a mechanism originally used by supplicant European traders to shield themselves from assimilation into a powerful eastern empire became the means by which Europe's imperial powers compelled eastern nations, including the Ottoman Empire, to assimilate into the Western system of diplomacy, law and commerce.

This process did not end with the abolition of the consular court system in China. A new form of 'institutional imperialism' developed after the end of the Second World War. Although the United States had emerged from that conflict as a convincing victor, the American government did not surrender its jurisdiction over its military personnel on foreign bases and it continued to use its federal courts to enforce U.S. foreign policy goals abroad.[76] It also established a new system of international relations regulated by institutions founded on Western legal principles, such as the United Nations, the International Monetary Fund and the World Bank. At the same time, supranational extraterritorial mechanisms such as International Court of Justice, the International Criminal Court, the European Court of Justice and the European Court of Human Rights, among others, today uphold the tenets of Western law independently of the legal traditions of individual states. This is not to question the utility or the morality of such institutions, but to point out that the legal institutionalisation of global society is part of a long historical tradition that includes the era of treaty ports and extraterritoriality clauses. 'Institutional imperialism' also remains controversial; in recent years the American government has invoked extraterritorial privileges to wage drone warfare on foreign territories and has used extraterritorial sites such the detention camp at Guantanamo Bay to imprison suspected terrorists without charge. Furthermore, as this essay has demonstrated, 'institutional imperialism' can be deeply damaging (if not downright dangerous) to both the countries that impose it and to those that must endure it. As Earl Grey told the British government in 1863: "you have no right to protect British subjects unless you at the same time control them."[77] It is a warning that the international community would do well to remember today.

[75] KAYAGLU, op.cit., p. 191.
[76] Ibid., p. 195.
[77] *Hansard Parliamentary Debates*, House of Commons, 10 July 1863, vol. 172, c.531.

Maintaining Law and Order in a Democratic and Pillarised country: the Belgian Gendarmerie between 1918 and 1957

Jonas Campion[*]

Abstract

The gendarmerie is a national armed force entrusted with judicial, administrative and military police missions. Consequently, gendarmes are deeply linked with the political ideology of the State and the Nation they serve. In this paper, the goal is to analyse the gendarme's policing in Belgium, in the framework of keeping and restoring public order during the first half of the 20th century (1918–1957). During this period, Belgium defined itself as a democratic and pillarised country. The country was successively characterised by a period of reconstruction marked by deep economic and social progress, followed by an economic crisis, which was aggravated when parliamentary democracy was jeopardised. After the Second World War, it was necessary to rebuild the State, to deal with the Collaboration and with the Royal Question. In this context, we analyse both gendarmes' rules and practices to characterise the construction and the transformation of public security in Western Europe.

Key words: *20th Century; Belgium; demonstrations; Gendarmerie; law; military police force; policing; riots; strikes; violence.*

As a traditionally liberal country, Belgium defined itself as a democratic and pillarised country in the first half of the 20th century. In this respect, the end of the First World War was a transition period. Indeed, as soon as November 1918, reforms were enacted that radically transformed the frameworks of participation to public life, the most important of which were the adoption of male universal suffrage and the liberalisation of the right to strike. With the adoption of a proportional electoral system since the end of the 19th century, this resulted in a social and institutional framing of populations within the pillars structured around the three great political families (catholic, socialist and liberal), and the need to resort to coalition governments based on compromise.

The first half of the 20th century, which was marked by the two world wars, but also by a succession of social, economic and political crises, was a major transformation period for security logics implemented in Belgian society. Together with the progressive integration of population categories to public life, the definition of risk and the establishment of a security policy were redefined by the legislators, the executive power, but also by the practices of the order-keeping institutions. In this paper, we establish a relation between public order-keeping and the reestablishment of order, as was implemented by the gendarmerie, and the crises Belgian democracy experienced from the end of the First World War until 1957, when the organic law on the gendarmerie was adopted.

The choice to study the gendarmerie in order to bring a new perspective on the process of restoring order is justified by the major role that this institution took within the police system after the First World War. This role was redefined. The Army would not be mobilised anymore for dealing with public order disorders. The *gardes civiques* were in fact dissolved in 1914, while the municipal police forces' effectiveness and means of action remained broadly limited. Even though a prosecution service police (*police judiciaire près des Parquets*) was established in 1919, the gendarmerie became the cornerstone of the repressive apparel.[1] As a result, it gradually extended its hold on the whole territory (notably in towns when it was necessary to contain the crowds) and within the police functions as a whole (administrative and judicial tasks). From an institutional point of view, the situation resulted in an increase in staff, equipment and financial means. The theoretical staff passed from 4,900 men in 1918 to 6,000 men in August 1919, 6,800 in 1921 and 8,300 gendarmes and officers in 1940. Following the enactment

* Dr. Jonas Campion, FRS-FNRS Postdoctoral Researcher, Center for Law and Justice History, Catholic University of Leuven, Belgium.

1 MAJERUS Benoit, ROUSSEAUX Xavier, "The impact of the war on Belgian police system", in FIJNAUT Cyrille (ed.), *The impact of WWII on Policing in North West Europe*, Tilburg, Leuven University Press, 2004, p. 43-89 and CAMPION Jonas, DE KOSTER Margo, KEUNINGS Luc, MAJERUS Benoît, ROUSSEAUX Xavier, WELTER François, "L'appareil policier en Belgique (1830–2010)", in DE KOSTER Margo, ROUSSEAUX Xavier, HEIRBAUT Dirk (eds.), *Tweehonderd Jaar Justitie. Historische encyclopedie van de Belgische Justitie. Deux siècles de justice. Encyclopédie historique de la justice belge,* Bruges La Charte/Die Keure, 2015 (to be published soon).

of the reorganisation decrees that followed the Second World War, the theoretical staff increased and reached 12,000 men.[2] The primacy of the gendarmerie was finally acknowledged by the legislators in 1957, when the fundamental law organising the body was adopted. The law had been announced in the Constitution in 1831, but had never been voted until then.

Firstly, we study the changes that occurred within the legislative and regulatory framework and the judicial and policing doctrines, regarding the gendarmes' actions from an administrative police function perspective. Secondly, the aim will be to shed light on the way a concrete order-keeping policy was implemented on the field by the gendarmes.

1. Re-establishing order: frameworks and limits of the administrative police function

The gendarmerie is a military force, the role of which is to *"Keep order and public security"*.[3] It is entrusted with administrative, judicial and military missions. The gendarmerie, a body which was established in our regions in the wake of the French annexation in 1795, was successively taken over by Netherlands in 1815 and by the new independent State as of 1830. As a national body, its organisation, staff or military tasks were defined by the Ministry of Defense, while the civil police functions were under the authority of the departments of Justice and the Interior.

1.1 From 1815 until 1957: a patent filiation

That legislative framework organising the Belgian gendarmerie was relatively restricted until 1957. More precisely, since the basic law mentioned in article 120 of the Constitution wasn't adopted, it still was the "*Règlement sur la police, la discipline et le Service de la Maréchaussée*" (Decree on the police, discipline and the service of the *Maréchaussée*), signed by William I on January, 30th 1815 which prevailed, a decree which was broadly inspired by the French law of 28th Germinal, year VI. The principles regarding public order that were formulated in this decree were excessively simple: when they were ordered to do so in writing by the competent authority, or on their own initiative when they observed a clear case of unrest, the gendarmerie had to intervene in order to *"dissiper par la force tout attroupement armée, ou non armé qualifié de séditieux par la loi, ou tel attroupement capable d'entraîner du désordre"* (disperse by force any mob, whether armed or not, qualified as riotous by law, or any mob with the potential to bring about disorder). Likewise, the gendarmes also had to arrest the perpetrators of *"voies de fait ou de violences contre la sûreté des personnes, des propriétés publiques et particulières"*[4] (assault and battery or violence against the safety of the population, public and private properties). Beyond the principles of law enforcement and the protection of citizens' rights, the text remained silent as for the procedures to carry out these functions. It only specified that, while the gendarmes' duty was to act upon an order from the civil authority, the latter could in no way interfere regarding the way of applying this order, thereby bequeathing the gendarmes in charge the autonomy to use their staff as they saw fit.

Defined by the 1957[5] law as a *"force publique instaurée pour assurer le maintien de l'ordre et l'exécution des lois"*[6] (public force established in order to keep order and enforce the law), the gendarmerie simultaneously carried out pre-emptive and repressive functions, on their own initiative or upon receiving orders from the competent authority. The decree's text testified to an adaptation to the social and political transformations of society and to the modernisation that it experienced (means of communication, locomotion speed, etc.). In that sense, far from being a way to implement a tutelage or diminish the institution's autonomy, the text capitalised on its recent development and on an acknowledged expertise.

As far as order-keeping is concerned, the law was remarkable in many ways. Firstly, it redefined the disorders that required the intervention of the gendarmerie, by making them fit in line with the legislative changes that Belgium had experienced for nearly 40 years. For instance, it took into account the liberalisation of the right to strike, since the notion of sedition disappeared from the text regarding the mobs and protests to be controlled.[7] Except for this adaptation, which characterised the democratisation of Belgian society where protests were *a priori* no longer considered as a risk, the content of the 1957 text remained similar to that of 1815.

Besides, it specified the conditions in which the body could intervene, thereby redefining the hierarchical bonds established between the authorities that gave the orders and the gendarmerie. The law testifies to the acceleration of the way information circulated, but also to the factors that led to disorders, since the orders could first be given orally, when necessary (including by telephone or radio), although they had to be confirmed in writing afterwards.[8] Even though the gendarmes could not discuss on order's relevance, they had the possibility to report to their hierarchical superior if the order that they received was obviously abusive.[9] This shows the importance the body had taken within security policies in Belgium, which gave it the possibility to contest some missions and to oppose political, administrative or judicial officials.

Lastly, it provided further details on the conditions in which the gendarmes could resort to violence and use weap-

---

2 CAMPION Jonas, *Les gendarmes belges, français et néerlandais ŕ la Sortie de la Seconde Guerre mondiale,* Brussels, André Versaille, 2011. Id., *De Rijkswacht (1918–1957) : De Belgische Gendarmerie tussen evolutie en revolutie,* Buren, Stichting Vrienden van het Museum der Koninklijke Marechaussee, 2013.

3 „Arrêté du Gouvernement provisoire, 10 Décembre 1830», in *Règlement général sur la police, la discipline et le service intérieur de la gendarmerie nationale*, Brussels, ICM, 1929, p.4.

4 *Règlement général sur la police, la discipline et le service intérieur de la gendarmerie nationale*, Brussels, ICM, 1929, article 11.

5 „Loi sur la gendarmerie", *Moniteur belge,* December, 12th 1957, pp. 8752-8759. See the law's analysis in DE TOLLENAERE Veerle, «Quelques commentaires sur la loi du 2 décembre 1957», *Revue de l'administration et du droit administratif de la Belgique*, t.6, 1959, pp. 125-137.

6 „Loi sur la gendarmerie", first article.

7 „Loi sur la gendarmerie", articles 33-34.

8 „Loi sur la gendarmerie", article 46.

9 „Loi sur la gendarmerie", article 44.

ons. Clearly aiming at responding to disorders in a graduated way, the law underlined that the gendarmes could, when the circumstances permitted it, use "*des engins spéciaux moins sévères que les armes blanches ou à feu*"[10] (special equipment other than bladed or fire weapons). Without specifically mentioning them, the text referred to equipment such as gas, clubs, water pumps, *chevaux de frise* that were increasingly allocated in the body and aimed at avoiding confrontations between the gendarmes and the protesters. The law laid down the main means of action at the gendarmes disposal, such as patrols, information collection, guard posts, barricades and judicial inquiries.[11] Pre-emptive and repressive measures combined, as well as the gendarmes' competencies regarding administrative and judicial police tasks.

The comparison between the 1815 decree and the 1957 law shows the continuity of the frameworks defining the order-keeping police function carried out by the gendarmerie. Yet, the 1957 law is slightly more detailed, nuanced and logically adapted to the sociopolitical conditions of the mid-20th century. In that respect, it can be seen as a confirmation and an evidence of the gradual appearance of an omnipresent gendarmerie regarding the public security issues. Although the law on the gendarmerie laid down in more details the doctrines and practices that the gendarmes were able or allowed to implement, it remained focused on general principles. At an intermediary level, it needed to be converted into operational terms in order to be applied on the field's "*micro*" level.

1.2 From the legislative framework to the gendarmes' tactics

These guidelines – little known outside of the professional spheres – are yet incontrovertible items in order to understand the order-keeping policies implemented by the gendarmerie. These guidelines are hybrid in nature and their goal is two-fold: reminding the rules of law and formulating military and policing tactics. Their emergence corresponded to a double dynamic. On the one hand, they resulted from the gradual specialisation of the gendarmerie. Indeed, from 1921 onwards, mobile units in charge of order-keeping in industrial and urban areas were established. On the other hand, they resulted from the changes that Belgian democracy experienced, where the boundaries between protest and the corresponding official response were redefined. Oscillating between repression and tolerance, these instructions illustrated a new security situation, which was characterised by a new balance that needed to be found between the old and the new risks, the old and the new fears. Fitting in line with the temporality of reactivity, they were based on and changed according to the gendarmes' experiences.

The example of the confidential instruction of April 1925 *"donnant les règles tactiques à observer lorsque la gendarmerie doit intervenir pour le maintien ou le rétablissement de l'ordre public"*[12] (providing the tactical rules to be observed when the gendarmerie are required to intervene in order to maintain or restore public order) is particularly interesting as regards the nature and the stakes related to these instructions. The text is a first summary of the new order-keeping conditions that emerged in the wake of the First World War. Aimed at reminding the officers of the concerned units the principles to be applied regarding administrative police missions, it successively dealt with judicial, policing and military considerations. Detailing the conditions in which the gendarmerie could be used, it addressed the available equipment, the intervention methods and the tactics the gendarmes could use to confront/gain ground against protesters and rioters, and included diagrams.

The instruction analysed in depth the issue of violence management and state violence. The instruction clearly fits in line with a transition period. Although the policing logic adopted an increasingly graduated way of dealing with mobs, the available equipment, which was essentially military, still offered a limited set of options to this end. "Physical" contact with the troublemakers still happened frequently, as the doctrine had not yet shifted to the need to maintain a distance between the order-keeping forces and the protesters in order to reduce peaks of violence. While largely testifying to an actual fear of the working class, of armed riots and some political stakeholders (socialists, but mostly communists), the text insisted several times on the self-control the public force had to show when dealing with mobs in the public sphere. Although the main principle of the instruction stated *"que coûte que coûte force reste à la loi"* (the law has to prevail at all costs), it showed the emergence of a nuanced management of coercion, between repression and a certain level of tolerance towards some troublemakers.

One of the main principles was that the body had to produce on the mob *"un effet moral impressionnant qui lui inculquera le sentiment de son infériorité pour la lutte et qui sera ainsi susceptible d'éviter à la gendarmerie l'obligation d'employer la force meurtrière des armes"* (an impressive moral effect that will make them realise their inferiority and which will likely make it possible for the gendarmerie to avoid using lethal weapons). This could be achieved through various methods (involved staff, used equipment, occupation of the public space, warnings). The officers both had to show their strength and avoid provocations. The gendarmes always had to leave the possibility for the protesters to withdraw. Indeed, *"les cadavres ou blessures […] seraient mis au compte de la répression et donneraient, soit une raison d'acharnement, soit le signal de troubles très étendus, renforcés de tous les éléments émus ou surexcités par l'exploitation des faits"* (the police would be blamed for casualties or injuries […], which would reinforce the determination of the protesters or give the signal of a very extended turmoil, in addition to the participants moved or galvanised through the exploitation of the events). If fire weapons had to be used, it was required to *"obtenir le résultat visé avec un minimum de mal pour les émeutiers"*[13] (obtain the targeted result while avoiding as much as possible to harm the rioters).

---

[10] „Loi sur la gendarmerie", article 20.

[11] „Loi sur la gendarmerie", article 41.

[12] Buren, Marechausseemuseum, Collectie Marechaussee, Politie Bel/Lux 2, map 1, confidential instruction for the commanders of the mobile legion, groups, companies, mobile forces or districts giving tactical rules to be observed when the gendarmerie had to intervene in order to maintain or restore public order, note no. D1249/3, April, 17th 1925.

[13] *Ibid.*

The text also considered two other domains, related to this new gendarmerie's expertise in restoring order. On the one hand, it considers the body's position within Belgian society and its relations with the political and judicial institutions involved in the State's security management. On the other hand, the text outlined the role and the qualities of the gendarmerie's officers. In this respect, it clearly testified to a solid institutional strategy. Starting with the legislative framework that established the independence of the gendarmerie regarding the actual way of carrying out their order-keeping missions, the arguments put forward in the text quickly switched to moral and political considerations. The body is presented as an incontrovertible force, which had to get the upper hand in all the aspects of administrative police.

The mission of the gendarmerie's officer in charge is first presented as a task requiring the capacity to plan and provide information regarding the events occurring in his jurisdiction, but also concerning the responses provided by other official stakeholders. Even before actually intervening, the officer has to plan his possible engagement. To this end, *«le chef de la gendarmerie fait appel* […] *au concours du bourgmestre et du gouverneur de la province. Il expliquera à ces autorités civiles qu'en recourant préventivement à la gendarmerie, elles lui faciliteraient de beaucoup la tâche et augmenteront les chances de maintenir l'ordre public sans devoir employer la force des armes et sans effusion de sang. Il profitera de toutes les circonstances favorables pour réitérer ces explications et convaincre ces autorités qu'il est plus humain de prévenir que de réprimer»* (the gendarmerie's head officer will collaborate with the mayor and the province's governor. He will explain to civil authorities that pre-emptively asking for the gendarmerie's help would enable them to simplify their task and to increase their chances of maintaining public order without having to resort to fire weapons and to shed blood. He will take advantage of any favourable circumstances in order to repeat these explanations and to convince the authorities it is more humane to prevent than to repress).

The officer had to try to increase his leadership. The arguments present the body as an elite force, entrusted with unique competencies. The instructions given clearly went beyond the regulatory framework that should normally define the relations between the institutions: *"l'officier tâchera de tirer profit de l'ascendant et du prestige inhérents à sa compétence spéciale et à sa qualité de Chef d'une troupe d'élite, pour amener les chefs de ces forces communales à suivre sa direction"* (The officer will endeavour to make the best of the prestige and the privileges granted to him by way of his special competency and his position as the head of an elite troop in order to convince the heads of these municipal forces (to be understood as both the municipal police and the mayors) to follow his lead). To this end, he was recommended *"de parler et d'agir avec autorité, mais aussi avec politesse, tact et fermeté"*[14] (to speak and act with authority but also with politeness, tact and firmness). The instruction underlined the relief that these officials would feel to know that they could rely on strong-willed and determined gendarmes, diminishing the responsibilities they would have to shoulder in the case of turmoil. The gendarmerie thereby assumed the political role that they had to play. They meant to use their influence on local stakeholders, which exposed them all the more on the public sphere.

From the inter-war period onwards, the internal guidelines enable us to make a clear statement. The administrative police function entrusted to the gendarmerie by the Central State is one of its primary missions, but also represented a field of opportunity for a growing institution. On the one hand, the gendarmerie was the only police body that had the legitimacy to take action in this domain. The doctrine that stemmed from it summarises its military and police identity. The gendarmerie took advantage of their technical expertise, their unrivaled means in comparison with other police forces, but also of their political or institutional interests. This institutional strategy was marked by a constant call to legalism and by the need to defend collective interests or to increase a field of influence. On the other hand, the image of the gendarmerie which is given by this instruction is typical of the inter-war period. The repression to be exerted by the gendarmes was meant to be more moderate. Yet, the guidelines underlined the necessity to be able to repress firmly when the circumstances demanded it or in the case of more pressing fears for the established order.

The tactical principles and the institutional stakes mentioned in the 1925 Spring instruction increased in importance as the gendarmerie developed. We can observe the assertion of an expert logic, which was marked by a technical, material, institutional and doctrinal specialisation. Adapting to the gradual transformations of Belgian democracy, the gendarmerie's *doxa* insisted on the importance of effectively managing threats to public order. The time had come for better managed relations between the gendarmes and the protesters: pacification and professionalisation were key to this trend. These developments led to a notable change in the available equipment for the gendarmes: as members of the military, they originally used swords, fire weapons and military engineering material. Later on, this gear gradually extended to police logics marked by a will to control space while keeping protesters at a distance (obstacles, *chevaux de frise*, teargas) and limiting the lethal nature of used equipments during "contacts" (clubs, pistols, etc.).

In some respects, the graduated management of violence had limits: when the State was in a position of weakness, the guidelines once again became more strict. This testifies to the close political relation that linked the gendarmerie, the State and society, notably as far as order-keeping was concerned. During the second German occupation, when the authority in Belgium was in the hands of collaborationist instances, the instructions given to the gendarmes by the new commander of the body were clear: refusing to make a distinction between the resistance and ordinary criminality, the gendarmes had to act with firmness without any hesitation, including by increasingly resorting to fire weapons to kill.[15] In other political contexts, once the rule of law was reestablished, the guidelines were still

[14] *Ibid.*

[15] Brussels law court, Archives of the *Auditorat militaire*, Colonel Van Coppenolle's file, box no. 5, note no. 2405 of the gendarmerie's body commander, August, 6th 1943.

highly coercive. In Autumn 1944, in the middle of the political crisis caused by the tension strategy led by the Communist Party,[16] the orders transmitted to the units were characterised by their firmness. The tactical instructions insisted on the ratio of power to be established with possible dissenters[17] and on the need for the gendarmerie to keep the upper hand on the field and the situation.[18] This point of view was summarised by a gendarmerie's officer as follows: *"défense 'très énergique' des barrages, défense 'à outrance' des hôtels ministériels et du Parlement"*[19] (a very vigorous defense of the barricades, an excessively strict defense of ministry premises and the Parliament). In Summer 1950, the same scenario was observed during the demonstrations organised to put an end to the Royal Question. In both cases, the conjunction of a crisis context, a feeling of vulnerability of central authorities and instructions of firmness given to the gendarmes resulted in extreme violence episodes, such as the November, 25th 1944 protest in Brussels where gun fires were exchanged, which caused several wounded, or the Grâce-Berleur protest on July, 30th 1950.[20]

The instructions concerning order-keeping testified to the institutional growth of the gendarmerie (as for staff, missions or available means). They show a will to assert and extend the fields of intervention within public policies or to put under tutelage political, administrative and police institutions or stakeholders. More than the corporatist logic, spread through classic internal communication channels, [21] these instructions provide a direct communication method, aimed at the members of the body and anchored in the day-to-day practice of the gendarme's profession.

2. Order and turmoil: the gendarmes in action

Beyond law enforcement, the issue of order reestablishment by the gendarmerie can only be understood through an in-depth analysis of practices on the field, testifying to the mobilisation of the gendarmes and the relations with the stakeholders of order and turmoil. Guided by the exceptional preservation of two series of archives, we focus our analysis on two „moments of tensions" in Belgian history: firstly, the strikes of textile industries in the North of France, from July until September 1930 and from May until July 1931,[22] during which French workers claimed better salaries, that involved Belgian gendarmerie in order to keep order in the boundary area. Secondly, we consider the Summer 1950 events, when the Royal Question had reached its peak, notably marked by violence during the Grâce-Berleur protest.[23]

In spite of the striking differences between the two moments (regarding the extent of the disorders, the resulting national or international stakes), a comparative approach at the "gendarmerie" level enables to highlight a few similarities. We successively analyse the violence and the related degree of coercion; the mobilised staff and means and lastly, the relations with the stakeholders involved in public security. All of these domains were addressed in the regulatory framework.

2.1 Public violence and gendarme's coercion

These two episodes represent moments of political and social tensions, characterised by an atmosphere of dormant violence that could lead to its explosion. In the case of the strikes in the North of France, the shared fear by Belgian and French authorities was to see the social conflict propagate into Belgium within an industrial area overlapping the boundary between the two countries. The facts confirmed this concern. There were cases of attacks against Belgian workers who were not on strike as well as material destructions. Cross-border tramway lines were damaged, attempts to erect barricades and carry out sabotages on certain communication channels multiplied. Mostly, protests that resulted in acts of violence occurred in towns and villages on the Belgian side of the border.[24]

In Summer 1950, in the last months of the Royal Question, the situation in Belgium was pre-insurrectional.[25] After the March referendum, which showed strong regional disparities even though the majority of the votes were in favour of the return of King Leopold III, protests, strikes and meetings multiplied. The tension gradually increased and reached Grâce-Berleur.[26] This event was a turn in the crisis. In view of the

[16] WARNER Geoffroy, *La crise politique belge de novembre 1944 : un coup d'État manqué ?*, no. 798 in *Courrier Hebdomadaire du CRISP*, May 1978; GOTOVITCH José, *Du rouge au tricolore : résistance et parti communiste*, Brussels, Labor, 1992.

[17] See Brussels, *Service Historique de la Police*, corps' notes, note no. 3792/F, November, 27th 1944 and Jambes, private collection of Colonel Claessens, doc 338, M record from the *groupe de Mons*, note no. 333 et 334/M, November, 15th 1944.

[18] See the file on November 25th 1944 protest in Brussels, AGR, archive depository of the *activité du Haut-Commissariat à la Sécurité de l'État*, 1580–1586.

[19] Brussels, AGR, archive depository of the *activité du Haut-Commissariat à la Sécurité de l'État*, 1583, letter from Colonel Leroy to the HCSE, November, 26th 1944.

[20] Four casualties during a protest. The consequences of the protest and the risk of a revolution led to King Leopold III's abdication. Regarding the aspects of this event related to the police, see *below.* L'ENTRÉE Jonathan, *La gestion du maintien de l'ordre en 1950 en Belgique sous l'œil de la police judiciaire près le Parquet du Procureur du Roi de Bruxelles et de la gendarmerie,* Master dissertation, History, UCL, 2014.

[21] To begin with, the orders from the corps or the speeches during public ceremonies.

[22] Brussels, Royal Army Museum, Moscow depository, 5535, 185 14a 7231. Regarding these strikes, see TELLIER Thibault, «La représentation sociale, politique et littéraire du peuple des villes : l'exemple des grèves du textile à Roubaix en 1930–1931», in GUIGNET Philippe, *Le peuple des villes dans l'Europe du Nord-Ouest (fin du moyen âge -1945*), Villeneuve d'Ascq, Centre de recherche sur l'histoire de l'Europe du Nord-Ouest (Research Center on the History of North-Western Europe), 2003, pp. 329-339.

[23] See the dissertation by Jonathan L'Entrée, whom we warmly thank. Brussels, AGR2, Police judiciaire près le parquet du procureur du Roi de Bruxelles (PJP de Bruxelles) (Judical police of Brussels' senior Crown prosecutor's Prosecution office, referred to as *PJP de Bruxelles*), no. 4838-4839.

[24] Brussels, MRA, Moscow depository, 5535, 185 14a 7231, Report no. 1804, October, 10th 1930 and telephone conversation, June, 6th 1931.

[25] DUJARDIN Vincent, VAN DEN WIJNGAERT Marc, *La Belgique sans Roi 1940–1950*, Brussels, Complexe, 2006 and DUJARDIN Vincent, DUMOULIN Michel, VAN DEN WIJNGAERT Marc (eds.), *Léopold III*, Brussels, Complexe 2001.

[26] GOOSENS Thierry, *Grâce-Berleur, le dernier combat de la campagne des dix jours*, Liège, Wallonie-Europe, 1990 ; DOLHET Manuel, *Le dénouement de la question royale. Juillet – août 1950,* mémoire de licence en histoire, UCL, 2001 ; HALIN Caroline, *Mémoire des événements de Grace-Berleur du 30 juillet 1950, Licence* dissertation, ULg, 2008.

increasing urging threats of marches on Brussels, the situation gradually unblocked. It resulted in a political solution: the King abdicated and his son succeeded him.

These two events had consequences on the long run. The gendarmes were forced to use a wide array of coercive methods, not only to maintain, but also to restore public order. From their perspective, the situation was in no way an issue: they largely took responsibility for the violence they resorted to so that the rule of law would prevail. In the years 1930–1931, still equipped with an essentially military gear, the gendarmes could only implement a restricted series of tactics, which led to a firm opposition. Principles of territorial occupation and "meshing", close surveillance of workers, confrontations mixing charges on horses, *"mêlées"* using clubs and swords,[27] etc.

In Summer 1950, the set of implemented practices that were used was relatively close to that adopted 20 years earlier. In spite of a slow change in the doctrines, the situation in the country was so tense that it resulted in violent oppositions between the gendarmes and the protesters. The gendarmes, who were mobilised and on duty for long and frequent periods,[28] often understaffed and tired by the multiplication of interventions, had no other choice but to react vigorously during protests that often led to skirmishes. The logics that guided the gendarmes' actions could be explained by the convergence of a series of factors: an actual fear for a destabilisation of the regime by the anti-leopoldist forces, the need to enforce the rule of law in order to maintain the institutions, the risk for the individual safety of the staff, the regulatory framework and the doctrines guiding the gendarmes' behaviour on duty, but also the human and material constraints that weighed on an overworked institution.

Although the violence of the gendarmes was largely assumed by most of them and by their tutelage authorities, it still brought about various questions. Firstly, within the body, officers criticised the allocated equipment in years 1930–1931. They argued the available gear was a source of violence, since they were forced to use it in an inappropriate way (rifle grips used to hit protesters, etc.), they pleaded for the adoption of non-lethal material (clubs) or enabling to keep the protesters at a distance (teargas grenades).[29]

Later on, this led to a debate within the gendarmerie's hierarchy. Those in favour of the status quo claimed that it was useless to limit violence, because it was violence that was aimed for when the gendarmes had to intervene.[30] Violence was presented as inherent to the gendarmes' interventions and as a behaviour that was difficult to calibrate. They insisted on the shock and the fear that heavily equipped gendarmes needed to inspire. The debate did not give rise to quick changes, but it demonstrates the presence of change factors within the gendarmerie.

Of course, most of the criticism came from outside of the gendarmerie. Criticism became more and more frequent, which illustrates the increasingly important role played by the gendarmerie within Belgian society and its omnipresence during social and political conflicts. In view of the institution's structure, it had to face criticism at both local and national levels. They came from the "street", from the editorial press, political parties, political stakeholders: mayors of some municipalities, local officials, deputies and senators.

In the years 1930–1931, socialist mayors complained that the gendarmes (allegedly) blindly attacked pacifists protesters.[31] In 1950, in the context of the Cold War, communist parliamentarians advocated for a considerable decrease in the gendarmerie's means of action.[32] The gendarmes were at the heart of the Belgian political game because of their action, their organisation and what they symbolised. Therefore, its apparent neutrality in restoring public order did not fit in line with reality.

2.2 The staff

The issue of the necessary staff in order to guarantee the stability of public order is of the utmost importance. The equation's data is the following: on the one hand, the gendarmerie became the main police force handling these issues. On the other hand, the first half of the 20th century was marked by a succession of crises and by an increasing tolerance towards the expression of discontent, which required a multiplication of police forces' staffing. As a result, at the macro-level, the gendarmerie's staff never stopped increasing over time and almost multiplied by three in nearly 40 years. Besides, the body's staff specialised. Territorial and mobile units in charge of maintaining public order were added (1920–1921) to territorial units, then from 1945, judicial police units were created in order to carry out surveillance and political intelligence missions. Lastly, the situation resulted in a redeployment of the territorial control carried out by the gendarmes. Their jurisdiction was extended to urban and peri-urban areas, which enabled them to extend their hold on the whole national territory on the long run.

Yet, the situation seemed more contrasted at the micro-level. Indeed, the local staff sometimes appeared insufficient in order to deal with disorders. In many cases, only a few gendarmes were dispatched in order to keep order (between six and twelve). As in Grâce-Berleur, where twelve gendarmes had to deal with a mob of several hundreds of people,[33] this could lead to situations where those gendarmes were obviously or supposedly outnumbered. The power struggle resulted in a heavy re-

[27] CAMPION Jonas, "Gendarmes facing political violence (Belgium, 1918–1940)", in MILLINGTON Chris, PASSMORE Kevin (eds.), *Political Violence in Western Europe*, Basingstoke, Palgrave, to be published in 2015.

[28] 1290 cases of social disorders were reported in 1950 by the judicial police, among which nearly 750 between June and August. L'ENTRÉE Jonathan, *La gestion du maintien de l'ordre en 1950…,* pp. 79-84.

[29] Brussels, MRA, Moscow depository, 5535 185 14a 7231, note no. 1805 by Major Kinzinger, to the corps' commander, October, 11th 1930.

[30] Brussels, MRA, Moscow depository, 5535, 185 14a 7231, note no. 798 from the *groupe de Namur*, November, 11th 1930. An officer *"estime qu'il n'y a pas lieu de faire de la sentimentalité et qu'il faut y aller carrément"* (considered that sentimentalism was out of the question and that it was necessary to resort to violence). Brussels, MRA, Moscow depository, 5535, 185 14a 7231, note no. 202 of the *district de Liège*, November, 11th 1930.

[31] Brussels, MRA, Moscow depository, 5535 185 14a 7231, copy of a letter from the Mayor of Mouscron, August, 20th 1930.

[32] *Annales Parlementaires, Chambre*, August, 17th 1950.

[33] L'ENTREE Jonathan, *La gestion du maintien de l'ordre en 1950…,* p.37.

sponsibility laying on the shoulders of the involved gendarmes and a wide autonomy given to the non-commissioned officers or subordinate officers.

This way of dealing with disorders and dispatching staff is related to a will to be present on the field and to occupy it in circumstances of turmoil. Indeed, the gendarmes multiplied preemptive static guards of infrastructures, patrols on the roads, checkpoints,[34] which contributed all the more to repressive actions in the event of unexpected disorders or badly assessed situations. In this context, the gendarmes needed to be very mobile, easy to mobilise, and have the possibility to benefit from reinforcements on short notice. They also required effective means of communication and links[35] as well as relevant intelligence. The military nature of the gendarmerie enabled the body to cope with this high degree of mobilisation, by demanding longer tours of duty to staff and by temporarily grouping units according to the circumstances. On the medium-term, the situation yet proved tricky: staff reassignments led to a disorganisation of the body and weakened normal hierarchical relations, while the duration and frequency of social or political conflicts prevented the gendarmes from properly carrying out their regular duties or activities (professional and physical trainings, administrative duties, etc.).

The actual behaviour of the gendarmes had sometimes little to do with the principles laid down in official instructions. The actions they took were meant to react to the events in order to best handle a disruptive situation. This partially explains the constant claims from the gendarmerie to gain better gear or staff increases. These demands fostered criticism from those who opposed the gendarmerie, who emphasised its continuous and unjustified growth.[36]

2.3 Relations and institutional cohabitations

In a situation where local and national logics combined, the relations between the gendarmes and the various authorities deserve to be analysed in depth. These analyses confirm the power struggles, the priorities, but also the political and institutional oppositions that emerged regarding the body regarding the re-establishment of order. It also demonstrates the divisions and tensions within Belgian society, between a will for centralisation and local autonomy, or between the Catholic institutions, the liberal and working classes, represented here by socialist, and later on, communist instances.

In the years 1930–1931, the relations between the heads of the gendarmerie and the socialist mayors, who were deemed too lenient towards the protests, became very tense.[37] The same wariness was observed in the relations with the municipal police forces of small-sized to medium-sized localities which, as they directly depended from the mayors' authority, were considered little efficient, too tolerant and too close to the protesters. In the framework of this "struggle", the gendarmerie benefited from the support of the government and central administrations, who aimed at dealing with violence in a global way and at avoiding any contagion effect between social movements.[38] Belgian gendarmes also closely collaborated with their French counterparts. The coordination included exchanging intelligence, protecting the free circulation of workers and closely watching Belgian syndicates in order to avoid a propagation of the conflict. The gendarmes who faced disruptive situations easily understood each other and on the field, they adopted an attitude of cross-border professional solidarity.[39] In the years 1930–1931, since the events remained restricted to a regional dimension, they only gave rise to little nation-wide repercussions: the body's central hierarchy did not have to provide extensive justifications for the behaviour of the staff dispatched to the region in crisis.[40]

The analysis of the events of Summer 1950 confirms these roles, where the national dimension of the Royal Question can be observed. The continuous engagement of the gendarmes during Summer 1950 led to numerous complaints towards the institution. The way the events developed confirmed the institutional autonomy of the gendarmerie. The body strongly put forward its point of view, without hesitating to criticise the behaviour of the other "agents of the State". The gendarmerie then proved self-confident in its way of dealing with order-keeping and little likely to question itself regarding its practices.

In this respect, the aftermath of the Grâce-Berleur protest is a typical example. On both local and general staff levels, the gendarmerie criticised the administrative authority who was unable to ban the meeting before its start.[41] Far from adopting a low-profile posture in the face of criticism, the general staff rewarded the gendarmes involved in the protest. The gendarmerie stood together, but also kept the support from central authorities, as an incontrovertible stakeholder in view of the political risks of the time. The speeches held in Parliament, which tapped in the institutional arguments, sufficiently testify to this fact.[42] The dramatic event was to become the trigger for a legislative process that resulted in the adoption of the law of December 1957.[43]

---

[34] Brussels, MRA, Moscow depository, 5535 185 14a 7231, note no. 1805 by Major Kinzinger, to the corps' commander, October, 11th 1930.

[35] Hence the power struggle, which started in the 30s, between the gendarmerie and the Army in view of establishing an autonomous radio network for the body. See Brussels, MRA, Moscow depository, 1777 185 144 363, „note from the *T. GN.F*'s commander, no. 5412 B/H", July, 26th 1933.

[36] *Annales Parlementaires, Chambre*, February, 7th 1923.

[37] Brussels, MRA, Moscow depository, 5535 185 14a 7231, note no. 342 of the General inspector of the Gendarmerie to the Ministry of Defense, September, 4th 1930.

[38] Brussels, AGR, Council of Ministers, minutes of September, 12th to October, 17th 1933.

[39] Brussels, MRA, Moscow depository, 5535 185 14a 7231, letter from the General Maury to the commander of Lille's legion, September, 27th 1930.

[40] Brussels, MRA, Moscow depository, 5535, 185 14a 7231, letter from the Inspector of the Gendarmerie no. 432, September, 4th 1930.

[41] Notably the *Commissaire d'arrondissement*. Jonathan L'Entrée, *La gestion du maintien de l'ordre en 1950…*, pp. 40-41.

[42] *Annales Parlementaires, Chambre*, September, 11th 1951.

[43] See CAMPION Jonas, „Vers un État dans l'État ? La gendarmerie belge, d'une sortie de guerre à l'autre (1918–1957)», in HOUTE Arnaud, LUC Jean-Noël (eds.), *Les gendarmeries dans le monde, de la Révolution française à nos jours*, Paris, PUPS, to be published in 2015.

Conclusions

The crossed analysis of the changes that occurred within the regulatory framework and the practices of the gendarmerie regarding keeping and restoring order is a starting point so as to observe the transformation of Belgian democracy and its successive crises in the course of the first half of the 20th century. The order-keeping methods gradually adapted to legislative transformations, to the emergence of new feared social groups and stakeholders, acknowledged or tolerated, and to the progressive implementation of the Social State where repression was no longer the only option when dealing with anti-establishment phenomena. Order-keeping is a very useful point of view to study the stakes regarding the organisation and the practices of the gendarmerie, and a clear illustration of the political, geographic and social divisions which structured the country. The military logic, which required the use of the force, was gradually replaced with a graduated coercion dynamic, based on new equipment's and principles. It was no longer necessary to resort to force in order to reach the expected goals.

The carried out analysis also demonstrates the gradual increase in importance of an institution, which had been little influential in these domains until then. The First World War, through the redefinition of the police system that it demanded, opened the way to an extension of the gendarmerie, which quickly specialised in the order-keeping missions. Gradually, the gendarmerie acquired more autonomy, multiplied interventions and developed an expertise which was both acknowledged and put forward.

This resulted in institutional tensions: on the one hand, the gendarmes were more exposed to criticism as they were more regularly present on the field. On the other hand, this strategy could prove costly in terms of human and material resource management. These restrictions could sometimes be felt during disorders and forced the engaged staff to resort to "extreme" reactions. The gendarmerie –aware of these difficulties – unceasingly demanded more material means and staff, which led to a de facto increased wariness towards the institution, but also to an increased importance in the political agenda and public debates.

Tackling the Terrorists: the Experience of Internment without Trial in Northern Ireland

Martin Doherty[*]

Abstract

In August 1971, the devolved Stormont administration in Northern Ireland introduced internment without trial of those suspected of involvement in IRA terrorism. Ever since, the policy has been regarded as an abject failure. This article will reassess many of the key questions about internment: why did the Northern Ireland government introduce it when it did? Why did the Westminster government agree to a measure without parallel in British peacetime history? Why did it fail, when it had worked before? Was internment always doomed, or only because it was badly implemented? What was the alternative? How does the liberal democratic state defend itself against violent subversion without itself resorting to brutality and violence? This article is based on archival research in Great Britain, Northern Ireland and the Republic of Ireland, and on interviews with former internees, politicians and civil servants, and former members of the security forces. It suggests that internment was a relatively humane and honest policy and might, in different circumstances, have spared Northern Ireland thirty years of murder and mayhem.

Key words: *counter-terrorism; internment without trial; Irish Republican Army; Northern Ireland; 'troubles'.*

The most spectacular challenge to law and order in contemporary European societies comes in the form of political terrorism. In recent decades, terrorist groups from left- and right-wing extremes have bombed, kidnapped, robbed, intimidated and assassinated in a variety of European states in pursuit of a variety of supposedly political objectives. More recently, the citizens of Madrid, London and Paris have been the victims of an Islamist terrorist onslaught of unprecedented savagery. Such terrorist campaigns place enormous pressures on liberal democratic states and on their criminal justice systems, and at times, can succeed in bringing some of them to the brink of collapse and civil war. One such campaign was that waged by the Irish Republican Army in the UK province of Northern Ireland, from 1970 until 1997. By 1972, the centres of many towns and cities in Northern Ireland had been ruinously bombed, and the everyday lives of their citizens seriously dislocated. In those republican areas of Belfast and Londonderry, from which the IRA recruited and drew support, the British Army was effectively an army of occupation. Meanwhile pro-state loyalist death squads conducted a despicable campaign of sectarian murder against the Roman Catholic population of Belfast and elsewhere.

Northern Ireland in this period was governed by a devolved executive based at Stormont on the outskirts of Belfast. In the fifty years of the existence of the statelet of Northern Ireland, political power had been exclusively exercised by the Unionist Party, which was elected by, and felt accountable only to, the Protestant-unionist majority community. The Roman Catholic-nationalist minority had repeatedly accused the Stormont administration of allowing discrimination in the allocation of housing and jobs and had mounted a largely peaceful campaign of civil protest to seek redress of their grievances in the last years of the 1960s. This civil rights campaign had often faced violent opposition from hard-line unionist groups and the police, and really serious disorder broke out in Londonderry in August 1969 over a contested sectarian parade. Rioting rapidly spread to Belfast, with the Catholic population there enduring dreadful attacks from Protestant mobs. In the face of the inability of the Royal Ulster Constabulary (RUC) to contain the disorder, the British Army had to be deployed to prevent anarchy.

In the absence however, of really serious political reform, the hitherto quiescent Irish Republican Army (IRA) sought to take advantage of the situation to reassert its control over nationalist areas, by playing its traditionally defensive role, but then to moving rapidly to a much more aggressive policy of bombing and assassination, aimed at destroying the Northern Ireland state. This terrorist organisation had its origins in the Anglo-Irish War of 1919 to 1921, following which the greater part of the island of Ireland secured its independence from the United Kingdom. The north-eastern section of the island, where the Protestant-unionist section of the population was in the majority, had remained part of the UK, but with its own devolved executive. At various times, most notably during the so-called 'Border Campaign' of 1956 to 1962, the IRA had attempted

[*] Dr. Martin Doherty, Head of the Department of Social and Historical Studies, University of Westminster, London, United Kingdom.

to provoke the Northern Ireland state by bomb attacks and assassination bids on policemen. However, these campaigns had petered out because of a lack of public support, and the use by both Irish states of the powers of internment of IRA suspects. After the failure of the Border Campaign, the IRA had come increasingly under the influence of various Marxist academics and was taken aback by the civil strife which engulfed the province from August 1969. A traditional, hard-line faction broke away from the Marxist leadership in December 1969. It was this 'Provisional' IRA (PIRA) which spearheaded the campaign of bombing of commercial targets in 1970 and the assassination of policemen, followed from 1971 by a guerrilla warfare campaign against the British Army.

PIRA strategy in this period seems to have amounted to little more than the attempt to cause as much havoc as possible by bombing, shooting, threats and intimidation, robbery and fomenting general mayhem; to tear asunder the fabric of normal life; to smash the institutions of the Northern Ireland state; and to intimidate and harass British official and public opinion into the type of weariness with Ireland which had facilitated the partial accomplishment of the earlier IRA's aims in 1921. In retrospect, such a policy seems utterly reckless, callous, mindless and totally naïve.

Nevertheless by the summer of 1971, the IRA had succeeded in bringing chaos and carnage to the streets of the province. Rioting battles between the Army and large numbers of young hooligans were commonplace, while bomb attacks on commercial and other premises continued relentlessly. In August 1970, two young police constables were murdered by an improvised explosive device in an abandoned car. By September of the same year, terrorists, mostly from the IRA, had exploded over one hundred bombs. Between August 1969 and November 1971, 104 civilians, twelve members of the RUC and thirty-eight members of the armed forces had been killed, with many hundreds more injured. In February 1971 in Co. Tyrone, five innocent civilians were killed by an IRA landmine, intended for a British Army patrol. There had been over 1,000 incidents involving explosives.[1] From 1 January to 9 August 1971, there had been thirty-eight deaths, 327 explosions and 251 incendiary devices discovered. The security situation was clearly deteriorating, with a marked increase in the weight and quantity of explosives used and a growing number of attacks on commercial premises in Belfast. 'These have included for the first time well-planned attacks by gangs of up to a dozen men, and this has shown the growing confidence with which the IRA is operating.'[2] There had been sixteen explosions in January, between thirty and forty in each of the months of February, March and April, between forty and fifty in May and June, ninety-four in July and twenty-three in the first eight days of August. In the view of the Northern Ireland Government, this was 'not only a sustained but a mounting pattern of violence, which could not be borne in any community determined to stay alive.'[3] In these circumstances, there was a growing clamour from many circles for the re-introduction of the internment of terrorist suspects.

The power to intern without trial was set down in Regulations 11-12 of the Northern Ireland Civil Authorities (Special Powers) Act of 1922, whereby the Minister for Home Affairs was empowered to 'take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order'. This extraordinary piece of emergency legislation, introduced to protect the nascent state in its turbulent early years, had been made permanent in 1933.[4] Internment had been used most recently, in both Northern Ireland and in the Republic of Ireland during the Border Campaign, during which time the UK had lodged a derogation under Article 15 from the European Convention on Human Rights. However, the abolition of the Special Powers Act had been one of the key demands of the Civil Rights movement and so the use of internment was always likely to be highly controversial.

Senior Northern Irish politicians had publicly and repeatedly declared that they would not hesitate to intern, but that their security advisers did not recommend it.[5] The reality was that it would have been impossible for the Northern Ireland authorities to have introduced internment without the consent of the UK Government, who certainly in 1970 and early 1971, were reluctant to countenance so drastic a measure.[6] Nevertheless, officials from the Home Office in London, from as early as August 1970, were being dragged into discussions about contingency planning for internment, apparently at the instigation of the Army Director of Intelligence.[7] In December 1970, construction of an internment camp (with a cover story and an alternative use as a military camp) on Ministry of Defence land at Long Kesh was agreed, with work commencing on 1 June 1971.[8]

And it is true that in 1970 at any rate, the Northern Ireland security professionals, specifically the Chief Constable of the RUC, Sir Arthur Young and the General Officer Commanding of the Army, Lieutenant-General Ian Freeland were strongly opposed to internment. Sir Arthur produced three reports for the Northern Ireland government between May and August 1970, in which he unequivocally stated that internment would make matters worse. The political situation was now entirely different from that prevailing in 1956, he wrote, pointing to the existence now of 'a conditioned, indoctrinated, vociferous and articulate minority [community] which is highly volatile, together with a similarly inflamed large body of militant Protestants.'[9]

1 *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971*, HMSO 1971, Cmnd. 4823.
2 The National Archives (UK) (hereafter TNA) CJ 4/56, Douglas-Home to Ambassador, Dublin, 30 July 1971.
3 Public Record Office of Northern Ireland (hereafter PRONI) HA/32/5/8, *Government of Northern Ireland Press Release*, 21 September 1971.
4 Laura K. Donohue, 'Regulating Northern Ireland: the Special Powers Acts, 1922–1972' in *The Historical Journal*, 41, 4 (1998), pp. 1089-1120.
5 *The Times*, 20 January 1971.
6 TNA CJ 4 4/464, Burroughs to Woodfield, nd, late October 1970.
7 TNA CJ 4/464, Hewins to Leyshon, 11 August 1970.
8 TNA CJ 4/65, *Detention and Internment*, August 1971.
9 TNA CJ 4/56, *A Second RUC Paper on Detention and Internment*, 1 July 1970.

He also pointed out however, that in the event of internment 'unilateral' action, directed at the IRA only, would be indefensible and 'many extreme Protestants must be considered as candidates'.[10]

The security situation deteriorated rapidly in March 1971, with a particularly brutal murder by the IRA of three young Scottish soldiers, including two brothers, aged seventeen and eighteen years. However, only days before this atrocity, Home Officials had noted with alarm that David Johnston, Head of the RUC's Special Branch, had changed his mind on internment and was now in favour of it. The Home Office security specialist Philip Woodfield, reported that he had been told by the Secretary to the Northern Ireland Cabinet that internment might be proposed by his government 'not necessarily out of any conviction of its effectiveness but as a last desperate measure to save the Government'.[11] Another British official based in Belfast reported that 'the Head of Special Branch has now advised the Prime Minister that he considers internment to be essential not because he believes it will be effective (Director of Intelligence believes we might pick up about 20 percent and then mostly small fry) but because he fears that the Protestants will take the law into their own hands if internment is not introduced before Easter.'[12] However, the new Army commander, Lieutenant-Colonel Tuzo remained 'firmly of the view that internment is undesirable and would be ineffective. This being the case, they virtually exercise a veto since interment would require a massive military effort in support of the civil power'.[13]

Northern Ireland Prime Minister Brian Faulkner seems to have made up his mind in favour of internment on July 20 1971.[14] The new Chief Constable of the RUC, Sir Graham Shillington was also now in favour, and influential figures in the Army were also speaking out in support, including Major-General A.H. Farrar-Hockley, Commander of Land Forces in Northern Ireland. In early August, he produced an optimistic opinion about the likely impact of internment which although not strictly necessary on purely military grounds, would produce 'a substantial intelligence dividend … especially from the middle ranking members.' He anticipated a few days of rioting and propaganda following which 'the residue of IRA men left with arms would throw their bombs and shoot wildly'. IRA activity would begin again, but probably in the form of flying columns operating in border areas. 'There was a fair chance here of pitched battles, in which the Army would come off the best. Then activity would tail off.'[15]

The meeting at which it was agreed to intern took place at Downing Street on 5 August 1971. It was attended from the UK Government side by the Prime Minister Edward Heath, the Home Secretary Reginald Maudling, the Defence Secretary Lord Carrington, the Foreign Secretary Sir Alec Douglas-Home, and Chief of the General Staff, General Sir Michael Carver. From Northern Ireland there was Brian Faulkner, accompanied by the GOC Lieutenant-Colonel Tuzo and Chief Constable Shillington. Maudling was now more inclined to support internment, although Tuzo was still not in favour on military grounds.[16] Faulkner stressed the seriousness of the security situation, the decline in public confidence, the increasingly serious implications for commerce and industry and the absence of any new initiative which the security forces could suggest to make an early impact. Accordingly, he argued that should be an early use of internment powers. The UK ministers pointed out the difficulty that military advice that internment was necessary had not been given, and stressed the national and international implications of so serious a step. It could not be contemplated without 'balancing' action against parades, curtailment of gun clubs and the clearest emphasis that initiatives to unite the community would be sustained. Heath made the point that if internment was tried and did not succeed in improving matters, the only further option could be direct rule from London. The Chief Constable stated that the time for internment had now arrived, but Tuzo and Carver stated that they could not describe it as essential in purely military terms. The IRA could be defeated by present methods, but whether the likely timescale was acceptable was essentially a political question, and thus not one for determination by them. It is thus apparently misleading to argue that internment was introduced 'contrary to military advice' as is often claimed.[17] The crucial decision in the end was taken by Heath. As the minutes note, 'at this stage, Mr Heath give the firm decision of the UK Government that if, as the responsible Minister, Mr Faulkner informed them that it would be his intention to proceed to early internment, they could concur and ensure the necessary Army support'. Initial UK demands that there be an accompanying indefinite ban on parades were watered down at Faulkner's insistence to a six-month moratorium. Heath also demanded that if there was any evidence of the involvement of Protestants in any form of subversive or terrorist activity, they too should be interned. Faulkner retorted that whatever their involvement in past acts, there was no intelligence indicating an existing or imminent potential Protestant threat. It was only on these grounds that internment of Protestants was not envisaged at present.[18]

The internment operation, 'Demetrius', began at 4:00 am 9 August 1971. Arrests were conducted by the Army, who began raiding homes and hauling suspects off to a Police holding centre, where they were to be held for not more than forty-eight hours. If they were not released or charged with a specific offence, they could be detained under Regulation 11 for a period

[10] TNA CJ 4/56, *A Third Paper on Detention and Internment*, 6 August 1970.
[11] TNA CJ 4/464, Burroughs to Woodfield, 9 March 1971.
[12] TNA FCO 33/1463, Burroughs to Home Office, 15 March 1971.
[13] TNA CJ 4/464, Burroughs to Woodfield, 9 March 1971.
[14] TNA NA CJ 4/56, UKREP to Woodfield, 20 July 1971.
[15] TNA 4/56, White to Crawford, 3 August 1971.
[16] TNA CJ 4/56, Home Office, PS Secretary to State to PS Minister of State 3 August 1971.
[17] See for example, *Operation Banner. An Analysis of Military Operations in Northern Ireland. Prepared under the Direction of the Chief of the General Staff* (2006), Section 219, p. 2-7.
[18] TNA CJ 4/56, *Note of a meeting at 10 Downing Street on Thursday 5 August 1971.*

not normally longer than thirty days. During this period, they could be charged, or released by order of the Attorney General. Alternatively, on the recommendation of the Chief Constable, they could be interned indefinitely under Regulation 12. Detention and internment orders were signed personally by Prime Minister Faulkner in his role as Minister for Home Affairs. Detainees were initially held on *HMS Maidstone*, a former Royal Navy submarine depot, moored in Belfast Harbour, while internees were imprisoned at the newly constructed internment camp at Long Kesh outside Belfast, and later at Magilligan in County Londonderry. A small number of men were taken to a secret interrogation centre at Ballykelly.

RUC Special Branch had produced an initial wanted list of 464 persons of whom 304 were 'lifted' on the first day.[19] In total, 337 men were arrested in the first 'grab' operation, of whom ninety-two were released almost immediately. Detention orders were made in respect of the remaining 245 but fourteen were subsequently released. By 26 August another thirty-four had been detained of whom twenty-two were released. By 10 November 1971, 980 men had been arrested, while 299 men had been interned and were being held at Long Kesh. One-hundred-and-four were being held under detention orders in Belfast prison. Five-hundred-and-eight men had been released and 69 were being held pending a decision on the making of detention orders.[20]

According to the official estimates, those arrested included fifty-seven officers and 101 volunteers of the Provisional IRA and thirty-six officers and thirty-eight volunteers of the Official IRA. The UK Representative reported that of the Provisionals, these included six officers from the Belfast Brigade Staff, two battalion commanders, seven company commanders (plus one company commander killed) and one complete three-man active service unit. 'Those taken outside Belfast included the area organiser for Tyrone, Armagh and South Down. Of Goulding [Official] IRA, four out of eight company commanders in Belfast, three company adjutants, two company quarter-masters and one battalion quarter-master.'[21]

Whatever the military success of the operation, the immediate reaction was an instant and sustained increase in violence, with ferocious street rioting and furious gun battles between the Army and the IRA. Fourteen people were killed on the first day, including eleven civilians, killed by the British Army. Robert Fisk, reporting from Belfast, wrote of days filled with riots, gun battles and fire with up to fifty gunmen in action against the Army.[22] Between 9 August and the end of the month, thirty-two people had been killed, including five killed by the IRA and a further nine killed by the Army. A total of 171 persons were killed in Troubles-related violence in 1971, of whom 140 were killed on or after 9 August.[23]

Moreover, it quickly became apparent that many aspects of the policy had been badly mishandled. Of the total of 980 men who had been arrested since 9 August, over half were released by November, raising questions as to why these individuals had been arrested in the first place. Much of the Special Branch evidence appears to have been inadequate, while one Army order stated that in a house where the wanted man was not present, all males over eighteen were to be 'lifted'.[24] Furthermore, a good deal was made in the press of the fact that some fairly innocuous persons had also been 'lifted', including critics of the Northern Ireland government who had been involved in left-wing or civil rights groups, such as the People's Democracy (PD). It was still being claimed in public that only known IRA men were 'lifted', but it was privately admitted that this was not the case. The UK Representative in Belfast noted that the initial grab list included 'eight members of the People's Democracy or similar groups who represent a particular threat because of their activity in fomenting public disorder and who thus complement the IRA activities.' He noted however, that the list did not contain any person simply on the grounds that he was active in the Civil Rights movement.[25] In the case of a man called John Murphy, the Home Office in London noted that there was evidence to support the view that a 'number of people on the list were there mainly because of general left wing attitudes and membership of left wing organisations'.[26] Another such was Paddy Joe Mclean, who was not and claimed never to have been a member of the IRA. Mr Mclean, then president of the National Association of Schoolteachers, appears to have been interned because he had been interned for four years in the 1950s. On both occasions he strongly denied any involvement in terrorist activity. Nevertheless, he was one of the 'hooded men' whose treatment remains one of the most infamous aspects of the internment episode.[27]

The 'hooded men' were a group of fourteen individuals who were particularly brutally treated during and after arrest. They were subjected to 'deep interrogation', using the so-called 'five techniques' of prolonged wall-standing in a 'stress position', sleep deprivation, hooding, subjection to prolonged hissing noise and deprivation of food and drink. They claim also to have been repeatedly beaten.[28] On 31 August, the Home Secretary appointed a Committee of Enquiry to investigate allegations by those arrested on 9 August of physical brutality. In November the Committee reported that in nineteen cases out of the 342 arrested on the first day, there was evidence

[19] TNA CJ 4/56, *Report by the Army Dept on Northern Ireland for the Period 0908OOE to 1008OOZ Aug '71.*
[20] *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August*, 1971, HMSO 1971, Cmnd. 4823.
[21] TNA CJ 4/56, UKREP to Howard Blake, 14 August 1971.
[22] *The Times*, 12 August 1971.
[23] Extracted from Malcolm Sutton, *Bear in mind these dead ... An Index of Deaths from the Conflict in Ireland 1969–1993* (1994).
[24] Martin J. McCleery (2012) 'Dubunking the Myths of Operation Demetrius: The Introduction of Internment in Northern Ireland in 1971', *Irish Political Studies*, 27:3, p. 428.
[25] TNA CJ 4/56, UKREP to Howard Drake, 8 August 1971.
[26] TNA CJ 4/56, Home Office to Smith, 26 August 1971.
[27] Witness Seminar, *Internment: Forty Years On*, University of Westminster, London, 25 July 2011.
[28] *loc.cit.*

of ill-treatment.[29] Even taking into account likely underestimation, this is relatively small number under the circumstances. However, the treatment of the 'hooded men' was disastrous for the reputation of the entire internment policy and indeed of the British Government. In 1978, the European Court of Human Rights overturned a previous judgement from 1976, that the use of the 'five techniques' amounted to torture. The ECHR ruled instead that they amounted to inhuman and degrading treatment.[30] However, the affair continues to rumble on and in 2014, there was a furore in the British and Irish press, when it was revealed that in March 1977, the then Secretary of State for Northern Ireland had told the Prime Minister that in 1971, a Cabinet Minister had sanctioned the use of 'methods of torture' in Northern Ireland.[31] Other than the use of the word 'torture' by a British minister, and the newly revealed location of the interrogation centre at Ballykelly, there appears to be little new in these revelations. Nevertheless, in late 2014, the Irish Government confirmed that a decision had been made to refer the case of the 'hooded men' back to the European Court of Human Rights in Strasbourg in an application to revise its 1978 judgement.

As has already been noted, British ministers and Sir Arthur Young, former Chief Constable of the RUC, had insisted that it would be necessary to avoid a 'one-sided' internment, and that a number of Protestant-unionist (loyalist) extremists should also be arrested. In the event, this did not happen and all of those arrested in the first and subsequent sweeps were associated with Republican paramilitaries and were overwhelmingly Roman Catholic. It was not until February 1973 that any loyalists were interned and of 1,981 persons interned in total, only 107 were loyalists. However, Faulkner insisted and continued to insist publicly and privately that the decision on whom to intern was based entirely on his security advice. 'At present he was advised there was no case to justify the detention of Protestants.'[32] In fact, the original Special Branch list included '145 Republicans, 62 Protestants and 15 Anarchists.'[33] In August 1971, however, other practical considerations were brought into play. As the UK Representative in Belfast pointed out, 'the security forces are going to be stretched to the limit in pulling people in and at the same time containing the public demonstrations which we must assume will take place. If they were simultaneously to go after people in the Protestant community they would also have to face mob resistance there … In the light of the picture that has been given to me, I must recommend, however reluctantly, that we allow the initial grab to go ahead on the basis of the list that has been worked out.'[34]

It was not until March 1972 that it was decided that 'it might be necessary to detain some Protestants for security reasons in the future'.[35] But it was nearly another year before any actually were. In fact, the loyalist parliamentary group the Ulster Volunteer Force (UVF) had begun a campaign of sectarian murder in 1966. In 1971, it was responsible for at least eighteen murders, including the bombing of McGurk's bar in Belfast in December in which fifteen people died. In 1972, the UVF was responsible for at least forty-five murders, mostly of entirely innocent Catholic civilians. Whatever might be said of the pressures under which the security forces laboured in the first days of internment, the failure to intern any loyalists for fear of a 'Protestant backlash', after so murderous a campaign, was a lamentable dereliction of duty.[36]

There seems little doubt that the effectiveness of internment against the IRA was seriously impaired by the unwillingness of the government of the Republic of Ireland to introduce it there also, as it had during the Border Campaign. Ironically enough, the first serious suggestion of internment anywhere in Ireland in this period had come in December 1970 in the Republic, in the face of rumours of an IRA threat to the Government there.[37] The British had secretly approached the Prime Minister of the Republic, Jack Lynch in late July 1971, to sound him out about the possibility of the 'parallel' implementation of internment in both jurisdictions. However, Lynch said that he could not possibly introduce internment in the Republic, that there were no immediate grounds for doing so, and that if he tried to do so because the British had done so, 'neither his nor any Irish government could survive such a measure'.[38]

Lynch was probably correct, and internment in the Republic could only have been contemplated as part of an overarching political settlement in Northern Ireland and one somehow involving the Republic. This was not on the agenda in 1971 however, and 'Demetrius' was unaccompanied even by political measures likely to make it less unpalatable to the local Catholic-nationalist community. For instance, Faulkner told his Cabinet in late August that UK ministers had clearly accepted that in any moves to encourage the minority to play their full part in the affairs of the State, the constitutional position of Northern Ireland must remain inviolate. Moreover, if Opposition MPs could be attracted back to Parliament, Faulkner insisted that 'any scheme must operate within the framework of a majority-rule democracy.'[39] Any talk about coalition government was out of the question and 'any moves to make special provision for minority interests in a situation in which political power was out of their grasp in the foreseeable future would have to be

[29] *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971*, HMSO 1971, Cmnd. 4823.
[30] Case of Ireland v. The United Kingdon, (Application no. 5310/71), Judgment, Strasbourg, 18 January 1978.
[31] *The Times*, 6 December 2014.
[32] PRONI CAB/4/1609, *Conclusions of a Meeting of the Cabinet Held on Tuesday 17 August 1971*.
[33] TNA CJ 4/56, *A Second RUC Paper on Detention and Internment*, 1 July 1970.
[34] TNA CJ 4/56, UK REP Belfast to Howard Drake, 8 August 1971.
[35] PRONI NI HE/32/3/7, *Conclusions of a Meeting of the Joint Security Committee*, 16 March 1972.
[36] McCleery, *op.cit*., p. 429.
[37] TNA CJ 4/65, *Detention and Internment*, August 1971.
[38] TNA CJ 4/56, Peck to UKREP, 30 July 1971.
[39] PRONI CAB/4/1610, *Conclusions of a Meeting of the Cabinet Held on Friday 20 August 197*1.

broadly acceptable to the community as a whole.'[40] The most that Faulkner was prepared to suggest in August 1971, was an enlarged Northern Ireland House of Commons, a reformed Upper House with wider activities and a number of nominated members, and a possible Minority Advisory Body.

But since the moderate nationalist SDLP had already withdrawn from Stormont before the internment policy was implemented, it would have taken a really imaginative and radical offer to tempt them back into an unreformed Stormont which was wielding powers of internment, directed solely at the nationalist community. No such offer was forthcoming.

Despite the continued violence, there was some optimism in the Northern Ireland government that internment was working, talk of rehabilitation of the internees, the release of the less dangerous ones, and even, ultimately of a general amnesty. The Stormont Emergency Committee was told in October 1971 that 'it now appeared that internment was breaking up the leadership of the terrorists, and wanted men were still being picked up regularly. The terrorists were also losing men through casualties, and there was some evidence that less experienced men were carrying out the terrorist attacks. The IRA was still recruiting men to try to make good their losses.'[41] The following month, the Committee was told that 'the Security Forces thought that the backbone of IRA resistance was now broken, although this did not mean a quick end to the campaign'.[42] In mid-January 1972, Stormont security officials were discussing the possibility of a run-down of internment in return for an IRA cessation of violence: 'it could be argued that the IRA leadership are so hard pressed that within weeks they might be ready enough to give up their inflated aims for something more modest in this form.'[43] A few days later, Faulkner was writing to Maudling about segregating and rehabilitating some internees. The objective would be 'to remove the more amendable cases from the influence of hardliners … and to bring them to a form of mind where they can be safely released. This means rehabilitation with a view to a return to normal life as soon as possible. But one should be under no illusions that fighters in the cause of Irish nationalism can in some way or other be turned inside out like the Mau Mau or Viet Cong. The best one can aim at is to encourage those with strong republican aspirations to find other outlets for their energies or different means of achieving their political goals.'[44]

Such optimism however, was shown to have been terribly misplaced by the shocking events of 1972. At the end of January, significantly enough at an anti-internment march in Londonderry, British soldiers killed fourteen innocent and unarmed demonstrators on what became known as 'Bloody Sunday', completing the alienation from the existing system of the Catholic-nationalist community. The IRA's ferocious campaign of bombing and assassination continued unabated. In March 1972 in central Belfast, a bomb ripped through a restaurant, packed with Saturday afternoon shoppers, mostly women and children, killing two young female friends, and horribly mutilating dozens of others. In the previous three months, there had been 148 explosions in Belfast and 218 elsewhere in the province.[45] In Belfast in July, the IRA exploded twenty-six bombs in under eighty minutes, killing nine people. Also in July, the IRA set off three car bombs in the village of Claudy, killing nine people, including three children. By this time, the British Government, fearing that Northern Ireland was 'on the brink of complete anarchy' had decided that it had to assume direct control of law and order forthwith.[46] In March 1972, the Stormont system was prorogued, and the British Government took full control of its benighted province, and its internment policy, for the first time in fifty years. 'Demetrius' had failed in its military aim of defeating the IRA and its political ambition of saving the Stormont system.

So, with the benefit of forty-odd years' hindsight, what might be said of experience of internment in Northern Ireland as a weapon against a terrorist insurgency? Historians of the 'Troubles' in Northern Ireland have not looked favourably on the policy, almost universally regarding it as a 'colossal blunder', which made matters worse rather than better, which alienated the Catholic-nationalist community, spurred more of its young to join the IRA, and which significantly damaged Britain's reputation in the world.[47] That the violence increased after internment is undeniable, and the calendar year after its introduction, 1972, was the worst of the 'Troubles', with 480 violent deaths. However, as was pointed out at the time, to argue that internment had failed because violence had increased 'is a clear example of the logical fallacy of 'post hoc ergo proctor hoc' which consists in arguing that because one thing follows another, the first is the cause of the second.'[48] In the absence of internment, it is very hard to imagine a scenario wherein IRA violence would have decreased in the second half of 1971 and into 1972, or even to have been kept at a 'tolerable' level. If the IRA was capable of increasing its campaign after hundreds of its members had been interned, it was certainly capable of having done so if they had still been on the streets. As the Government pointed out, 'none of those who have since been critical of the internment policy had suggested any practical means to control the situation. The choice facing the Government was not, unfortunately, whether to deal with this evil through the ordinary legal process or through the use of Special Powers. It was a choice between using these Powers and failing to deal with the matter in any adequate way.'[49]

[40] PRONI CAB/4/1610, *Note of a Meeting Held at Chequers*, 19 August 1971.
[41] PRONI HA/32/5/8, Emergency Committee Meeting, 29 October 1971.
[42] PRONI HA/32/5/8, Emergency Committee Meeting, 26 November 1971.
[43] PRONI NIO/25/3/16, Harris to Stout, 19 January 1972.
[44] PRONI NIO/23/3/16, Faulkner to Maudling, 25 January 1972.
[45] PRONI CAB/9/312/4, *Government of Northern Ireland Press Release*, 7 March 1972.
[46] Edward Heath, *The Course of My Life. The Autobiography of Edward Heath* (1998), p. 436.
[47] J.J. Lee, *Ireland 1912–1985. Politics and Society* (1989), p. 437
[48] Rev. Gillies, quoted in *The Case for Internment*, Unionist Research Department, n.d., PRONI CAB/9b/83/7.
[49] PRONI HA/32/5/8, *Government of Northern Ireland Press Release*, 21 September 1971.

Faulkner was right to argue that none of his critics in 1971 or 1972 offered any viable alternatives to interment. The moderate nationalist party, the SDLP had withdrawn from Stormont in July 1971, before the policy was introduced, and after it, refused to engage in any way with Faulkner's government. They supported a campaign of civil disobedience, including a rent and rates strike, thus bringing to an end any hope of political progress while internment continued. No viable alternatives were suggested either by Jack Lynch, other than the immediate abolition of the Stormont system, and this despite the fact that he himself had threatened the introduction of internment in the Republic the previous December. The British Government had no alternatives to offer either, and were obliged to continue internment after they abolished the Stormont system in March 1972. The last internees were released in December 1975.

Faulkner had spoken in March 1972 of his reluctance to 'bend' established judicial procedures in order to secure convictions, as an alternative to internment. He told Harold Wilson that to do so 'would raise a storm that would be even more serious and damaging than that raised by internment and I have been impressed by hearing this view expressed quite freely by people with wide experience of internal security operations. Internment, which is in effect preventative detention, has the merit, however slight, that it can be ended quite simply when the emergency has passed, and leave the Court procedures free of any taint'.[50] The same view had been expressed the previous month in a Northern Ireland Government briefing paper. 'Those who attack internment are … equally ready to attack any interference with, or usurpation of, the ordinary courts. Furthermore, many lawyers would maintain that in times of civil strife it is better to introduce internment than to alter or strain common law principles and procedures. It is important that these be preserved in view of an eventual return to normal conditions.'[51]

However, in the event, this 'bending' is exactly what happened and it could be argued that the alternatives to internment had even more deleterious consequences than the policy itself. In August 1973, following the publication of the Diplock Report, the UK Government under the Northern Ireland (Emergency Provisions) Act, abolished juries for what were known as 'scheduled' (ie terrorist) offences. In the 'Diplock' courts, a single judge, sitting alone, determined the guilt or otherwise of the defendant and also sentenced him.[52] Moreover, under Section 6 of the same Act, the rules of evidence were changed to allow the admissibility as evidence of statements made by the accused, so long as he had not be subject to torture or to inhuman or degrading treatment. A year later, following murderous IRA attacks on public houses in Birmingham, Parliament rushed through the Prevention of Terrorism (Temporary Provisions) Act, which gave the Secretary of State the power to order detention of suspects for up to seven days, without evidence necessarily connecting them to any specific crime. In Northern Ireland, suspects arrested under this draconian legislation, were held without access to legal representation for up to a week in interrogation centres at Strand Road RUC Station, Londonderry, Gough Barracks in Armagh, and Castlereagh Interrogation Centre, Belfast. Moreover, there were widespread allegations that suspects were routinely beaten to extract confessions, which were then used to secure their conviction under the Diplock Courts system.[53] These suspicions were confirmed for many people in 1979 with the publication of the report of an official enquiry into RUC interrogation techniques, conducted by an English Circuit Judge, Harry Bennett, which found that abuse of suspects had indeed taken place while in police custody.[54] More recently, former RUC officers have confirmed that beating and abuse of suspects was commonplace and systematic.[55]

All of these changes need to be seen as part of a wider British government policy, instigated by the Labour government from 1975, of claiming that Northern Ireland was a 'normal' part of the UK, afflicted not by an armed, politically motivated insurgency, but rather by a crime wave, which could be tackled by the police in the first instance, and without extrajudicial, administrative measures such as internment. This meant the so-called 'primacy of the police', the abolition of 'special category' status for terrorist convicts, and the phasing out of internment.[56] As Secretary of State Rees put it in May 1976, 'those who commit murder and robbery, those who bomb and kill, will be arrested and charged and, if found guilty, sentenced to terms of imprisonment as the criminals they are. They will not be locked away by me as an administrative measure; and they will not be able to claim political status and special treatment when they go to prison.'[57] IRA convicts absolutely refused to accept that they were 'ordinary' criminals, and the criminalisation policy resulted in the IRA hunger strikes in the H-Blocks of the Maze Prison in 1980 and 1981, the deaths of Bobby Sands and nine of his comrades, and all of their lamentable consequences for Northern Ireland for much of the 1980s and beyond.

Moreover, following the publication of the Bennett Report in 1979, and the appointment of a new Chief Constable of the RUC, complaints of systematic police brutality fell away. However, what approached a policy of beating suspects to extract

[50] PRONI CAB/9b/83/7, Faulkner to Wilson, 7 March 1972.

[51] PRONI CAB/9b/83/7, *Internment. Background to Internment*, 28 February 1972.

[52] *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Chairman: Lord Diplock*, HMSO December 1972, Cmnd. 5185.

[53] Peter Taylor, *Beating the Terrorists? Interrogation in Omagh, Gough and Castlereagh* (1980), *passim*.

[54] *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland*, Chairman: His Honour Judge H. G. Bennett, Q.C, March 1979, Cmnd. 7497

[55] *The Guardian*, 11 October 2010.

[56] 'Special category' status had been conceded by the British Government in 1972, and was a tacit acknowledgment that Republican and loyalist convicts were politically motivated. These were housed in conditions not unlike those of prisoners-of-war, did no prison work, wore their own clothes, and organised their own social, educational and recreational facilities.

[57] 'Good Government, fair government, firm government', *Ulster Commentary*, no.356, May 1976, p.8.

confessions, seems to have been replaced by another controversial policy of using 'converted terrorists', otherwise known as 'supergrasses', to secure convictions of very large numbers of suspected terrorists on the evidence of a single informer. Between 1982 and 1985, no fewer than twenty-five 'converted terrorists' gave evidence leading to the imprisonment of hundreds of IRA and loyalist suspects.[58] In one notorious case, that of Christopher Black in 1983, thirty-five people were convicted in a Diplock Court, by Mr Justice Basil Kelly, a former Unionist MP, and sentenced to a total of 4,022 years in prison.[59] Subsequently many of the convictions secured through 'supergrass' trials were overturned on appeal, such as in the case of twenty-four individuals convicted on the evidence of 'converted terrorist' Harry Kirkpatrick. The judge described Kirkpatrick as a 'deeply flawed' witness who had lied in his evidence.[60] By this time the 'supergrass' system was more or less discredited and was discontinued.

Back in 1971 and 1972, Faulkner had been harangued from his unionist right, from the likes of Ian Paisley and Bill Craig, to instigate much more draconian measures against the IRA, to rearm the RUC and to reconstitute the disbanded and notoriously sectarian 'B' Special Constabulary. Craig made an infamous speech at a loyalist rally in Belfast in March 1972, when he talked of the necessity of 'liquating the enemy'. Faulkner's government had directly addressed such demands in February 1972, pointing out that in other countries, tackling terrorist violence had 'frequently involved the complete clearance of guerrilla bases, with consequent extensive hardship and loss of life to civilians in the areas. The security forces are, of course, ready to engage the IRA at any time. But underlying the policy of internment is the belief that it is better to deprive a man of his liberty than of his life. When the emergency is over, his liberty can be restored.'[61]

However, after internment had been phased out, members of the Special Air Service (SAS) of the British Army and of the Headquarters Mobile Support Unit (HMSU) of the RUC were involved in a number of notorious cases in the 1980s, when members of terrorist organisations, sometimes unarmed, were apparently deliberately killed without any attempt to apprehend them. The HMSU killed six republican paramilitaries in three separate episodes in November and December 1982. In February 1985, three armed members of the IRA were shot dead by the SAS in an incident in Strabane. This was the third time in twelve weeks that IRA men had been shot dead during terrorist operations, prompting the Leader of the Opposition in the Republic to accuse the British Government of approving a 'shoot-to-kill' policy.[62] In May 1987, the SAS killed eight heavily armed IRA men who were attacking an RUC station at Loughall in Co. Armagh. In March 1988 in Gibraltar, the SAS killed three unarmed members of an IRA 'active service unit'. Whatever the rights and wrongs of these episodes, had these twenty individuals belonged to an earlier generation of IRA activists, they would probably have been interned, rather than killed.

Perhaps most shocking and depressing of all however, is the clear evidence now of long-term collusion between members of the security forces – the British Army, its locally recruited unit the Ulster Defence Regiment, and the Special Branch of the RUC – with loyalist death squads, thereby implicating the British state in many dozens of murders.[63] After the largest criminal investigation in UK history, Sir John Stevens, Commissioner of the Metropolitan Police, who conducted three separate enquiries into collusion, found that 'the unlawful involvement of [British] agents in murder implies that the security forces sanction killings.'[64]

Supporters of the IRA in Northern Ireland and elsewhere, try to give the impression that their terrorist campaign arose in response and resistance to internment, rather than the other way around. In reality of course, had there been no IRA campaign, there would have been no internment. It is also hard to understand how any IRA man could legitimately object to internment - other than on the grounds that he had been caught - when the alternative was that he be tried and convicted as a criminal. Similarly hypocrisy applies to complaints from IRA supporters about a 'shoot-to-kill' policy, since 'shooting to kill' is surely, what war is all about. But Northern Ireland from 1970 was engulfed by an armed insurgency and not a crime wave. To pretend otherwise was, in a way, as hypocritical as IRA complaints about internment. Internment was an extraordinarily draconian policy, but these were extraordinary times. However, it was not necessary that internment be so indiscriminately and so clumsily executed, in so blatantly partisan a manner, and be accompanied by brutality and 'methods of torture'. And it could have worked, had it been executed in a joint operation with the Republic. But this could only have happened as part of an overarching political settlement of the type achieved with the Belfast Agreement of 1998. And harsh as it is to state it, the people of Northern Ireland had just not suffered enough by 1971, to countenance such a settlement. Nevertheless, in comparison to all the 'less draconian' measures which replaced it, from the systematic beating of terrorist suspects, through the perversion and distortion of the criminal justice system, through the deployment of paid spies and informers, and up to and including state-facilitated murder, internment in Northern Ireland seems, in retrospect, a more humane and certainly a more honest policy.

58 *The Guardian*, 22 February 2012.
59 *The Times*, 5 August 1983.
60 *The Times*, 24 December 1986.
61 PRONI CAB/9b/83/7, *Internment. Background to Internment*, 28 February 1972.
62 *The Times*, 25 February 1985.
63 Anne Cadwallader, *Lethal Allies: British Collusion in Ireland* (2013), *passim*.
64 *Stevens Enquiry: Overview and Recommendations*, By Sir John Stevens QPM, DL, Commissioner of the Metropolitan Police Service, 17 April 2003.

Hollywood: Propaganda and Control*

*Alan Sked***

Abstract

This article seeks to show from a review of Hollywood's attitude towards fascism, communism, Nazism, domestic politics and foreign policy that, despite the theory of the Frankfurt School that the American masses were induced into supporting capitalism through false consciousness, the opposite was the case. The views of the masses, particularly their objection to controversy and ideology, meant that studio moguls had to respect the line laid down by them or else lose their profits. In short, Hollywood was controlled by the masses, not vice-versa.

Key words: *Communism; dictatorship; Disney; Holocaust, Hollywood; ideology; Jews; Nazism; Red Scare; Vietnam.*

Hollywood

Hollywood in the twentieth century was the world's dominant, indeed unrivalled, film industry and would have been in a unique position to act as an agency of propaganda.[1] But was it ever used in this way? The Frankfurt School certainly believed it was employed by western capital as a means of sedating the masses and creating a false consciousness that reconciled the workers to the capitalist system by diverting their attention from the class struggle to the glamour created by the Hollywood studios with their regular fixes of star–studded musicals, westerns, thrillers and comedies. People watching the movies—and they were watched weekly by more or less the whole US adult population—could forget about the world depression. Moreover, Hollywood's films were exported all over the globe and, presumably, fulfilled the same function elsewhere. But did they?

Capitalists aside, there is also the question whether Hollywood was ever controlled as a propaganda machine by more precise political groups—the Left, Jews, Nazis, or, has been more recently alleged, "the national security state"? Did this ever happen? If so, how did any of these groups manage to take control?

Throughout its history Hollywood has been condemned regularly by many people—conspiracy theorists naturally but also more rational beings— for having fallen victim to political, ideological and social enemies. The latest dispute has been over the role of Nazism in Hollywood in the 1930s, with, for example, the British newspaper *The Sunday Telegraph*'s entertainment magazine *Seven* on the twenty-ninth of September 2013 running an article by the young American historian Ben Urwand entitled *Did Hitler Run Hollywood?* Its front cover has a picture of the Führer standing beside a cinema projectionist and its cover title is *Hitler's Hollywood Years. The untold story of the film industry's pact with the Nazis.* A more wide-ranging account of the debate around Urwand's work is to be found in the 10 July 2013 edition of America's *The Chronicle of Higher Education* in an article by Alexander C. Kafka entitled *When Hollywood Held Hands With Hitler.* We shall return to this particular debate later on.

Hollywood and Reds

The fear of Hollywood coming under the control of sinister forces can be dated perhaps to the First World War. America then used Hollywood stars such as Charlie Chaplin and Douglas Fairbanks Jr. to sell US war bonds to huge crowds of people. And they were very successful. These stars raised about $2 million—a huge sum in these days. But their very success created a problem. Suppose they started to sell political formulae? As Marlon Brando later remarked, if movie stars could sell cologne, why couldn't they sell ideas?[2] In Chaplin's case, this indeed be-

* This article hopes to provide an original analysis of the work of many specialists on film history, whose output is rarely pulled together. It asks the obvious questions about power in Hollywood. Others who have done this seem to have got side-tracked amidst the tangents of post-modernist or Marxist theory.

** Alan Sked, Professor of International History, Department of International History, London School of Economics and Political Science, Houghton Street, London, United Kingdom.

1 Victoria de Grazia, 'Mass Culture and Sovereignty: The American Challenge to European Cinemas, 1920–1960,' *The Journal of Modern History*, Vol. 61, No. 1, (March 1989), pp. 53–87.

2 The actual quote was: "If an actor can be influential selling deodorants, he can be just as useful selling ideas." See Steven J. Ross, *Hollywood Left and Right. How Movie Stars Shaped American Politics*, Oxford and New York, 2011, p. 5.

came a problem.[3] The most famous—also the richest—movie star in the world was a left-winger. His most famous silent film character, the Tramp, was famous for mocking the authority of all sorts of authority figures. Later on, during the Depression, his films—*City Lights* (1931) and *Modern Times* (1935) — mocked the capitalist system, without, of course, calling for its overthrow. Moreover, Chaplin could not be controlled. He was filthy rich, owned his own studio, and was his own star, producer, director and distributor. He had distinct intellectual pretensions and was feted by intellectuals all over the globe. His right-wing enemies also put it about—quite falsely—that he was Jewish. With the making of *The Great Dictator* (1940), his comic genius reached new heights and the spoken climax to the otherwise silent film has the faux-dictator, Hynkel, addresses the mass ranks of Nazis, reaching the resounding peroration: "Let us fight for a new world –a decent world that will give men a chance to work—that will give youth a future and old age a security…Let us fight to free the world—to do away with national barriers—to do away with greed, with hate, and intolerance. Let us fight for a world of reason—a world where science and progress will lead to all men's happiness. Soldiers, in the name of democracy, let us unite!"[4] The isolationist Right hated it. Chaplin seemed to be not only a Marxist but one apparently pursuing a path that would lead to the USA becoming involved in the European war. And Chaplin indeed took up the cause of a second front to aid the Soviet Union. He was not a communist, of course, but his efforts on behalf of the USSR won him no friends and after the war, with his opposition to atomic weapons, he was denounced by the House Un-American Activities Committee (HUAC) and the leading Hollywood gossip columnist, Hedda Hopper, as a red. His film of 1947, *Monsieur Verdoux*, which satirised the rich, was booed and *Limelight* in 1952 was boycotted by a public who by now thought of him as both communist and anti-American (he never relinquished his British citizenship), if not a pervert (he had a well-known taste for young women and married his fourth wife only when she reached eighteen).When he left for London in 1952 to attend the British premier of *Limelight*, he was not allowed to return. He did so only twenty years later to receive an academy award.

Later on Jane Fonda and Warren Beatty, it is true, founded their own production companies after the collapse of the studio system, yet since they never made films as popular as Chaplin's early ones, he must be considered a one-off. It should be stressed, however, that he never controlled anything except his own career, his own intellect and his own talent. His universal appeal as the Tramp gave hope and amusement to millions of poor immigrants and Americans, not to say to the poor around the world who sympathised with his mockery of those in higher stations. But he never had a political programme and for all his critiques of capitalism never attempted to provide any specific solutions to its problems. He was a man of great humanity and compassion but not an ideologue.

Still, there was the danger that behinds the scenes, darker forces could be lurking. Many thought that after the First World War that movies had become so powerful a form of communication that they might be exploited by subversives. Adolph Zukor, head of Paramount Pictures, said that films could now no longer be seen as "mere entertainment and amusement"; the war years, he explained had "register(ed) indisputably the fact that as an avenue of propaganda, as a channel for conveying thought and opinion, the movies (were) unequalled by any form of communication."[5] Hence FBI leaders William J. Byrnes and J. Edgar Hoover shared the same insight and in 1918 ordered the surveillance of Hollywood radicals. Chaplin would be investigated by them for forty years. In 1922, their agents reported: "Numerous movie stars were taking an active part in the Red movement in this country" and were "hatching a plan to circulate Communist propaganda…via the movies". The Red Scare, of course, became an obsession with Hoover for the rest of his life.[6]

After the Second World War, in particular after the discovery of a Soviet spy ring in Canada in 1946, the same fears erupted. A strike in the studios in 1947 seemed to confirm the desire of the Communists to take over Hollywood.[7] Indeed, in the words of the US Communist Party's newspaper, the *People's Daily World* during the strike, which was led by Communist trade union leader and alleged Soviet spy, Harry Bridges: "Hollywood is often called the land of Make-Believe, but there is nothing make-believe about the battle of Hollywood today? In the front lines of this battle, at the studio gates, stand the thousands of locked-out film workers, behind the studio gates sit the overlords of Hollywood, who refuse even to negotiate with the workers… the prize will be the complete control of the greatest medium of communication in history…" To underscore the point, the newspaper quoted Lenin:[8] "Of all the arts, the cinema is the most important."[9]

A secret directive had been issued by the CPUSA in 1935 calling for the capture of Hollywood's labour unions. Party members had also been told to take leading positions in Hollywood's so-called intellectual groups composed of writers, directors, and performers. Comintern leader, Willi Münzenberg, declared: "One of the most pressing tasks confronting the Communist Party in the field of propaganda is the conquest of this supremely important propaganda unit, until now the monopoly of the ruling class. We must now wrest it from them and turn it against them."[10]

---

3 For what follows on Chaplin, including quotes, see Ross, *op. cit.,* chapter one; 'The First Political Movie Star: Charlie Chaplin'.

4 Ross, p. 40.

5 Jack G. Shaheen, 'Bad Arabs: How Hollywood Vilifies A People', *Annals of the American Academy for Political and Social Sciences*, Vol. 588, (July 2003), pp. 171–193, p. 187.

6 Ross, p. 3.

7 For the version of the Red Scare in this section and the quotes used in it, see Peter Schweizer, *Reagan's War. The Epic Story of His Forty-Year Struggle and Final Triumph over Communism*, New York, 2002, pp. 7–8. See also the more extended account in the concluding section of this article.

8 *Ibid.*

9 Schweitzer, p.7.

10 *Ibid.*

By 1945 party membership in Hollywood was close to 600 including half a dozen producers and as many directors and actors such as Lloyd Bridges, Edward G. Robinson and Frederick March. These people were so well organised that F. Scott Fitzgerald said: "The important thing is that you should not argue with them. Whatever you say, they have ways of twisting it into shapes which put you into some lower category of mankind, 'Fascist', 'Liberal', 'Trotskyist', and disparage you both intellectually and personally into the process."[11] When the Hollywood Independent Citizens Committee on Arts, Sciences and Professions—which included names like Sinatra, Welles, Hepburn and Reagan with support from Einstein and Max Weber—was accused by Arthur Schlesinger Jr. of being a communist front, some members tested this by proposing a motion denouncing communism. The result was that they all had to resign. According to Sterling Hayden, another communist actor, the man who defeated what became the very violent strike of 1947, was Ronald Reagan, who was active in the Screen Actors' Guild and who after the strike became its president. Despite threats—and the need to carry a gun—Reagan refused to support the strike or give in to violence. He also expelled communists from the Guild afterwards— or at least, communists were no longer able to become members.

Following this episode, came the well-known story of the House Un-American Activities Committee (HUAC) with its enquiries of 1947, 1953, 1955, 1956 and 1958, as a result of which some seventy-two 'friendly' witnesses named about 325 film people as present or past communists. All studio contracts by now included official disclaimers of communist party membership or activity and leading stars debased themselves in front of the Committee: "I was duped and used", pleaded Edward G. Robinson.[12] By 1935 250 film artists had been blacklisted and about one hundred greylisted. The Hollywood Ten were jailed for contempt, while others fled into exile. (Chaplin, as already noted, was forced into exile.) In 1954 the *New York Times* reported that 1,500 film and radio people were blacklisted (In 1950 radio still commanded the lion's share of advertising.) In December 1950, CBS demanded loyalty oaths from its 2,500 employees.

There was never any chance, of course, that the Communists could have taken over Hollywood, even supposing they had won their strike (really a demarcation dispute). The studio system was a corporate capitalist oligopoly that controlled its stars, writers and producers - Chaplin almost alone was outside its control - and besides, as has been seen and will be emphasised later - the public would never have tolerated or paid to see communist propaganda on film. Chaplin's career clearly demonstrated that. So, too, did the government's propaganda efforts on behalf of Russia during the war, not to mention Hollywood's films on Russia beforehand.

Hollywood and the USSR

The Russians were an unfamiliar people about whom Americans knew little, save that they liked ballet, music and vodka; their state was a totalitarian communist one of purges, secret policemen and collective farms and was heartily disliked by US democrats.[13] Again, there were few Russian actors around to play Russian parts so that often these were given to Germans—e.g. Emil Jennings in *The Last Command* (1928). Still, a few films were made about contemporary Russia between 1927 and 1934, the majority of which were set in the early days of the Revolution when its outcome was still to be determined. (Once it was clear that communism had won, the result was portrayed as barbaric.) These films included *Mockery* (1927), *The Tempest* (1928), *The Last Command (1928)* and *British Agent* (1934). Save for Sternberg's *Last Command*, they all ended with a romance between a red Russian and his or her class enemy which highlighted the destructiveness of Bolshevik class hatred. *Forgotten Commandment* (1932) was a sermon on Soviet evil which condemned Russia for forsaking Christianity.

Yet, curiously, there was a change of tone in the later 1930s. After a few films on *Catherine the Great*, *Anna Karenina* and *Crime and Punishment,* the severe criticism gave way to light comedy and satire. *Tovarich* (1937) started the trend but *Ninotschka* (1939), *Comrade X* (1940) and *He Stayed for Breakfast* (1940) continued it. *Ninotschka*, of course, with Garbo in the starring role, was the most important of these films but the latter three were all about communists who fell for western capitalist ways. *He Stayed for Breakfast* was a spoof on communistic camaraderie in pre-war Paris, while *Comrade X*, which was set in Moscow meticulously, satirised the communist system and made fun of the conversion of a rabid communist.

In *Ninotschka* the heroine is a cold, workaholic communist, a Soviet-style new woman, who is sent on a mission to Paris.[14] There she falls for Melvyn Douglas who transforms her into a warm, loving woman and human being, until Douglas's jealous boss arranges her to be sent back to the USSR which she now finds dull in the extreme. Her love letters to Douglas are censored, so when she gets the chance to be assigned to Turkey (arranged by Douglas) she seizes it and defects. The USSR as portrayed in the film is grim—censorship, spying, rationing, fear, and cramped living conditions. Ninotschka herself is educated and rational, indeed excessively so. She is allowed to give an impassioned denunciation of Tsarism and the script even includes the words: "The last mass trials were a great success. There are going to be fewer but better Russians."[15] (Nazism, by way of contrast, was never given the benefit of doubt—and no one was ever allowed to fall in love with a Nazi!)

Once the war started and the USA became the ally of the USSR, Stalin became Uncle Joe and in 1943 and 1944 US cinemas were flooded with propaganda films to strengthen the

[11] Schweizer, p. 8.
[12] Ross, p. 121.
[13] For Hollywood films on Russia, on which this section is based, see Siegfried Kracauer, 'National Types as Hollywood Presents Them,' *The Public Opinion Quarterly*, Vol. 1, (Spring 1949), pp. 53–72, pp. 66–70.
[14] See the analysis in Benjamin L. Alpers, *Dictators, Democracy and American Public Culture. Envisioning the Totalitarian Enemy, 1920s-1950s,* Chapel Hill and London, 2003, pp.133–134.
[15] Alpers, p. 133.

Russian Alliance. These included *Mission to Moscow*, *Miss V from Moscow, The North Star*, *Three Russian Girls* and *Song of Russia*. *The North Star* was written by Lillian Helman with music by Aaron Copeland and lyrics by Ira Gershwin and made the musical antics of peasants on a collective farm look like a Broadway musical.[16] *Song of Russia*, written by two US communists, had Robert Taylor as a US orchestra conductor on tour in Russia before the Nazi invasion. He falls for a typical Russian girl, dines in a typically opulent Soviet night club, and visits her parents' happy private farm where she drives a tractor in a ruffled blouse and fresh lipstick. They are married by a benevolent priest and everyone has a radio. However, the worst excesses of slavish pro-Stalinism were committed in the ineffable *Mission to Moscow*, the film brought to Stalin personally in 1943 by former US Ambassador to Moscow, Joseph E. Davies, and based on his memoirs of the same name.[17] Roosevelt was worried that Stalin in 1943 was preparing to make a separate peace with Hitler and thought that Davies could arrange a summit meeting between the two of them at which all differences could be cleared up. The film was supposed to prove America's good intentions and pave the way for a summit after being shown at the Kremlin. In fact, the film soon became notorious and HUAC and other critics would damn it as pro-Soviet propaganda made by communists. Warner Brothers, under the strict supervision of Davies himself, who had the final say on all aspects of the film and stayed on set for almost two months while it was being made, and with the encouragement of the Office of War Information (OWI), the official US body in charge of communications during World War Two, really believed it would cement the alliance with Moscow. The studio, on the other hand, simply hoped that it would open up the Russian market to commercial films, especially when Stalin allowed it to be shown in Soviet cinemas. However, its main purpose was to inveigle Stalin into staying in the Alliance, trust FDR and agree to a summit.

The film actually had a different kind of impact. In the USSR it both rationalised the Great Terror and the Nazi-Soviet Pact and reinforced regime propaganda. Yet it also displayed the superior standard of living enjoyed by Americans. At home, in the USA itself, it failed to promote pro-Soviet sympathy and created a backlash. This led to quarrels with the Kremlin and to opposition to FDR and his foreign policy.

The USSR had never been popular with Americans and the 1939 Nazi-Soviet Pact merely convinced them that Nazis and Communists were all the same. Even Hitler's invasion did not produce much sympathy for the Russians. In June 1941 an opinion poll found that 88% of Americans would trust China after victory, 72% Great Britain but only 41% Russia.[18] Should the film have helped? The wealthy Davies, a financial backer of FDR, had not been much of a success as ambassador to Moscow in 1937–8, but his book, which came out just after Pearl Harbour had been a best seller and FDR had taken up Davies's suggestion to make it into a film. Indeed, he had regular reports at the White House on the film's progress. Warner Brothers—known as "Roosevelt Studio"—was happy to cooperate and let Davies dictate the script. It had persuaded the White House just before the war to get the Justice Department to drop anti-trust suits against the industry. Moreover, the film was powerfully backed by the OWI, which wanted to present the Russian people "more sympathetically".[19] Of the film itself it said: "Every effort has been made to show that the Russians and the Americans are not so very different all. The Russians are shown to eat well and live comfortably—which will be a surprise to many Americans."[20] (And Russians too, no doubt!) The film's own producer called it "an expedient lie for political purposes, glossily covering up important facts with full or partial knowledge of their false presentation."[21] And he was by no means exaggerating: the film whitewashed the Stalinist purges, rationalized Moscow's participation in the Nazi-Soviet Pact and its invasion of Finland and presented the Soviet Union as a non-totalitarian state that was moving towards the American model and was committed to internationalism. Following a prologue in which Davies himself assured Americans he was no communist, Walter Houston portrayed his mission to Moscow in the film in which the USSR was a country where citizens were well-fed and happy, the NKVD protected people, and a consumer society was emerging. In one notorious scene—added at the Davies's family's insistence—Mrs. Davies visited a Soviet cosmetic factory shop with a window display straight out of Fifth Avenue. The USSR, she told the world, had discovered that feminine beauty was not a luxury. Davies also insisted that the victims of Stalin's purges—Bukharin, Tukachevsky, Radek and others—were portrayed as saboteurs and traitors who had conspired with Trotsky, Japan and the Nazis to betray the USSR to a Nazi invasion. Otherwise Davies threatened to walk away taking the picture's negatives.

The film, unsurprisingly, was soon dubbed "Submission to Moscow" despite its half-million dollar advertising budget. The left-wing press defended it and even the *New Yorker* praised its efforts on behalf of the alliance but *Partisan Review* and *Life* magazine condemned it. Film critic James Agee in the *Nation* called it "A mishmash of Stalinism with journalism with opportunism with shaky experimentalism with mesmerism with onanism, all mosaicked into a remarkable portrait of what the makers of the film think that the American public should think the Soviet Union is like— great, glad. Two-million bowl of canned borscht, eminently approvable by the Institute of Good Housekeeping."[22] Suzanne La Folette and John Dewey in a letter to the *New York Times* called the film "the first instance in our own country of totalitarian propaganda for mass consumption".[23] The harshest

[16] Alpers, 228–230.
[17] For all that follows on *Mission to Moscow,* see Todd Bennett, 'Culture, Power and Mission to Moscow: Film and Soviet-American Relations during World War II,' *The Journal of American History*, Vol. 88, No. 2, September 2001, pp. 489–518.
[18] Bennett, p. 493.
[19] Bennett, p. 498.
[20] *Ibid.*
[21] Bennett, p. 499.
[22] Bennett, p. 501.
[23] *Ibid.*

critics were the non-socialist Left, Catholics and the far right. Noting it said nothing on religious oppression, the Catholic periodical *Commonweal* called it "straight propaganda".[24] Senator Robert A. Taft of Ohio called for an investigation of movie propaganda and the administration's links with Hollywood.

General audiences found it boring—it ranked only 84th out of the 95 features films of 1943 according to *Variety* and Warner Brothers lost $600,000 on the project. The Warner brothers, of course, were Jewish leading one lady, "a native-born American citizen", to write to the studio to ask them "why you don't go to Russia and stay there?"[25]

Davies also took with him to Moscow a list of future pro-Soviet films to encourage Stalin, whose personal reaction to the film was unclear (he certainly did not approve a one-to-one summit with FDR) but who, as previously noted, allowed it to be shown in Soviet movie theatres. This led US film studios to negotiate new deals with the USSR, which bought a couple of dozen of US films, including musicals and comedies, for prices ranging from $25,000 to $50,000. Most of these showed US life as opulent and happy leading the USSR in 1944 to cut back its purchases. Indeed, in 1944 it bought only the explicitly pro-Soviet *Song of Russia* and others which portrayed American life in an unflattering fashion. That same year, the OWI was informed by the Soviets that "films contrary to Russian ideology were not acceptable, no matter how good technically they might be."[26] Yet George Kennan in Moscow at the end of the war reported that Hollywood movies had, none the less, subverted the Soviet system. During the war, in fact, Hollywood had sold between $600,000 and $1.2 million to the Soviets and in the late 1940s, when the Soviet cinema was in difficulty, it sold another million dollars-worth. But Eric Johnson, head of the Motion Pictures of America, the studio cartel, assured US foreign policy makers that no "films which could be used to portray the United States of America in an unfavourable light would be" sold to the Soviets.

Crude US propaganda on behalf of the USSR, therefore, did not really work. Meanwhile, it should be noted that there was a hiatus of about three years after the end of the war before Hollywood adopted a fully committed Cold War attitude to the USSR.[27] The key film which demonstrated the change was *The Iron Curtain* (1948) in which Soviet officials were pictured as the ruthless, totalitarian masters of devout slaves. The only "good" Russian was a man who believed in the superior values of the West, leading him to desert communism and betray his country. True, other films before then such as *The Fugitive* (1947) showed humble priests wantonly persecuted by all-powerful (communist) authorities, while the Russian black-marketeer in *To The Victor* (1948) was no endearing figure either. Yet the fact that films like *Berlin Express* (1948) and *A Foreign Country* (1948), both set in Germany, retained favourable attitudes towards Russian characters, demonstrated that the Hollywood line had not quite yet been settled. One leading film expert of the period put the ambivalence down to the fact that relations with the USSR were still controversial immediately after the war and only with evidence by 1948 that American public opinion, fearful at first of the prospect of another world war, had come down hard against the USSR, could Hollywood begin its truly Cold War period. In his words: "Hollywood's films are commercial products designed for mass consumption at home and if possible abroad.. The implications of this overall principle are obvious: Hollywood must try to captivate the masses without endangering its affiliations with vested interests. In view of high production costs it must try to avoid any controversial issues lest box office receipts fall off."[28] Equally important, in the words of another critic, the film industry "remain(ed) afraid of portraying characters and situations in a way which would offend its existing foreign market: why jeopardise a source of revenues?"[29] The thesis that Hollywood was guided by a desire to avoid controversy is one that should be borne in mind when we consider its attitude towards Hitler and the Nazis.

Hollywood, Hitler and the Jews

Before 1933 Germany had not been of much interest to Hollywood although in the critical years 1930–1934 there had been two A movies about her—*All Quiet on the Western Front* (1930) and *Little Man, What Now?*, a screen adaptation of Hans Faluda's pre-Hitler novel about unemployment in Germany.[30] Thereafter, when Nazism and Hitler were the burning topics of the day, the Führer seemed to be in all the media—except the movies. Only two films with Germans in them appeared in the following years—*The Road Back* (1937) and *Three Comrades* (1938), both adapted from novels by Eric Remarque, a known literary figure and box-office attraction, and both set in the Weimar Republic.[31] Only when war was looming in Europe did Hollywood take notice and make *Blockade* (1938) which denounced the bombing of Spanish cities during the Spanish Civil War, without, however, mentioning either Republicans or Franco.[32] Hesitation about Germany was only overcome with the making of *Confessions of a Nazi Spy* (1939), which was realistic on Nazi activity in the USA and condemned everything Hitler stood for.[33] Even then, one member of the Production Code Administration (PCA), which censured Hollywood films, objected that the film unfairly represented Hitler and ignored "his unchallenged political and social achievements."[34] Sena-

[24] Bennett, p. 502.
[25] *Ibid.*
[26] Bennett, p. 516.
[27] See Kracauer, p. 68 for this point.
[28] Kracauer, p. 55.
[29] Leonard W. Doob, *Public Opinion and Propaganda*, New York, 1948, p. 507.
[30] Kracauer, p. 59.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] Steven Allen Carr, 'Hollywood and Anti-Semitism: A Cultural History up to World War II, New York, 2001, p. 158.

tor Nye then started committee hearings on Hollywood and propaganda.[35]

The film industry had been following reactions to *Blockade* very carefully. Indeed, *Variety* published an article by John C. Flynn on 22 June 1938, entitled "Film Industry Watching 'Blockade' as BO Cue on Provocative Themes." The article began: "Upon its success financially revolve the plans of several of the major studios heretofore hesitant about tackling stories which treat with subjects of international economic and political controversy."[36] (Indeed, the Industry's Production Code of 1934 forbade, apart from nudity, immorality and profanity, attacks on foreign governments and political controversy.) As things turned out, however, apart from protests from some Catholic groups, *Blockade* was a success financially—"and although Hollywood might have felt tempted to produce anti-Nazi films even before *Blockade*, it did so only after having made fairly sure that they would be accepted on a nation-wide scale. The appearance of the Nazis on the screen was connected with the evolution of public opinion in the USA. They appeared when, after Spain and Austria's fall, the time of wavering controversy was practically over. Isolationism, to be sure, was still persisted, but the whole country bristled with indignation against the Nazis and there was no longer any doubt that someday the world would have to stop Hitler. Since this conviction also prevailed in France, Britain and elsewhere, Hollywood did not risk much in expressing sentiments so universally popular."[37]

Hitler himself, in any case, had never been popular. He and many of his colleagues, to begin with, were seen as gay. Leni Riefensthal had stated that the Führer could only love platonically and Hitler was a bachelor. Göring was thought to be gay and Röhm certainly was. Hence *Hollywood Now* could publish a cartoon of Göring as Mother Goose watering a patch of flowers with Hitler faces above the caption:

> "Goering, Goering—oh so daring,
> How does your garden grow?
> With little pansies here and there
> And fairies all in a row."[38]

The most comic portrayal of Hitler, of course, came in Chaplin's *The Great Dictator* of 1940.[39] The British government had tried to stop him making this in the late 1930s and so, too, had Hollywood. Yet the film was a huge success and the only one before Pearl Harbour to feature a fictional Hitler. It revolved around a Jewish barber who resembles Adenoid Hynkel, the dictator of Tomania. The dictator is also known as the 'Phoney' and has a minister of propaganda called Garbitsch. Nothing Hynkel does goes right and even his sexuality is questioned—as, for example, when he asks a huge lady to dance with him and expects her to lead and to bend him backwards. In the end, when he invades the neighbouring state of Ostrich, he is confused with the Jewish barber and gets arrested. The barber, mistaken for the dictator, then makes an appeal for democracy and the crowds cheer, Jewish fugitives are bathed in sunlight, the music suggests salvation and the film ends—without explaining why the dictatorship had first arisen or how it really ends. Chaplin had to be careful. Most Americans did not want to enter a war and the film suggested that one might not yet be necessary. Both communist and Catholic reviewers were ecstatic about this.

If the avoidance of controversy, which always led to poor box office receipts (it was an economic rather than an intellectual issue) was one, perhaps the major, factor behind studio behaviour, it was not the only one. Anti-Semitism also figured. Hollywood had been established at the turn of the century when unprecedented numbers of East European immigrants were flooding into America and its major cities were becoming home to majorities of them. Hollywood itself was built up by Jewish immigrants who ran the studios there and made them by the interwar period into huge corporate enterprises which had monopoly control over distribution rights and owned their own cinema chains. Small town movie theatre owners were dictated to and represented a declining WASP culture that resented the new Jewish immigrants who owned the studios and undercut independent or small production firms. Small town American society also felt that the sexual license and crime portrayed in Hollywood films—Mae West was a constant irritant—destroyed traditional values and encouraged, crime, promiscuity and perversion. Hence parents and teachers groups plus the Catholic Church waged a campaign for federal regulation of the industry and threatened law suits under the Sherman Anti-Trust Act. All this had to be resisted but although Louis B. Mayer of MGM was a leading Republican and a friend of Hoover and others, and although Will Hays, formerly Postmaster General in Coolidge's cabinet, headed the MPPAA (the studio cartel), the industry caved into pressure and in 1930 adopted a Production Code that was only really enforced after the Catholic Legion threatened to have millions of followers—eventually backed by the Pope himself—boycott the movie theatres.[40] This enforcement was largely the result of the appointment of Joseph Breen, an extreme anti-Semite, as head of the Picture Code Administration in 1934, where he remained for two decades.[41] Breen blamed all the ills of the industry on "the lousy Jews"—"95% …are Eastern Jews, the scum of the earth." He denounced studio heads to a prominent Catholic theologian as "simply a rotten bunch of vile people with no respect for anything beyond the making of money." When leading Hollywood actors, screenwriters and producers denounced Republican Spain and organised an Anti-Nazi League, Hollywood got accused of leading an interventionist campaign when the country was deeply isolationist. Hence there was a renewed wave of anti-Semitism.

[35] *Ibid.*
[36] Kracauer, p. 60.
[37] *Ibid.*
[38] Alpers, p. 85.
[39] Alpers, p. 89–91.
[40] See the section below on American Self-Censorship for a discussion of the Production Code, its origins and effects.
[41] On Breen, see Carr, 'Hollywood and Anti-Semitism: A Cultural History up to World War II.',p.131.

Testimony to HUAC before the war, suggested that Communists aided by Jews were actually responsible for the rise of Hitler: "instead of articulating opposition to the Nazi treatment of the Jews," the 'Hollywood Question', "explained German anti-Semitism as a national response to communism, and anti-Nazism as an over-reaction that would bring even more hardship upon Jews."[42] Breen accused Hollywood's Jews of trying "to capture the screen of the United States for Communist propaganda purposes."[43] Yet, as has been noted, Hollywood's most influential Jew, Louis B. Mayer, head of MGM, was a staunch Republican Party member, and Hollywood waited till very late in the day to attack fascism and Nazism directly. In the words of a distinguished film historian: "Jewish studio heads and prominent industry leaders fought anti-Semitic attacks but they did so largely indirectly as private individuals rather than through their studios. During the late 1920s and 1930s, Hollywood Jews engaged in fundraising and political efforts on behalf of a variety of Jewish causes: they donated money to the United Jewish Welfare Fund, lobbied for a Jewish state in Palestine and …called for a trade boycott of Germany in 1938. Although the moguls tried to keep their interests as Jews separate from their responsibilities in running studios, they adopted the clever strategy of making biographical films about prominent individuals who just happened to be Jewish: *The House of Rothschild* (1934), *The Life of Emile Zola* (1937), a re-released version of *Disraeli* (1940)."[44] According to the same historian, Stephen Ross, the moguls also financed efforts to spy on and sabotage Nazi groups like the German American Bund and the Silver Shirts in Los Angeles. Indeed, the tale that Ross and others are now fleshing out from the archives "reads like a cross between James Ellroy LA-noir and an Alan Furst spy thriller."[45]

Broadly speaking, Leon Lewis, a former Anti-Defamation League executive and Hollywood–connected lawyer, organised a highly effective spy ring funded by Jewish movie moguls.[46] The moles infiltrated and hobbled a variety of Bund plans, including bombings, lynchings and assassinations of Jewish business and civic leaders (including the studio heads) as well as their non-Jewish allies like Charlie Chaplin and James Cagney. The American Nazis also wanted to recruit American soldiers to divulge key military secrets, and planned "to blow up aviation, munitions and port facilities along the Pacific coast." Information from Lewis's spy network was relayed, without any indication that it was from a Jewish-studio-sponsored enterprise, to top US officials, who usually preferred to chase communists. The Nazi goal was to paralyze the Pacific Coast and allow the Reich to take over the country, according to one of Lewis's spies. A key figure was Neil Ness, who had studied engineering in Berlin and who was an old friend of Hans Luther, the German Ambassador to the USA, who introduced him to Georg Gyssling, the Nazi consul general in LA. Gyssling, in turn introduced Ness to German American Bund leader, Hermann Schwinn, and Ness became his "main confidante". In this role he was able, according to Ross, to thwart some of the Bund's most savage schemes although he may have paid with his life, dying in suspicious circumstances several years later.

It is in this context of Jewish activity in Hollywood that we must consider the recent controversy over Ben Urwand's book (Harvard University Press, 2013) entitled *The Collaboration: Hollywood's Pact With Hitler*, which was the subject of impassioned rhetorical exchanges in the *New York Times* from Thomas Doherty of Brandeis University, whose own book, *Hollywood and Hitler: 1933–1939* was published by Columbia University Press, also in 2013. Urwand uses the word 'collaboration' because both the Nazis and the studios used it to describe their relationship. The movie industry sold large numbers of films to Germany and their profits there and elsewhere could determine the profitability of any film. For example, the Nazi protests in Berlin in 1930 at the showing of *All Quiet on the Western Front* had got the film withdrawn from screenings in German cinemas. Then, once in power, the Nazis' demands, presented in LA by Gyssling came to include, notoriously, the removal of the word 'Jew' from the script of the Zola biopic, the removal of Jewish actors from films, and the prevention of the making of a virulently anti-Hitler film entitled *The Mad Dog of Europe*. Louis B. Mayer, head of MGM, confirmed the film would not be made "because we have interests in Germany; I represent the picture industry here in Hollywood; we have exchanges there; we have terrific income in Germany and as far as I am concerned, this picture will never be made."[47] The industry did indeed look slavish. Twentieth century Fox, for example, sent a letter directly to Hitler's office: "We would be very grateful if you could provide us with a note from the Führer in which he expresses his opinion of the value and effect of the American film industry in Germany…" And it ended with 'Heil Hitler!'[48] But Urwand says that the industry was involved in much worse dealings to protect its profits.

It turns out that Nazi Germany would not allow the studios to take their profits out of the country. Paramount and 20th Century Fox circumvented that restriction by shooting newsreel footage in Germany that they could sell worldwide. However, the Nazis determined what footage those newsreel crews could film and how that footage was used for studio-produced Nazi propaganda shorts. MGM did not have a newsreel operation and was losing most of its profits to German banks because of draconian Nazi finance laws. To cut such losses, Urwand, in one of his most damning archival discoveries, found that MGM instead lent money to firms that manufactured Nazi armaments in Austria and the Sudetenland, received bonds in exchange for

[42] See Steven J. Ross's review of Steven Allen Carr's 'Hollywood and Anti-Semitism: A Cultural History up to World War II.' in *Reviews in American History,* Vol. 30, No. 1, (December 2002), pp. 622–630, p. 626.
[43] *Ibid.*
[44] *Ibid.*
[45] Alexander C. Kafka, 'When Hollywood Held Hands With Hitler,' *The Chronicle Of Higher Education*, 10 July 2013, review section.
[46] *Ibid.*
[47] Quoted in Ben Urwand, 'Did Hitler Run Hollywood' *Seven*, (*Sunday Telegraph Magazine)*, 29 September 2013, pp. 6–9, p. 9.
[48] *Ibid.*

these loans, and then sold the bonds to an American bank. "In other words—the largest American motion picture company helped to finance the German war machine," writes Urwand.[49]

Is Urwand being naďve or principled? Should the moguls have been able to foretell in 1933 that America would be at war with Hitler in 1941? If US newsreel crews had pulled out, would there not have been just less footage on what was happening inside the Reich? As for the Zola biopic, were not audiences aware that he was a Jew? Jewish audiences, in fact, were deeply moved by it. And would *The Mad Dog of Europe* really have made a profit or an impact? Maybe, but American audiences usually preferred musicals, comedies and westerns and other escapist fare. Kafka quotes Samuel Goldwyn in this context: "If you want to send a message, use Western Union."[50] One US Professor of communications says the patriotic motives of the moguls in staying in Germany have been "vastly underestimated". He argues: "The Hoover and FDR administrations encouraged Hollywood to pursue those markets. Both administrations saw motion pictures as essential to selling the American way of life, sort of a form of propaganda for capitalist democracy. I think for the Hoover administration, there was more emphasis on consumerism and exporting American goods. Not that the Roosevelt administration shifted from this entirely, but the emphasis upon featuring American democratic ideals in films became more pronounced under Roosevelt… what made Hollywood film valuable in this context was not the profit generated, but its influential image of America and the counterweight this image promised to exert against totalitarian theology."[51] Altogether, given these views, Ross's account of the moguls, plus the need to calm isolationists and anti-Semites if US box-office profits were not to disappear, the record of the Hollywood studios is much less 'collaborationist' than Urwand makes out. It should be remembered, too, that the German consul was not the only one in LA to pressurise the studios. The Chinese consul did so; the President of the Philippines did so; and after the war, we shall see an incredible complaint from the French consul.

In fact, the outbreak of the war saw another evolution of attitudes concerning Hollywood's Jews.[52] Senator Nye's 1941 hearings into "Propaganda in the Motion Pictures" marked a turning point. They became a showdown between the old isolationists and a new, interventionist America, between those who saw the Jews pushing America into war and those who saw war as necessary and Jews as patriots. Nye came under withering criticism from the press when in an August 1941 radio address at an American First rally he denounced Hollywood as a "mighty engine of [pro-war] propaganda" whose power lay "in the hands of men who are naturally susceptible" to "national and racial emotions".[53] He then accused the movie moguls of pressuring FDR to make policy not in the national interest. The moguls hired Wendell Wilkie to defend them and he declared that Jewish concerns about Nazism were also American ones and praised American pluralism. The moguls were true Americans. He said: "This industry, with many others in this country, demonstrates that neither race, creed or geographical origin is an essential qualification to participate in American business."[54] Studio executives joined him in arguing that the American people at the box office should decide what was propaganda—not the Senate. Nye's committee first recessed its hearings and then cancelled them after Pearl Harbour. The publication of Leo Rosten's *The Movie Colony, The Movie Makers* (1941) then helped complete the turnaround. In this book, the moguls personified the American dream—poor immigrants of whatever religion, rising to success by building the industry through hard work and catering to the desires of the masses. Their movies, moreover, taught millions of poor immigrants the values needed to become Americans. As for politics, although many were right-wingers, Hollywood's Anti-Nazi League had opposed an enemy that most Americans considered vile.

Hollywood and the Holocaust

Still on the theme of Jews, it is also interesting briefly to consider Hollywood's attitude to the Holocaust. This was another controversial topic and just as Hollywood ignored Nazism and Stalinism for most of the 1930s, it also ignored the Holocaust from 1945 to 1959.[55] Even after America's entry into the war in Europe with increasing knowledge about the persecution of the Jews, no film came close to grasping the truth about the Final Solution. Only a few B movies such as *None Shall Escape* (1944) attempted to depict the slaughter of Jews per se. All seemed to change, however, with the liberation of the concentration camps by the US army, recorded on film by the US Army Signal Corps. This was shown by government officials to Hollywood executives, who were invited to tour the camps. The moguls vowed "never to forget" but soon found it "too difficult to face or to assimilate into the typical Hollywood narrative."[56] None the less, Hollywood did feel confident enough to produce *Crossfire* and *Gentleman's Agreement* in 1947, which for the first time, dealt with American anti-Semitism.

In the period mentioned, 1945–1959, there were partial exceptions to the neglect of the Holocaust—a story of displaced persons in *The Search* (1948) and, on television, an edition of *This Is Your Life* in 1953 celebrating concentration camp survivor Hannah Bloch Kohrer. But not till 1959 with *The Diary of Anne Frank, Judgement at Nuremberg* (a television play in 1959, a film in 1961), coverage of the Adolf Eichmann trial in 1962

[49] Quoted in Kafka, *When Hollywood etc.,*
[50] *Ibid.*
[51] Steven Carr, quoted in *Ibid.*
[52] For this paragraph and its quotations, see Steven J. Ross's review of Steven Allen Carr's 'Hollywood and Anti-Semitism: A Cultural History up to World War II.' in *Reviews in American History,* Vol. 30, No. 1, (December 2002), pp. 622–630, p. 627.
[53] Ross, p. 626.
[54] *Ibid.*
[55] See Robert H. Abzug's review of 'Imaginary Witness: Hollywood and the Holocaust.' By Daniel Anker, *Reviews in American History*, Vol. 92, No. 3 (December 2005), pp. 1099–1100.
[56] Abzug, p.1099.

and *The Pawnbroker* in 1965 did the subject make its appearance with any force.

A new historical consensus on the Holocaust led to television mini-series, *Holocaust* (1978), *War and Remembrance* (1988) and other television accounts as well as a long series of films including *Sophie's Choice* (1993) and *Schindler's List* (1993). There was also Roman Polanski's *The Pianist* (1993). The key film was undoubtedly *Schindler's List* which soon became "the most important source of historical information affecting popular perceptions of the Holocaust." Four months after its release, it had brought in $170 million, an unheard of sum for a movie on the subject. Naturally, it was not shown in Arab countries, although one of the curious aspects of Holocaust films has been the lack of an Israeli connection, this despite the fact that Otto Preminger's film version of Leon Uris's best-selling novel, *Exodus* (1960), played a key role in the emerging public consciousness of the Holocaust.

America and Dictatorship[57]

If Hitler and Stalin were disliked by Americans, the same was not true of Benito Mussolini. In 1933, Columbia pictures released a film entitled *Mussolini Speaks* which was full of praise for the Italian dictator's accomplishments and began with the message: "This picture is dedicated to a Man of the People whose deeds for his people will ever be an inspiration for mankind." Mussolini was a "man of achievement", a man of magnetism and charisma, who combined the joy of youth with discipline. He was shown as wildly popular and successful. At one point the Duce was even lauded for the Rooseveltian sentence "We have nothing to fear". The film's advertising copy read: "A lot of us have been asking for a dictator. His name is not Mussolini or Stalin or Hitler. It is Roosevelt." Remarkably, the film was given a good review by the *New York Times* on the grounds that it showed Mussolini's mastery with crowds and how he had kept his promises to the Italian people. Indeed, "even those in the audience who are not Italians cannot resist a surge of patriotic feeling." In mid-America, however, the picture bombed. The film had obviously picked on the fact that Roosevelt in his inauguration speech had not only stated that "we have nothing to fear but fear itself" but had hinted that he might have to assume wartime-like dictatorial powers at some stage. Perhaps America needed a dictator. Some in Hollywood seemed to endorse this proposition.

In 1933 Cosmopolitan studios released *Gabriel over the White House* which openly advocated an American dictatorship. The film starts with Walter Houston as President Hammond presiding over a USA on the verge of economic and social collapse with record unemployment. He is then involved in a car crash and is expected to die. The Archangel Gabriel awakens him from his coma and he is a changed man. (Gabriel is never seen by the way and is only represented in sound by the trumpet theme in the finale to Brahms First Symphony.) The President now becomes a determined radical and creates "an army of construction" to provide jobs for the unemployed. He dismisses his cabinet when they object. When told he is acting like a dictator, he replies: "You've closed your ears to the appeals of the people…I believe in democracy as Washington, Jefferson and Lincoln believed in democracy. And if what I plan to do in the name of the people makes me a dictator, then it's a dictatorship based on Jefferson's definition of democracy: a government of the greatest good for the greatest number." Faced with a threat of martial law, Congress goes along with the President. The press declare he is now a dictator, yet armed with dictatorial powers he proceeds to solve the problems of unemployment, organized crime and the international arms race. Once having completed his holy mission by securing prosperity and international security, Hammond is allowed to return, briefly, to his old self and die. Gabriel's trumpet is then heard for the last time.

The men behind the film were a British Liberal, a liberal American Democrat and the newspaper magnate William Randolph Hearst who owned Cosmopolitan Pictures. It was meant as a tribute to FDR by men who wanted him to have dictatorial powers. The Hammond before the car crash was meant to be Herbert Hoover. The Hays Office (the studio cartel's regulatory body) and MGM (run by the Republican Louis B. Mayer) objected but nothing was done. Hearst was wealthy and independent like Chaplin. Highbrow reviewers did not like the film although many audiences did. A dictatorship was regarded as a temporary expedient to allow someone to do 'good' and repair democracy. Needless to say, the film was admired by the Nazis and the MGM representative in Germany, Frits Strengholt, touted it as resonating with Nazi work-mobilization, anti-crime and other efforts. Yet it was outperformed in Germany by Greta Garbo in *Queen Christina* and Claudette Colbert in *Cleopatra*, although the Prussian Justice Minister and the President of the German Film Chamber and other dignitaries from the Foreign Office attended a special screening and Nazi critics praised its *Führerprinzip.*

The film, thankfully, was a one-off and soon Hollywood was producing others that, instead, tackled the internal threat to the USA.

One of these was *The President Vanishes* (1934). It was critical of fascism but saw the need for strong leadership and family values. It opens with the country threatened by plutocrats who want to involve America in a new European war. Their plan is to organise a democratic campaign to engineer this but in case that fails, they establish a paramilitary organisation called the Greyshirts and soon anti-war campaigners and Greyshirts are fighting in the streets. The pacific President Stanley, meanwhile, concocts a plot to stop the anarchy by simply vanishing, leaving the Greyshirts to be accused of kidnapping him. Their leader then plots a coup but by the end of the film is dead and the president is back. He then persuades the nation to stay out of war. Democracy and isolationism triumph

The film version of Nobel laureate, Sinclair Lewis's, *It Can't Happen Here* (1935) told the story of a small town in Vermont in 1936. The hero is a 60 year-old local newspaper editor married to a domestic type of woman but having an affair with a local busybody. The story opens with the presidential campaign of a populist, fascist-like senator, whose key aide is the effeminate

[57] This section is largely based on Benjamin L. Alpers, *Dictators, Democracy and American Public Culture. Envisioning the Totalitarian Enemy,1920s-1950s,* chapter one, Chapel Hill and London, 2003. The accounts and analyses of the films covered are based on Alpers, from whom the quotations are also taken.

Lee Sarason. Senator Windrip also has a white-shirted paramilitary movement called Minute Men. In any case, Windrip wins the election and then establishes a dictatorship as well as a corporate, one-party state, the newspaper editor and his mistress join the resistance, while Sarason overthrows the dictator in a coup, before being overthrown in turn. The editor then escapes to Canada where the resistance (the New Underground) is based and at the end, the future is unclear. The tale is really rather mixed up. No one emerges from it very well and there is a lot of prejudice against not only the dictator but also against French Canadians and especially gays—Sarason is gay and dies being killed in violet pyjamas. Windrip is also gay or bisexual—someone refers to 'Windrip and his boyfriend Hitler'. The Minute Men engage in homoerotic activities while women are either authoritarians who emasculate their men or are lesbians. The hero is left abandoned in Canada and the most decisive character is the evil, gay fascist, Sarason, who is murdered.

Another film that looked at the threat from fascism was Frank Capra's 1941, *Meet John Doe.* (Between 1942 and 1945 Capra would create the best known series of US wartime propaganda films, *Why We Fight.*) The story revolves around the dictatorial figure, D. B. Norton who buys the local city newspaper, the *Bulletin* and fires its feisty columnist, Ann Mitchell, whose last column purports to tell the tale of one, John Doe, who is going to jump off the roof of the city hall on Xmas eve in protest against the injustices of the world. Norton then keeps Mitchell on his staff to ghost-write a John Doe column entitled 'I Protest'. But soon a down-and-out character (Gary Cooper) is hired to be a real John Doe who gets radio speeches to read. These are all love-thy-neighbour stuff and are so successful that he is put on the front page of *Time* magazine while John Doe clubs spring up all over the country. Then Norton arranges for the simple John Doe to announce his (Norton's) candidature for the presidency at a national convention. The simpleton gets word of the plot and opposes the plan, but at the national convention his microphone is cut off, Norton's motorcycle troops take charge and distribute an issue of the *Bulletin* which accuses Doe of being a fraud. The crowd then insult him, so that he now goes off to the roof of the city hall and claims he will jump off after all, before his supporters persuade him not to. He leaves, before telling Norton: "There you are Norton, the people. Try to lick that."

The film does not make sense. It would have made absolutely no difference had John Doe jumped off the roof. Norton is still in charge at the end. The John Doe groups are good but the national convention leaders are evil. The morale of the film seems to be that good people are simple and easily deceived—not a good message to send Americans in 1941. Still, Hollywood had survived the 1930s without really supporting dictatorships at home or abroad and eventually warning against them. Wartime expediency, of course, marred this record with the fatuous flattering of Stalin.

Government and Self-Censorship of Hollywood

If Hollywood had to reckon with foreign dictators and its own attitude towards democracy on film, it also had to reckon with the need to appease those officially empowered to censor it. There were many who believed that it could not be trusted to produce the correct product either in peace or war.[58] For example, pressure on the studios to introduce a Production Code in the 1930s came, as has been seen, from a variety of groups representing the family, teachers, social workers and the Catholic Church, lobbies which also pressurised the federal government to bring anti-trust suits against the movie industry. There was also economic pressure. The Great Crash of 1929 had seen the studios partially taken over by bankers and some moguls like Jack Warner—who went bankrupt—lost tens of millions of dollars. The huge re-investment needed in the studios and the refurbishment of all cinemas after the introduction of talkies (1927) had also cost millions. So bankers had to be kept friendly and they saw a Production Code as a means of keeping the government and public happy, thus creating a climate of stability for their investments. Former Republican politician Will Hays and Republican Louis B. Meyer had staved off political pressure for so long, but agreed in 1930 to a code to outlaw blasphemy, sex, nudity, profanity, and controversy and to keep films moral by insisting that all evil-doers got their just deserts. When at first it was not properly enforced, Joseph Breen was brought in as head of the Production Code Administration (PCA) in 1934 to ensure that it was—and he presided ruthlessly over the organisation for twenty years. An odious anti-Semite, he thought that Hays lacked guts and always bamboozled by "the scum of the earth"—"the lousy Jews" who ran the studios: "here we have paganism rampant," he wrote "and in its most virulent form".[59] Only in 1952 did the Supreme Court in the *Miracle* case grant Hollywood protection under the First Amendment.[60] Breen resigned in 1954 and in 1956 the Code was radically amended.

In the meantime, Breen had objected to "sex" scenes in *The Outlaw* (1943), to Rhett Butler's "damn" in *Gone with the Wind* (1939), the lack of obvious retribution in *The Postman Always Rings Twice* (1944), the fleeting image of a young boy about to urinate against a wall in *The Bicycle Thief* (1945) and the secret, sexy message whispered in James Mason's ear by the nymphet in *Lolita* (1962). There were also objections to the use of the word "virgin" in *The Moon is Blue* (1953) and to Louis Armstrong and Martha Raye singing and dancing together in *Artists and Models*—such inter-racialism upset Southerners. On the other hand, the PCA defended racialism and racist identity from the erotic "half-breed" in *Duel in the Sun* (1946) to the use of "nigger" in *Gone with the Wind* (1939). PCA archives are littered with protests from the Chinese consul, who objected to one film after another, from President Quezou of the Philippines, not to mention the German consul.[61] One critic wrote: "The Production Code did, after all, require that all wrong-doing must meet with

[58] For the best survey, see Stephen Vaughn, 'Morality and Entertainment: The Origins of the Motion Picture Production Code,' *The Journal of American History*,Vol.77 (January 1990), pp. 39–65.

[59] Vaughn, *Origins etc.,* pp. 62–63.

[60] Burstyn v Wilson, 1952.

[61] These examples are taken from Thomas Cripps's review of Leonard J. Leff and Gerald J. Simmons, *The Dame in the Kimono: Hollywood Censorship and the Production Code from the 1920s to the 1960s* in *Reviews in American History*, Vol. 18, No. 4 (December 1990) pp. 525–529.

eventual punishment. A formula that might work with gangster movies did not transfer easily to a gangster country and one can hardly be surprised that the film–makers in the 1940s did not give it much of a try."[62]

Thus, all in all, the PCA did little to alter films and may even have helped the studios sell them abroad.

The Office of War Information (OWI) was set up during the Second World War in effect as America's own propaganda agency.[63] It was headed by Elmer Davis, a liberal radio commentator and run by New Dealers who wanted to imbue US films with the spirit of social equality at home and internationalism abroad. It employed such liberal luminaries as Archibald MacLeish, Robert Sherwood, Milton Eisenhower, Arthur Schlesinger Jr., Leo Rosten, Joseph Barnes, Alan Cranston, James Warburg and Owen Lattimore. Inside the OWI was the Bureau of Motion Pictures (BMP), another New Deal stronghold headed by Lowell Mellett—a former news editor - with Nelson Poynter, one of his former colleagues, as head of its Hollywood Liaison Office. Poynter was no movie buff and when Ulric Bell was brought in from the Overseas Section of the OWI to help him, the two men—who loathed each other -quarrelled over censorship.

Davis believed that a movie could be "the most powerful instrument of propaganda in the world whether it tries to be or not".[64] FDR thought the same. The government clearly believed it had a huge opportunity to shape the thoughts of millions. Hollywood veritably boomed during the war, producing nearly 500 films annually with weekly paid admission to cinemas reaching a peak of 80 million. Foreign audiences were just as big and often determined a film's profitability. In wartime, moreover, when people had more cause for escapism, the industry suffered fewer restrictions than other industries. Still, the BMP 'manual' for the industry asked producers to think about what each film could contribute to the war effort since "every film enhanced or diminished America's reputation abroad and hence affected the nation's power."[65]

Would Hollywood take any notice? When Abyssinia was invaded in 1935 and one Hollywood mogul was asked for his reaction to the latest news from Italy, he replied: "Yes, Italy has just banned *Marie Antoinette.*"[66]

Hollywood was a very conservative place which believed in entertainment. Stereotypes flourished in its films; "accuracy was incidental"; and social awareness remained dim. Audiences were assumed to be passive or uninterested in political issues. Could such a Hollywood really sell New Deal liberalism to the USA and the world? In 1942 Hollywood had 213 films in production or under consideration dealing with the war - 40% on the armed forces, 20% dealing with enemy spies and saboteurs. War issues, the home front, the United Nations received only minimal attention. Hollywood's message was simple: the USA had been attacked; it was fighting back; and it would win. Otherwise the war could serve as a backdrop to musicals, mysteries, comedies and romances.

The BMP's *Manual for the Motion Picture Industry* of June 1942 was supposed to change all that. It saw the war as a people's war between fascism and democracy. It was not a "national, class or race war" (tell that to Hitler and Stalin!) but a fight for the Four Freedoms of the Common Man. Allied victory would bring about a decent standard of living for all, a good job, good housing and health insurance - in short, a global New Deal.[67] Wartime gains for minorities would be preserved. The nation, if not the world, would unite behind human progress. The enemy was fascism everywhere - at home and abroad. If fascism won, on the other hand, there would be racial discrimination (as practised in the South or the US armed forces perhaps?) and an end to labour rights. Victory alone would bring a better, safer world.

The *Manual* was distributed around the studios, but with what results? The BMP was soon objecting to Spanish Republican violence as portrayed in Paramount's 1942 film version of *For Whom the Bell Tolls*: "To focus too much attention on the chinks in our allies' armour is just what our enemies might wish. Perhaps it is realistic but it is also going to be confusing for audiences."[68] MGM wanted to re-release the 1939 film *The Real Glory* about the suppression of the turn-of-the-century Moro rebellion in the Philippines, now billed as a war between US and Japanese troops. When the President of the Philippines objected, Mellett got Sam Goldwyn to drop the film. Films on British imperialism due for re-release - *Gunga Din* and *Kim* - were also dropped by RKO and MGM. A film called *Trans-Sahara* by Columbia Pictures was also dropped since, according to the BMP, the USA still had not decided on its policy towards Africa.

After Congress in 1943 severely cut the OWI budget, the Hollywood Office was run by Ulric Bell who worked with the Californian censor to control the studios by refusing to grant the necessary export licenses. This had become a necessary ruse, since the army and navy had ignored the OWI and had approved scripts without dealing with the BMP at all. Bell's tactics worked and he got producers to show him almost all scripts. (The Creek Committee during the First World War had only bothered with films for export.) Hence in 1943, the OWI read 466 scripts and in 1944, 744. That represented about three-quarters of the 1,652 scripts read by the BMP's Hollywood office from May 1942 till it closed in 1945. During this time it managed to get 272 out of 390 cases of objectionable material

[62] Patricia Nelson Limerick in a review of R. Koppes and Gregory D. Black, 'Hollywood Goes To War: How Politics, Profits and Propaganda Shaped World War II Movies,' New York, 1987 in *Reviews in American History*, Vol. 16, No. 3, (September 1988), pp. 472–477, p. 474.

[63] This section on the OWI (including all quotations) is based on the article which summarises the book reviewed by Limerick cited in the previous footnote. See Clayton R. Koppes and Gregory D. Black, 'What to Show the World: The Office of War Information and Hollywood, 1942–1945,' *The Journal of American History,* Vol. 64, No. 1, (June, 1977), pp. 87–105.

[64] Koppes and Black, p. 89.

[65] *Ibid.*

[66] Koppes and Black, p. 90.

[67] Koppes and Black, p. 92.

[68] *Ibid.*

corrected - a success ratio of 71%. From January 1943 it got 29 films dropped and five films already approved by the censor re-worked. It, therefore, exercised unprecedented influence over the movies - legally and technically at least. The studios cooperated to save their profits. Their principles had never been robust in the first place.

Yet that was hardly the full story. There were certainly setbacks. Twentieth Century Fox's 1942 film *Little Tokyo USA* concerned Japanese American Fifth Columnists attempting to take over California and showed the US authorities beating up culprits and marching them off to detention camps. However, the detective-hero's girlfriend was converted from isolationism to internationalism. The BMP was appalled but the producers refused to compromise - the army had already approved the film and it *was* US policy to detain Japanese-Americans. Then there were the pro-Russian movies, all of which flopped. Even Eisenhower's protests could not stop Bob Hope's *The Road to Morocco* being exported as was *The London Blackout Murders*, a B movie which implied that the British government would accept a compromise peace, took mild swipes at Lend-Lease, and showed an overworked British doctor in the blackout accidentally cutting off a woman's head instead of amputating her leg. Finally, there was Daryl Zanuck's (1944) film biography of Woodrow Wilson, entitled *Wilson* which the BMP saw as a vehicle for US internationalism.[69] In it Wilson says things like: "A world united against the awful wastes of war is too deeply embedded in the hearts of men everywhere." Yet the OWI praised its "rare entertainment value". The historians of OWI, on the other hand, write: "Despite good intentions and a $52 million budget, however, Hollywood and the OWI reduced a character worthy of William Shakespeare to a cardboard prig and his ideas to primer simplicity. As history it was a travesty, as entertainment a bore, as box-office, a bust."

As for domestic propaganda, the BMP took pride in Universal's *Pittsburgh* (1942) where a love triangle of John Wayne, Randolph Scott and Marlene Dietrich was resolved when labour and management united behind something bigger than themselves - the war effort. The OWI, however, as has been seen, proved unable to do such for either Japanese or blacks.

US blacks were very cynical about the Second World War, at least to start with.[70] Many even sympathised with the Japanese - another people of colour. Blacks had gained little from the New Deal, found the US army was still segregated, saw an anti-lynching bill fail, and read polls showing that 70% of Americans approved of segregation. Did the BMP help them? A Columbia University study in 1945 found that of 100 black appearances in wartime films, 75 perpetuated old stereotypes, 13 were neutral and only 12 were positive. When controversy arose of the biopic of Andrew Johnson - *Tennessee Johnson* - it proved easier simply to eliminate blacks altogether than create positive images. Membership of the black actors' union declined by 50% during the war, in which, of course, minstrel shows survived.

The OWI did question the use of racial epithets like 'Nips', 'slant-eyes', 'monkey'. 'beasts' and removed 'East Ocean Dwarfs' and 'pygmies' from the film *Dragon Seed* (1943). Likewise 'little yellow men' was cut from *Bombadier* (1943). Yet "the cinematic Japanese remained monolithically diabolical".

The overall record of the OWI therefore was not very good. Its positive efforts at propaganda for internationalism flopped, it did nothing for minorities, preview audiences regularly objected to the lines it inserted in films as blatant propaganda, and its changes were to minimal effect. For example, it got the tone (and title) changed of *Where Are Your children?*, but it remained the sad tale of a teenage girl who got drunk, seduced, pregnant and involved in theft, murder and attempted suicide. Whether the films it got dropped would have altered the course of the war is extremely doubtful. In any case, by 1944 people were growing war weary and expecting peace. A booming Hollywood cooperated reluctantly on war movies but otherwise simply concentrated on its usual fare of entertainment. So, all in all, even 'unprecedented' government supervision in wartime made little difference.

Hollywood and the Pentagon

After 1948 Hollywood entered its Cold War period and between 1948 and 1990 churned out innumerable anti-communist films. The immediate post-war Red Scare has already been examined but it is important to note that the whole Cold War period has given rise to debate, with critics maintaining that Hollywood in this era was effectively a propaganda machine. For example, the French scholar, Jean-Michel Valantin, in a book translated as *Hollywood, The Pentagon and Washington. The Movies and National Security from World War II to the Present Day*,[71] argues that Hollywood embodied (and still embodies) a "national security cinema" which cooperates with the national security state to combat, albeit with the support of the American public, the various threats that have faced America from communism to terrorism. Hollywood does this by producing uniquely expensive films, costing hundreds of millions of dollars, seen by tens of millions of people across the globe not only at cinemas, but on television, on DVDs, video rentals etc. etc. Other books tell a similar tale, for example, David L. Robb's fascinating *Operation Hollywood. How the Pentagon Shapes and Censors the Movies,*[72] which tells the story of relations between Hollywood's film directors and the Pentagon's Liaison Office, whose head, Phil Strub, described its criterion for getting a film described as "accurate" as follows: " any film that portrays the military as negative is not realistic to us." Hence the Pentagon only hires out armies, fleets, planes, tanks, soldiers or airmen when it approves the scripts involved. And it examines these very carefully. Thus, with regard to the film *Thirteen Days*, it objected to the Chiefs of Staff favouring an attack on Cuba and to General Curtis Le May being portrayed as aggressive and unintelligent. It also objected to a scene involving the shooting down of a U2 spy

[69] For this film and the two quotes below, see Koppes and Black, p. 102.

[70] The following two paragraphs summarise the evidence from Clayton R. Koppes and Gregory D. Black, 'Blacks, Loyalty and Motion Picture Propaganda in World War II,' in *The Journal of American History,* Vol. 73, No. 2, (September 1986), pp. 383–406.

[71] London, 2005.

[72] New York, 2004.

plane over Cuba, denying that such an event ever took place, despite a posthumously awarded Air Force Cross and letter of condolences to the widow from JFK. In the end the producers were forced to spend a good deal of money in the Philippines to reconstruct vital set equipment.

Not all directors resist. John Woo, for example, in *Windtalkers,* a film about Navajo "code talkers" during the Second World War, bowed to Pentagon pressure and changed the script of his film merely to *imply* that marines had been ordered to kill any Navajos in danger of being caught by the enemy. They had indeed been ordered to do so but the Pentagon denied this. Still, Woo needed the army to make his film. Occasionally, tricks have to be resorted to in order to outwit the Pentagon. For example, when Mace Neufeld was shooting *No Way Out*, which depicts the Secretary of State for Defense as a murderer and has a US naval officer as a Russian spy, it was necessary to film it inside the Pentagon building itself, although official Pentagon approval was highly unlikely. Neufeld, fortunately, discovered that the Pentagon does not actually own the Pentagon, which is owned instead by a body called the GSA or General Services Administration. And this gave Neufeld the permission he required to shoot the film inside the Pentagon itself.

Neufeld's next project, *The Hunt for Red October*, did require naval approval which was very difficult to obtain even after President Reagan had commended the novel on which it was based as "non-put-downable". In the end, a - quite incredible - navy memo ran as follows: "There is insufficient explanation in the script to explain or justify the Soviet defection. There is insufficient development of the tremendous professional respect and admiration between Mancus (the US skipper) and Ramus (the Russian one). This could be easily developed by a little dialogue. The cause of death of Ramus's wife is insufficiently explained. There is no explanation regarding the Soviet distrust of the Lithuanians. Closing dialogue regarding reason for Ramus's defection is vague and confusing." The changes in script demanded were agreed and the film became a $500 million blockbuster. Yet what right had the navy to interfere in such detail with a script? Was this not censorship? And why were script permissions needed anyway? Did *No Way Out* undermine US democracy or security or faith in the US armed services because it lacked Pentagon approval?

Certainly the Pentagon and Hollywood had close ties. On 3 November 2000, for example Hollywood's luminaries attended a star-studded dinner hosted by Secretary of Defence, William Cohen in honour of the Motion Pictures Association's President, Jack Valenti. The Pentagon paid the bill for this, which was $295,000. It justified the expense when spokesman Kenneth Bacon said: "If we can have television shows and movies that show the excitement and importance of military life, they can help generate a favourable atmosphere for recruiting."[73] But of course, as has been hinted already, much more was involved than recruiting. Individual film scripts were censored and broad policy hints were given. For example, while *Bridge over the River Kwai* was being filmed, Donald Baruch, head of the Motion Picture Production Office of the Department of Defense had cautioned producers not to over-emphasise Japanese torture or terror, advising: "In our ever-increasing responsibility for maintaining a mutual friendship and respect among the people of foreign lands, the use of disparaging terms to identify ethnic, national or religious groups is inimical to our national interest, particularly in motion pictures sanctioned by government cooperation."[74] Perhaps, but such solicitude for foreign peoples was highly selective.

One people who certainly never experienced any respect or friendship from the Pentagon or Hollywood were the Arabs. In an interesting article in the *Annals of the American Academy for Political and Social Sciences* a decade ago, Jack G. Shaheen pointed out that in over 900 films concerning Arabs only 5% had any positive roles for them.[75] Indeed, several films over the years have included statements, spoken by leading characters, complaining that all Arabs look alike. However, in our present context, Shaheen notes of the film *Rules of Engagement* (2000) that it contains a scene in which American marines - uniquely probably in film history - are ordered to fire on Yemeni civilians, shooting 83 men, women and children.[76] When this was shown to US audiences, viewers rose to their feet, clapping and cheering. The director of the film, William Friedkin, even boasted: "I've seen audiences stand up and applaud the film throughout the United States."[77] Perhaps they saw the film after 9/11. However, the point to note is that the film, with these scenes was made before then, and its credits give thanks to the Department of Defense and the Marine Corps for their assistance.[78] Even before 9/11 according to Shaheen: "More than fourteen feature films, all of which show Americans killing Arabs, credit the DOD for providing assistance. Sadly, the Pentagon seems to condone these Arab-bashing ventures as evidenced in *True Lies* (1994), *Executive Decision* (1996) and *Freedom Strike* (1998)."

Vietnam

Were there never any doubts expressed in US post-war cinema history about US foreign policy? Given the already-mentioned hiatus of 1945–1948 when public opinion was still forming its views on the USSR and few partisan films were made, what for example was Hollywood's view of the war in Vietnam? Here there was again some hesitation and peculiarities, although not at first. When the war was a *French* one against communist revolutionaries, it fitted Hollywood's Cold War perspective very well.

The 1950s saw five movies and at least two television fictional dramas on Vietnam, all of them increasingly ant-revolu-

[73] Jack G. Shaheen, 'Bad Arabs: How Hollywood Vilifies A People', *Annals of the American Academy for Political and Social Sciences*, Vol. 588, (July 2003), pp. 171–193, p. 178.
[74] Shaheen, p. 178.
[75] Jack G. Shaheen, 'Bad Arabs: How Hollywood Vilifies A People', *Annals of the American Academy for Political and Social Sciences*, Vol. 588, (July 2003), pp. 171–193.
[76] Shaheen, p. 177.
[77] *Ibid.*
[78] *Ibid.*

tionary. The USA, after all, was backing France and opposing communism in South East Asia. Indeed, the threat to white civilization there recalled the threat from Red Indians to frontier life in westerns, where often the only good 'Injun' was a dead one. Hence a young Vietnamese boy - Jake - who represents the good Vietnamese in *A Yank in Indo-China* (1952) - says: ''Reds no good, kill'em all. Find shoot'em-up gun in airplane." In films like *China Gate* (1957) and *The Quiet American* (1958), the infantalization of the Vietnamese is evident. Vietnam clearly needs western tutelage.

Most readings of Vietnam War films overlook their predecessors. According to Scott Laderman, "scholars have ignored the ways that cinema, together with television and the news media, began to script an interventionist narrative for US involvement in SE Asia at a time when US military interest in Vietnam was still in its infancy."[79] Clearly, Hollywood did not compel policymakers to intervene in Vietnam - shoring up France, the domino theory, etc. etc. did that, "yet all of these strategic concerns derived from a larger political climate of the 1940s, 1950s and 1960s that found support and reinforcement within the American cultural industries" - with Hollywood at the centre.

Hollywood had an interest in Vietnam going back to 1929 and thereafter it began to situate the Vietnamese in an established racial hierarchy that "eventually came to reflect US modernisation objectives". It became the US objective to "uplift unfortunate Vietnamese primitives" - precursory aim to nation-building in Vietnam. Meanwhile, their opponents, the Vietminh, were seen as puppets of Moscow and/or Beijing. It would be impossible to go through all of the relevant films, but the significant ones of the 1950s need mentioning.

Warner Brothers' *Jump into Hell* (1955) was explained in a note by Jack Warner Jr. of 1954 which argued that the film was not "a mere commercial venture" but "a genuine effort to impress on the free peoples of the world the value of fighting for freedom." The film was meant, therefore, to "show the magnificent value of French democracy as exemplified in 1954 at Dien Bien Phu.'' The battle, he noted, had been lost but proved that "the goal is still worth the fight". In the "suggestively titled" *China Gate* (1957), the Vietminh were simply a front for Chinese communists determined to take over SE Asia. Despite a dig at white racism (a multiracial Foreign Legion unit ostracises a pig-headed American racist - the moral being that racism can be exploited even back home by communists), the anti-communism of the film is shrill. In fact, it opens with almost ninety-seconds of documentary footage accompanied by a narration that sets the context:

"This motion picture is dedicated to France. More than three hundred years ago, French missionaries were sent to Indochina to teach the love of God and love of fellow man. Gradually French influence took shape in the Vietnamese land. Despite many hardships they advanced their ways of living and a thriving nation became the rice bowl of Asia. Vast riches were developed under French guidance until 1941 when Japanese troops moved in and made the rice bowl red with blood of the defenders. In 1945, when the Japanese surrender was announced, a Moscow-trained Indochinese revolutionist who called himself Ho Chi Minh, began the drive to make his home country another target for Chinese communists. Headquartered in the North, he called the new party Vietminh. With the end of the Korean War, France was left alone to hold the hottest fort in the world and became the barrier between Communism and the rape of Asia."

Then the action in the film was explained.

The French consul in Hollywood, nevertheless, complained that the prologue was "too harsh" towards the French and demanded changes!

Yet probably the film that most denationalised the Vietminh was *The Quiet American* (1958), supposedly a screen adaptation of the Graham Greene novel of 1955. It was the first Hollywood production shot in Vietnam itself, and provided a critical view of the long Vietnamese revolutionary struggle against France. Framed as a rivalry between a young US aid worker and a middle-aged British journalist for the love of a young Vietnamese woman, the film's larger plot involves an effort by the US to create a "third force" of Vietnamese nationalists hostile to both French colonialism and the Vietminh. Yet the film never mentions the Vietminh or Vietnamese communists, since all communists there are implied or said to be Chinese, recasting the local struggle as a battle by China to take over all Asia. Whereas Greene's novel was critical of the USA, the film's director, Joseph Mankiewicz agreed with the PAC that US policy should go unscathed. So the hero is removed from the US foreign service and made an aid worker for 'Friends of a Free Asia' and given an attractive personality. Unsurprisingly the film was taken up by the Vietnam Lobby, given its positive view of US intervention and its subtle allusions to Ngo Dinh Diem's nationalist appeal. US supporters of the Saigon government sought to exploit the film for its propaganda potential.

With US intervention in the Vietnam War itself, Hollywood's role became more ambivalent.[80] Partly this was because television now existed and for the first time (it hadn't been much used in Korea) covered the war in Vietnam almost as freely as it did at home. The Vietnam War was also to be a "limited war" despite the fact that the US dropped 14 million tons of bombs on the Vietnamese, four times the total used on all fronts in the Second World War. Moreover, the US forces were "guests" of the South Vietnamese government, which, for various reasons, made it impracticable for the US administration to censor news coverage of the combat. Finally, the US film industry by this time had been shaken up by the rivalry of television and the emergence of independent producers and screen-writers that had produced anti-establishment and anti-military films such as Kubrick's *Dr. Strangelove* (1964) and *Failsafe* (1964).

These factors, but more particularly perhaps, the fierce controversy inside the USA over Vietnam (not to mention civil rights and the sexual revolution) again caused *Hollywood*

[79] Scott Laderman, 'Hollywood's Vietnam, 1929–1964: Scripting Intervention, Spotlighting Injustice,' *Pacific Historical Review*, Vol. 78, No. 4 (November 2009), pp. 578–607. The first part of this section on Vietnam is taken from Laderman's article.

[80] The rest of this section on Vietnam is based on Doug Williams, 'Concealment and Disclosure: From "Birth of a Nation" to the Vietnam War Film,' *International Political Science Review, Vol. 12, No. 1, The Politics of Art*, January, 1991, pp. 29–47.

to hesitate over producing films on the war. The only major film released while US troops were actually still in combat was *The Green Berets*, which echoed Hollywood's traditional support of US troops in wartime, but which, despite being directed by John Wayne (or because it was John Wayne) did poorly at the box office. Of course, Vietnam as a war was different. It divided US society and traumatised it and so was hardly suited to popular entertainment. Despite this, Wayne's film had treated the Vietnam War like World War Two and followed earlier wartime film formulae for movies such as *The Sands of Iwa Jima.* There were about 20 other movies that had Vietnam as a background to US involvement in SE Asia, but none of them is memorable. The war only really opened up as a topic later on with films that saw it through the eyes of returning Vietnam veterans made between 1967 and the early 1970s. There were, of course, two different types of veterans, first those portrayed (*Born Losers* (1967), *Billy Jack* (1971) and *Hard Ride* (1972)) as outcasts, albeit noble, benign and fully capable of fighting viciousness and corruption in US society, and, secondly, those (*Angels from Hell* (1968), *Chrome and Hot Leather, The Hot Ride* (1971) and *Welcome Home Soldier Boy* (1972)) that also pictured the vet as an outcast, but also vicious, unstable, predatory and a victim of a hypocritical silent majority. This traumatised-madman victim image of the Vietvet was especially powerful in *Death Dream* (1972), and *Black Sunday* (1972) and later in *Taxi Driver* (1976). Yet, none of these films actually contested the war itself. The first film to do that was an independently-made feature documentary, *Hearts and Minds* (1975). This even showed Vietnamese mourning their dead, allowing them to express *their* suffering.

Between 1977 and 1978 no less than eight films then appeared in the context of post-Vietnam disillusionment and reappraisal - *Heroes* (1977), *The Boys in Company C* (1977), *Go tell the Spartans* (1978), *The Deer Hunter* (1978), *Rolling Thunder* (1978), *Coming Home* (1978), *Who'll Stop The Rain* (1978) and *Apocalypse Now* (1979). All these are now seen as generic prototypes involving the demythologising of the hero, infighting among the troops, and the senselessness rather than the heroism of death and sacrifice. The very iconology of death changes from emotional burying scenes to almost disposable body-bags. There is also much racial tension and drugs. Blacks are given some major roles, since the average combat rifle unit in Vietnam was 50% black. (Few black actors actually got fully developed roles, save as a victim of abuse (*Full Metal Jacket*) or as a slow-witted sidekick to a zany DJ (*Good Morning Vietnam!*)) This changed during the 1980s but Hispanics or women were more or less ignored.

Perhaps inevitably, there was a traditional American reaction to the films of 1978–79. The mid-1980s saw the release of four commercially successful films, this time dealing with the rescue of US prisoners of war supposedly held in Vietnamese and Laotian camps: *Uncommon Valor* (1983), *Missing in Action Pts. I and II* (1984), and *Rambo: First Blood Pt. II* (1985). The aim was to blur fact and fiction in order to disable both political dissent and any clear understanding of historical truth. Yet clearly US movie-goers were thirsting for such a strategy. *Uncommon Valor* grossed $27 million in just four months and took $12 million more per week for many more. *Missing in Action Pt. I* grossed $14 million in ten days and remained in the top 50 films for more than two months. *Rambo* earned a record $57.2 million in its first two weeks. Each of these films was an attempt to re-write the history of the war and to regain the image of US invincibility by painting America as the victim of the conflict and revivifying the values of martial masculinity. They also revived the racism of earlier films of this genre and feminized the enemy—portrayed as weak, sly, deceptive and afraid. Condemned, too, were the US authorities, who were seen as impotent and incompetent. "By posing the question 'What is our obligation to veterans of the war?' the other question 'Was it right to fight the war?' was re-written."[81]

China

If China had been portrayed as the enemy during the Cold War, by the 1980s Hollywood was quite willing to demonstrate that its first interest there was profits rather than propaganda.[82] US films had been extremely popular in China before 1949 but had then been banned for three decades, even after Chinese economic reforms and some degree of political reconciliation. The key problem was that China insisted on paying a flat fee for showing a film instead of sharing box-office profits, so that the MPAA refused to do business with it. In any case, Chinese leaders still harboured ideological doubts about Hollywood.

In 1986, however, Paramount and Universal became the first US studios to enter the Chinese Communist market thanks to a compromise deal - longer runs of films would pay a higher fee. Profit margins were still limited but there were hints of better deals in the future, including television ones. In 1994 the first profits-sharing deal was done with Warner Brothers and contracts with other studios followed. In November 1994 *The Fugitive* became the first US blockbuster to be released in China. More US films followed in 1995 but were a small proportion of the 269 films shown in Beijing that year. None the less, they accounted for 40% of the city's box office revenues of $11.4 million and in 1996 foreign films accounted for 40% of all cinema ticket sales.

This success shocked China's party and film industry bosses. Yet both had to reconcile their fear of cultural imperialism with their desire to encourage commercialism and acquire WTO membership. Hollywood, for its part, lobbied for a new trade law in 2000 both to sell more films and build more cinemas. In the 1990s US films were still only earning $20 million a year in China.

The Chinese film industry, however, had four main reasons to accept a deal: competition would raise its standards; like Hollywood, it was hostile to film piracy and needed help with this problem; it wanted censorship relaxed and in this it had the support of US film stars: while Hollywood, finally, aided the commercialisation of the Chinese film industry, for example,

[81] Williams, p.42.

[82] This section is based on Wan Jihong and Richard Kraus, 'Hollywood and China as Adversaries and Allies,' *Pacific Affairs*, Vol. 75, No. 3 (Autumn 2002), pp.419–434.

through the distribution of Chinese films under revenue-sharing schemes. In fact, the Chinese film industry soon became dependent on foreign imports - for example, advertising its own feature films along with foreign ones. The Communist Party, meanwhile, placed less emphasis on propaganda and more on entertainment.

The appeal of US films had much to do with the lifestyles and values they displayed to a Chinese population starting to experience social mobility. Certainly it is difficult to see the increase in the movie trade as a US-controlled propaganda assault on China. Hollywood seemed far more concerned about profits than anything else in negotiating any deals although a final verdict will have to wait for a full analysis of the films sold and who chose which ones could be imported.

Disney

The very incarnation of wholesome American life, meanwhile, was Walt Disney and perhaps an oblique but critical way of entering his universe is to read *The Pirates and the Mouse. Disney's war Against the Counter-Culture,*[83] the story of the legal battles between Disney studios and a group of talented underground cartoonists called "air pilots" who published a series of quasi-pornographic, satirical comic books starring Disney's most famous characters ("I am Mickey Mouse and I am the American Dream").

Disney, of course, stood for family values and his works were aimed at producing wholesome children, all good little American patriots. He shared the common racist, homophobic, anti-Semitic prejudices of his era but his politics were rather extreme. In 1934 he forced his employees to contribute funds to defeat Upton Sinclair's bid to be Governor of California. He fought off the unionisation of his company with strike-breakers, racketeers, minor violence, and wild charges of communism. One biographer claims he was an FBI informant, America Firster, and attendee of American Nazi Party rallies.

However, he was a super-patriot in World War two turning out training films on chemical warfare and VD prevention. He admonished citizens to pay their taxes and save kitchen fat for explosives. He showed Goofy, Donald and Pluto fighting the Axis. His cartoon characters adorned over 1200 pieces of military insignia. On his own initiative he brought out the film *Victory Through Air Power* advocating the long-range bombing of major population centres. He ended the war as Vice-President of the Motion Pictures Alliance for the Preservation of Ideals and he encouraged HUAC to investigate communist influence in Hollywood. He appeared as a friendly witness and generally supported the later political campaigns of Goldwater, Nixon, and Reagan. By 1954 his films had been dubbed into fourteen languages and had been seen by a billion people. He had sold 30 million comic books and made $750 million. And that was just the start.

Disney was also a presence on television. The Mickey Mouse Club ran every Wednesday for seven years. Children were taught to be well-groomed, well-mannered and respectful of parents. They were taught that the FBI was their friend and rock 'n roll was evil. The viewing audience was 12 million children and seven million adults. 25 million Mouseketeer caps were sold.

Then in 1965 Disneyland opened on 160 acres with Adventureland, Frontierland, Fantasyland and Tomorrowland. By 1960, 5 million people visited it annually. By then Disney was raking in $70 million annually. LBJ gave Walt the Medal of Freedom, which he accepted, albeit wearing a Goldwater button, but by now he was a national monument to traditional US small-town values, US entrepreneurship, opportunity, patriotism, middle-class decency and moral uplift,

But he had his critics. One wrote: "Sex and death, longing and sorrow, ecstasy and grief, time and change held no sway in the world of Disney." That was the polite version. The anti-Disney line essentially stated that his fairy tales presented a false, neat, dishonestly orderly, over-sentimentalised view of life. His domestic history omitted slavery, Jim Crow, Indian removals, the subjection of women and maltreatment of children. Even his Pinocchio did not crush Jiminey Cricket as in the original version, nor was Cinderella's stepmother forced to dance herself to death in red-hot iron boots as in the original. One of his critics, Paul Krassner, editor of the viciously anti-establishment *Realist* magazine, published on Disney's death a "Walt Disney Memorial Orgy" showing Mickey Mouse shooting up, Goofy having sex with Minnie, and the Seven Dwarfs having their way with Snow White. It ran as a centrefold spread in May 1967 where it finished second in notoriety only to Jackie Kennedy's alleged account of LBJ screwing JFK's corpse on the flight back from Dallas in Air Force One. Kressner also released the 'Orgy' in poster form before it became famous in a bootleg edition. He also spread the rumour that Disney had his body frozen for regeneration. This was not true, so he then spread the story that when Disney's body arrived at the cemetery, an out-of-work actor employed as a gravedigger propped it up in its coffin and later wrote on his cv that he had "auditioned before Walt Disney." Clearly, therefore, to some radicals, Disney was a hateful right-wing extremist who indoctrinated America with conservative values. Their hatred apart, of course, they were right. However, his values were not extreme but those accepted by the vast majority of Americans. His "propaganda" therefore was a message Hollywood and the wider world could accept. Most people could see little wrong with it. As such, it did play a very important part in anchoring US and Western culture in traditional Christian mores.

Hollywood and Britain

The discussion so far has centred on Hollywood's treatment of foreign dictatorships and its attitude towards politics at home. Given, that a major theme has been its desire to avoid controversy, one way of demonstrating this is to consider briefly its attitude towards Great Britain before and after the Second World War.[84]

In the 1930s there were lots of films about the British - *Cavalcade* (1933), *Of Human Bondage* (1934), *Raggles of Red*

[83] Bob Levin, *The Pirates and the Mouse. Disney's War Against the Counterculture,* Seattle, 2003.

[84] This section is mainly based on the discussion of Hollywood and England in Kracauer, pp. 58–66, but see also H. Mark Glancy, *When Hollywood Loved Britain. The Hollywood British Film*, 1939–1945, London, 1999.

Gap (1935), *The Lives of a Bengal Lancer* (1935), *Angel* (1937), *Lost Horizon* (1937), *A Yank at Oxford* (1938), *The Citadel* (1938), *The Sun never Sets* (1939), followed by *Rebecca* (1940), and *How Green Was My Valley* (1941). No sooner did the USA enter the war than the frequency of topical films about Britain increased - for example, *Mrs Miniver* (1941), *The Pied Piper* (1942), *Journey for Margaret* (1942) and *The White Cliffs of Dover* (1944). Yet immediately after the war, despite Britain's distinguished war record, the fashion stopped. There were films about Britain, but none on contemporary Britain. There was one murder story with no bearing on contemporary Britain - *The Paradine Case* (1948) - and one international drama - *The Berlin Express* (1948) -, but two others were about pre-war Britain -*Cluny Brown* (1946) and *So Well Remembered* (1947) - while three were about Britain at the turn of the nineteenth/twentieth centuries - *Ivy* (1947), *Moss Rose* (1947) and *So Evil My Love* (1948).

One observer at the time suggested that this scarcity of films on contemporary Britain after 1945 might well have resulted from the uneasiness with Americans reacted to Labour rule there. He added: "Their disquiet is understandable, for what is now going on in Britain means a challenge to American belief in free enterprise and kits particular virtues.[85] In the United States any discussion of British affairs is therefore likely to touch off an argument about the advantages and disadvantages of the American way of life. But once this kind of argument gets started you never know where it may lead. The whole matter is extremely delicate and involved, and it is for such reasons, I submit, that Hollywood producers currently neglect, perhaps without consciously intending it, the living English in favour of their less problematic ancestors." He added that "gloomy" post-war Britain did not fit in either with "a screen infatuated with glamour". (It could be argued that US audiences still prefer period dramas set in Britain to those concerning contemporary British life.) In any case, Hollywood simply avoided controversy over post-war Britain in order to retain US audiences and profits, rather than indulge in propaganda to change British ways.

Conclusions

The conclusions I draw from all this is that if anyone controlled Hollywood it was not the Left or even the Right (who, it should be remembered, produced Hollywood's politicians - Senator George Murphy, Governor and President Ronald Reagan and Governor Arnold Schwarzenegger, leaving left wingers merely to advise or raise funds for Democrats) or the Jews or the OWI or the PCA (despite the efforts, partly successful, of the latter two bodies, before and after World War Two, to censor the movies) or even the Pentagon. In the end, propaganda never really worked, even in wartime. Hollywood basically was never a political enterprise but merely the home of the entertainment business. It simply hated controversy and politics. 'Message-movies' were usually dull, confused or boring. Moviegoers did not like them and always wanted to see what pleased them most - comedies, thrillers, detective films, westerns and musicals. If films had to be shown with political themes, then patriotism always won out, although in the late 1960s and early 1970s, when the trauma of Vietnam was still being felt, it was temporarily acceptable to reflect such trauma on the big screen. Eventually, however, Americans decided that they should have won the Vietnam War as well.

The only real propaganda the industry favoured was the projection of the highly opulent, thoroughly democratic, happy and successful American way of life that Disney exemplified. That was Hollywood's real propaganda theme and it played successfully not merely to domestic audiences but to audiences around the globe.

There were periods when the usual smooth pattern of filmmaking was undermined, however. The 1930s with their depressing domestic and foreign politics left Hollywood confused - not merely about how to treat controversial topics like Nazi Germany or the USSR, but how to treat the equally controversial implications of depression era politics - the need for strong government to conquer unemployment and the thorny issue of isolationism. Controversy upset the public and threatened box-office receipts, so it was important to behave circumspectly. The Production Code showed that. Even so, directors had to think carefully. Frank Capra, for example, filmed five different endings to *Meet John Doe*, including one that had him actually jump off the roof. But he concluded that it was impossible to kill off Gary Cooper or the dream he represented in the film. Hence his attitude to the depression remained ambiguous - rather like that of Hollywood's as a whole, with films depicting corrupt politicians and simplistic voters.[86]

On the other hand, there was the traditional escape route of comedy and song. The 1934 film *Stand Up and Cheer* actually had the US President create a Secretary for Amusement with instructions to "amuse and entertain people—to make them forget their troubles". He was given a budget of $100 million and launched a "Smile Campaign".[87] There was also the Marx Brothers' *Duck Soup* of 1933 in which Groucho played Rufus T. Firefly, the President of Freedonia and made clear his corrupt intentions, singing:

"The last man nearly ruined this place.
He didn't know what to do with it.
If you think this country's bad off now
Just wait till I get through with it."[88]

After steering the country towards war, he declared when peace threatened: "But there must be a war—I've paid a month's rent on the battlefield."[89]

The film was quite anarchic. At its climax, with Freedonia triumphant, Margaret Dumont began to sing the national anthem during which the Marx brothers pelted her with apples.[90]

[85] Kracauer, p. 59.
[86] Lawrence W. Levine, *Unpredictable Past. Explorations in American Cultural History*, New York, 1993, p. 252.
[87] Levine, p. 254.
[88] Levine, p. 246.
[89] *Ibid.*
[90] *Ibid.*

After 1947–8, a short period of indecision regarding the USSR, came to an end with the Red Scare of the late 1940s, the Hollywood strikes,[91] and the HUAC hearings. Hollywood was split.[92] Those on the political Right - including Walt Disney, Barbara Stanwyck, Robert Taylor, Adolphe Menjou, Ward Bond, Hedda Hopper and John Wayne - supported the Motion Picture Alliance for the Preservation of American Ideals (MPA). On the Left people like Edward G. Robinson, Danny Kaye and Myrna Loy supported the successor to the Hollywood Democratic Committee, the Hollywood Independent Citizens' Committee for Arts, Sciences and Professions (HICCASP). Then in response to the HUAC hearings came the Committee for the First Amendment (CFA) whose members included Marsha Hunt, Edward G. Robinson, Humphrey Bogart, Lauren Bacall, Katherine Hepburn, Danny Kaye, Judy Garland, Frank Sinatra and Gene Kelly. They denounced HUAC stating that "any investigation into the political beliefs of the individual is contrary to the principles of our democracy."[93] They were defending the Constitution, they maintained, not communism.

In the end, of course, the liberal resistance in Hollywood collapsed, but the story of how this happened is little known. Jack Warner and Louis B. Meyer, as studio heads, were "polite but uncooperative" witnesses in front of HUAC.[94] They had no desire for the government to interfere in the motion picture business. Indeed Mayer told Lester Cole, a communist party screenwriter at MGM: "I don't give a shit about the law. It's them goddam Commies that you're tied up with. Break with them…I believe you're great. Dough means nothing. We'll tear up the contract, double your salary. You name it, you can have it. Just make the break."[95] (He refused.) The Motion Pictures of America (MPPA), the studios' cartel, initially even took out advertisements in the *New York Times* and *Washington Post* backing the CFA, criticising HUAC, and supporting the Hollywood Ten.[96]

The latter, however, were confident of that their First Amendment rights would be backed by the Supreme Court (something that never happened, eventually forcing witnesses to resort to pleading the Fifth Amendment), the reason for the apparent arrogance displayed by the first communist witnesses before the Committee. In fact, the testimony of militant communist screenwriter John Howard Lawson on the opening day had a disastrous effect on public opinion and quickly destroyed any public sympathy for the subpoenaed men. Worse still, box-office receipts began to fall as the public began to boycott films starring Lauren Bacall and other members of the CFA, suspecting them of communist sympathies. By December 1947, in fact, they were 20% down. The result was that the MPAA president, Eric Johnson, abandoned support for the CFA, which itself withdrew active support for the witnesses. Then on 3 December 1947, New York financiers met studio heads at the Waldorf Hotel who issued the "Waldorf Statement" condemning the Hollywood Ten and pledging never again to employ communists. When Louis B. Meyer was asked whether he had agreed to this out of patriotism, he gave the reply: "The action was taken for economic reasons."[97]

The main victim of Hollywood's change of heart was Edward G. Robinson. One producer said of him: "Eddie's hotter than a two-buck pistol. It costs at least a million to make a picture. I'm not interested in having my pictures boycotted." Robinson was left-wing liberal who was accused by HUAC and the FBI of being a red. He had opposed Churchill's Iron Curtain speech, backed henry Wallace for President and throughout the 1930s and 1940s had spoken up for and donated large sums of money to progressive causes. He had also joined all sorts of popular front organisations to beat fascism. He put up a fight against his accusers but his career was ruined and he felt obliged to confess at his fourth HUAC hearing to having been duped in an effort to save his career. But it was only after 1969 that he started to get awards again for in recognition of his outstanding film career. He died in 1973 knowing that he was to be awarded an Oscar for his life's services to the movie industry. In the words of Stephen Ross, perhaps Hollywood's most distinguished historian: "Robinson's downfall sent an even greater chill throughout the industry than the incarceration of the Hollywood Ten. If the government could drive someone like Edward G. Robinson out of the business, it could destroy anyone. The chill remained till the 1960s."

Since the 1970s and Robert Sklar's *Movie-Made America: A Cultural History of American Movies* (1975), not to mention the opening up of all sorts of archives - particularly those of the Production Code Administration - in the 1980s, there has been a boom in film studies which has been markedly influenced by the theories of Gramsci, the Frankfurt School and the post-structuralists.[98] Today, a result of all the theorising involved, "there is not even an agreed definition of censorship" according to the introduction to a special edition of the *American Quarterly,* Vol. 44, (1992). As it explains:

"There is still much to be said for the classic liberal formulation, despite both radical and conservative critiques of it in recent years. But especially in their postmodern guise, recent

[91] On the strikes, exclusions, and loyalty oaths, see Harold W. Horowitz, 'Loyalty Tests for Employment in the Motion Picture Industry,' *Stanford Law Review*, Vol. 6, No.3, May 1954, pp. 438–472 and Murray Ross, 'Labor Relations in Hollywood,' *Annals of the Academy of Political and Social Sciences,* Vol. 254, *The Motion Picture Industry* (November 1947) pp. 58–64.

[92] For the next few paragraphs on Hollywood and the Red Scare see chapter three of the brilliant work by Steven J. Ross, *Hollywood Left and Right. How Movie Stars Shaped American Politics*, Oxford and New York, 2011. Chapter three is entitled; 'Little Ceasar and the HUAC Mob. Edward G. Robinson.'

[93] Ross, p. 113.

[94] Ross, p. 112.

[95] *Ibid.*

[96] Ross, p. 113.

[97] Ross, p. 114.

[98] See the final comments in Cripps's already cited review article, in *Reviews in American History* (1990), p. 529. Also, Francis G. Couvares, 'Introduction: Hollywood, Censorship and American Culture,' *American Quarterly,* Vol. 44, No. 4, (Special Issue, *Hollywood, Censorship and American Culture*), December 1992, pp. 509–524.

critics have mounted a massive assault on the entire Enlightenment project that undergirded the liberal formulation. In the process, censorship has come to be reconceived, not as one or more discreet acts of repressive control over free expression, but as a normal "constitutive" part, indeed a very condition of free expression."[99]

As a product of the liberal, Enlightenment tradition, my simple contribution to this debate can only be to point out that after examining the various alleged attempts to control Hollywood and examining its "propaganda", the obvious conclusion must be that Hollywood was basically an entertainment industry driven by the profit motive and therefore afraid of controversy, particularly political but also moral. Its greatest fear was to alienate its public and to lose money on controversial films. Its staple profit-making fare always remained comedies, musicals, thrillers, westerns, war films and cartoons. The government's efforts to control it in war or peace had little effect. Ideological influences had even less. In the end only the public, the box-office, its customers could exert control. The American masses controlled Hollywood with their desire for wholesome entertainment and their refusal to tolerate ideology or mission statements dressed up as film. The only propaganda that suited them was the accurate portrayal of the American way of life and American values. And, indeed, the rest of the world seemed to share their views. The Frankfurt School got things exactly wrong. The studios did not control the masses by false consciousness; the masses quite consciously controlled the studios.

[99] Couvares, p. 519.

The Nomenclature of the *Underserving* Poor: an Enduring History of Marginalisation

Tony Murphy[*]

Abstract

Since the formulation of the Poor Law system in Britain, elements of the poor have been caricatured through the creation of labels which have been used to signify the perceived troublesome nature of some of the neediest in society. In a contemporary sense, the term 'underclass' is often used as a byword for the problem poor, yet such a discourse has its origins in earlier accounts of the poor. Particularly since the nineteenth century Poor Law revisions, the process of identifying groups based on their burden to society, the threat they pose to social order, and even the possibility for them to infect the nation's gene pool, has been highly notable and indeed recurrent. Demands for intervention have followed. Such intervention has transcended individual policy domains, where criminal justice mechanisms have operated alongside welfare reforms, and indeed health and education policies, in the pursuit of dealing with such problem populations or undeserving poor. The origins of the various labels applied to the underserving poor have been deeply rooted in political and cultural discourses, often related to media and policy practices, and these processes have served to mutually reinforce one another. By charting the emergence of the labels applied to the poor, their wider context and the discourses they reflect, this paper demonstrates the enduring desire within British society to marginalise elements of the most needy, and thus, how such processes are reflected in more recent discourses of the poor.

Key words: *eugenics; Poor Law; 'poverty porn'; underclass; undeserving poor.*

Introduction

Since the formulation of the Poor Law system in England, the distinction between the *deserving* and the *undeserving* poor has been an acute feature of cultural and political representations of the most unfortunate in society. The 'Old Poor Law' of the seventeenth and eighteenth centuries, and particularly the later revisions in the nineteenth century, fostered a dual understanding of the worth and place of those at the bottom of the social and economic strata.[1] Such a conceptualisation has persisted throughout history, taking on different guises, and can be seen to operate within a number of caricatures of the *uncivilised* elements of the poor. This is visible in Marx's 'lumpenproletariat', Booth's 'residuum', Mayhew's 'taxonomy of defects', the 'social problem group' of the first half of the twentieth century, Murray's 'underclass', and the late twentieth / early twenty-first century discourses around the 'chav and the 'problem-families' (later re-branded as 'troubled-families').[2] All such conceptualisations signify a clear distinction between different elements of the poor in keeping with the *deserving* and *undeserving* dichotomy of the Poor Law system. This distinction appears to have been framed by the political and cultural representations of welfare recipients in each period, and appears to have caught the public imagination in each era. Indeed, we can identify a commodification of such labelling of the poor throughout history. Historically this has been reflected in print media and works of literature, and in a more contemporary vein, this has also been reflected in the rise of what might be termed 'poverty porn'. In this instance, an entire entertainment industry has flourished rested on the exploitation of the poor, often based around voyeurism of the 'benefits class'. Thus, we can understand the malign labelling of elements of the poor as an enduring process, with evidence of this quite visible within contemporary British society.

The distinction between *deserving* and *undeserving* has informed welfare policies implemented and the legal responses meted out to groups of the poor and their behaviours, with punitive responses directed towards those deemed to be trou-

[*] Tony Murphy, Senior Lecturer in Criminology, Department of Law and Criminology, Sheffield Hallam University, United Kingdom.

[1] For a discussion of the Poor Law system see Michael Rose, *the English Poor Law 1780–1930*, (Newton Abbot: David & Charles, 1971).

[2] For an exploration of some of these labels up to the late twentieth century see John Macnicol, 'In Pursuit of the Underclass', *Journal of Social Policy*, 16:3 (1987), pp.293–318, and for a more up to date account see John Welshman, *Underclass: A History of the Excluded*, 2nd edn (London: Bloomsbury Academic, 2013).

blesome.[3] One might easily recognise the parallels between the warehousing of the problem poor in workhouses within the Poor Law system,[4] with more recent castigatory welfare to work policies within which the heightening of welfare conditionality has been a prominent feature,[5] (and significantly in relation to disability benefits)[6] and with other policies such as the famed 'bedroom tax'.[7] These examples demonstrate that exclusionary processes towards elements of the poor have persisted, placing blame for disadvantage at the feet of the most unfortunate in society. Such processes, which serve to responsibilise the poor,[8] operate despite the fact that continued inequalities emerge from problematic economic and social arrangements within society and this shapes the lives and life-chances of the poor. Inter-generational deprivation and disadvantage can then follow. And yet, such inter-generational deprivation has often been viewed as *evidence* of the hereditary nature of the problem groups, and thus offered a rationale for extreme policy solutions.[9] Eugenics was one such mechanism explored. In short, iniquitous processes in society breed disadvantage, and those exhibiting the hallmarks of such disadvantage are punished for their troubles. In this paper I initially offer a brief historical account of some of the different labels placed on the marginalized poor in Britain since the nineteenth century to show how such labels emerged, and the way in which those representations have manifested in political and policy discourses throughout history. The contemporary landscape is then examined in this context in order to consider the extent to which the marginalisation of the poor has endured to this day. Indeed, contemporary representations of the poor reflect those of previous eras, and contemporary policies similarly appear to serve that end.

A brief history of the *undeserving* poor

The treatment of the poor has always been contingent on prevailing ideas concerning the c*auses* of their plight, and thus, where responsibility lies in addressing this. More fundamentally perhaps, we must also consider the extent to which there has been a desire to aid the poor in their plight: the rationale for doing so and indeed, the necessity or purpose of doing so. Needless to note, attitudes towards these issues have varied significantly over time. Reforms during the Tudor period in England sought to embed some form of social security in response to unrest in that period. This sowed the seeds for the subsequent Poor Law legislation: Acts in 1601 and 1662 can be seen to represent what came to be known as the Old Poor Law system.[10] These Acts, and subsequent Acts which built on them, framed how society should respond to the poor, both those deemed to 'impotent' and those deemed to be able-bodied. For the latter, the role of work became increasingly important, and this saw attempts to put those elements of the poor to work in workhouses, and later following critique of the working of the Poor Law, outside of the workhouses.[11]

Explicit within the Old Poor Law and also within the revisions following the Poor Law Amendment Act of 1834, was the distinction between the *deserving* and the *undeserving* poor. In essence, this was a separation of the needy poor in to two broad groups according to whether their plight was worthy of state support or not. Such a distinction was based on their perceived moral and behavioural traits, with those deemed to be anti-social, lazy, corrupted and ultimately culpable for their troubles, labelled as *undeserving*. Their plight was viewed as their own fault, and thus they should bear responsibility for the consequences of such. Thus, labelling elements of the poor as problematic became engrained in legislation.

The nineteenth century more broadly was a hotbed for the labelling and blaming of the poor. Media publications, politicians and even notable social reformers alike sought to circle-out elements of the poor who were deemed to be troublesome in some way: economically dependent on society, morally corrupted, a threat to law and order, or a combination of these. Often, this came in the context of utilitarian thinking, where those seen to be not contributing, and indeed taking away from the economy and the country's capacity to develop, became targets for intervention. Thus, utilitarian reformers such as Edwin Chadwick identified a 'criminal sub-group', who suffered from 'indolence' or who were 'in pursuit of easy excitement', and were predatory in nature - and could thus be seen unproductive.[12] Such reformers of the period saw the value of reforms in sanitation, health, education and criminal justice in utilizing the potential productivity of the poor, and also as a way of dealing with threats to social order, just as much as for any moral reason. Thus, important Acts within the period concerned with those areas can, to some extent, be viewed as having their roots in such a utilitarian discourse. We also began to see an increasing concern for professionalising areas such as policing and

3 For a broad contemporary discussion of this issue see *Security: Welfare, Crime and Society,* ed. by Allan Cochrane and Deborah Talbot (Maidenhead: Open University Press, 2008).

4 Michael Rose, p.160.

5 For a thorough account of this see Peter Dwyer, 'Creeping conditionality in the UK: from welfare rights to conditional entitlements', *Canadian Journal of Sociology*, 29:2 (2004), pp.265–287.

6 Katherine Weston, 'Debating conditionality for disability benefits recipients and welfare reform: Research evidence from Pathways to Work', *Local Community,* 27:5 (2012), pp.514–528.

7 In 2013 the government introduced a 'spare bedroom' penalty for those living in local authority housing. Formally titled 'Removal of Spare Room Subsidy', those with a spare room and thus demonstrating 'under-occupancy' have been encouraged to move to a smaller property or lose some of their housing benefits. This has become known as the 'bedroom tax'.

8 On 'responsibilisation', see Nikolas Rose, 'Government and control', *British Journal of Criminology,* 40:2 (2000), pp.321–339.

9 In the first half of the twentieth century this was cited as evidence for the existence of problematic groups of the poor who were morally and even genetically different to mainstream society. See later discussions of the 'social problem group'.

10 Michael Rose, p12.

11 Michael Rose, p.13.

12 Clive Emsley, *Crime and Society in England, 1750–1900*, 4th edn (Harlow: Pearson, 2010), pp.66–67

criminal justice, and relatedly, attention being given to effectively managing public fears of troublesome groups.[13]

Mayhew and Booth, both notable social investigators of the nineteenth century, spent time researching the conditions of the poor, and they both determined that a segment of them were particular problematic and represented a threat to wider society. For Booth, they were described as a 'residuum' of the 'submerged tenth' whilst according to Mayhew a 'taxonomy of defects' was evident within elements of them.[14] In a European context, Karl Marx also found it necessary to label elements of the poor as troublesome. This was represented by the idea of the 'lumpenproletariat', explored in the 'Eighteenth Brumaire of Louis Napoleon', which used the language of 'dangerous classes' 'social scum', and 'rotting masses'.[15] Ultimately, groups of the poor were deemed problematic (but not solely the poor) who engaged in immoral and depraved behaviours, and thus those who were not likely to be party to any revolutionary movement.

As we entered the twentieth century, the caricaturisation of the poor continued, and some of the mooted policy responses appeared to take on a more sinister nature. The 'social problem group' was a label used by some social commentators. This group was defined by one notable commentator of the day as 'that section of the population which claims the attention of society by requiring in a broad sense care, protection, or control'.[16] (This sentiment resonates with some of the more contemporary commentary on the poor) The Report of the Mental Deficiency Committee in 1929 noted how a 'subnormal' or 'social problem group' comprised 'approximately the lowest 10% in the social scale of most communities'.[17] This reflected Booth's residuum of the 10%. Such sentiments were also reflected in the thinking of the Women's Group on Public Welfare who noted how:

> within this group are the 'problem families' always on the edge of pauperism and crime, riddled with mental and physical defects, in and out of the courts for child neglect, a menace to the community of which the gravity is out of all proportion to their numbers.[18]

Thus, a portrait of the problem poor painted them as criminogenic, burdensome on the public purse, and mentally and physically different to the public at large. Inevitably, there were different narratives to the debate with some more focused around the need for reform of social welfare and wider support mechanisms in order to help the neediest. Other accounts were more pessimistic, and thus punitive in trajectory. Some commentators spoke of distinctions within the lowest groups in society where some could be put to *good use* more readily than others, and where some required some process of disciplining and control. Mary Carpenter for example identified two 'classes' among the 'immoral poor': the 'perishing'/'destitute', and the 'dangerous'. Those within the perishing class could be put to useful work, but the dangerous class needed to be reformed in some way.[19] In some circles, ideas were propagated about entrenched problem groups who were beyond help and reform, and thus the policy mechanisms required to deal with such groups took on a more serious nature.

In the first half of the twentieth century, the view that the 'social problem group' was an intergenerational phenomenon, where negative traits were hereditarily passed on and thus not fixable through conventional interventions, led some commentators to advocate eugenics as a mechanism for dealing with such threats to society. This was justified by *proving* that the traits of the dangerous classes were indeed hereditary, and thus membership of such classes was in itself a biologically determined process. The science upon which such ideas were based was flimsy to say the least. Yet the early decades of the twentieth century saw the development of a thriving eugenics community comprised of notable public figures and academics. The Eugenics Society claimed that a group as large as four million people in England and Wales were the:

> great purveyors of social inefficiency, prostitution, feeblemindedness and petty crime, the chief architects of slumdom, the most fertile strain in the community! 4 million persons in a socially well-defined group forming the dregs of the community and thriving upon it as the mycelium of some fungus thrives upon a healthy and vigorous plant'.[20]

What's more: they are in fact a group which generation after generation survives only by public support and this maintenance secures similar recurrent misery in the next generation'.[21] And thus, for some, this meant that extreme measures were called for to eliminate such persistent 'dregs'. This ranged from their permanent removal from society, to involuntary sterilisation, and beyond.[22] A racialised element to the issue was also injected by some. For example, the Report of the Mental Deficiency Committee noted that: 'If we are to prevent the racial disaster of mental deficiency, we must deal not merely with mentally defective persons, but with the whole subnormal group from which the majority of them come.'[23]

---

[13] For detailed accounts of criminal justice and policing reforms in the nineteenth century and their wider context, see Emsley, and also Barry Godfrey and Paul Lawrence, *Crime and Justice, 1750–1950,* (Abingdon: Routledge, 2011).

[14] For a discussion of both Mayhew and Booth, see John Macnicol, and also Kathleen Jones, *The Making of Social Policy in Britain, 1830–1990, 2*nd edn, (London: The Athlone Press, 1994).

[15] Karl Marx, *The Eighteenth Brumaire of Louis Napoleon* (Peking: Foreign Languages Press, 1978). For a discussion of this in relation to broader discourses see also Hartley Dean and Peter Taylor-Gooby, *Dependency Culture: The Explosion of a Myth,* (Hemel Hempstead: Harvester Wheatsheaf, 1992).

[16] Neville Rolfe, cited in Macnicol, p.313.

[17] Mental Deficiency Committee 1929, p80, cited in Macnicol, p.302.

[18] Women's Group on Public Welfare, 1943, p.xiii, cited in Macnicol, p.297.

[19] Godfrey and Lawrence, pp.135–136.

[20] Eugenics Society Archives, 1932, cited in Macnicol, p.304.

[21] Eugenics Society Archives, 1927, cited in Macnicol, p.306.

[22] Godfrey and Lawrence, p.85.

[23] Report of the Mental Deficiency Committee, 1929b, p.81, cited in Macnicol, p.301.

Dan Stone explored the racialised nature of the eugenics discourse at that time, offering an alarming account of how race was used as a proxy for the problem poor, and the contemporaneous concerns regarding immigration fed in to this. For instance, Stone recounts the novelist R. Austin Freeman's assertion that:

> For many years past there has been flowing into this country a steady stream of men and women of the lowest type - the very dregs of inferior populations…These hordes of unclean wastrels, including a large proportion of diseased, destitute, and criminal persons, were permitted freely to settle on this land like swarms of pestilential flies… we shall conclude that the alien sub-man, diff-using racial as well as personal inferiority, is an even more potent anti-social factor than the indigenous variety.[24]

Events in Europe in the late 1930s and early 1940s eventually brought to an end the Eugenics movement in this country. However, the notion of a persistent and transmitted set of behavioural and moral traits persisted. Later accounts of the problem poor in the twentieth century were propagated by authors such as Ralf Dahrendorf and Charles Murray - this time the vernacular had shifted to the use of the term 'underclass'. In a similar vein to some of the nineteenth century accounts of the poor, the 'underclass' label has usually served to problematise the behaviours of segments of the poor and place responsibility for poverty and related social problems at the feet of those labelled. This label, emerging prominently from the 1970s onwards, fell out of fashion in the twenty-first century, but it did not go away entirely, and now it often reappears in media reporting on prominent social issues.

Authors such as Ralf Dahrendorf and Chares Murray are associated with the early usage of the 'underclass' label.[25] Both identified the existence of a sub-group within society who hold different moral and behavioural reference points to those of the society at large. Yet, Murray's account is however most notable in relation to its enduring impact. In Murray's version, a significant minority of the poor are marked by their dependence on welfare hand-outs (created by perverse incentives of the welfare state), their involvement in anti-social behaviours, a lack of respect for the values of mainstream society, poor parenting and family structures, and the costs they impose on the state to look after them and to deal with their various problematic behaviours. The account is highly moralistic. Murray's work was originally focused on areas of America, but he turned his focus to Britain and highlighted populations within areas such as Middlesbrough as typical of his argument. Murray viewed processes occurring in such places, with high crime rates, unemployment and births outside of marriage, as evidence of a 'new rabble underclass', one that was 'culturally distinct, morally reprehensible, a structurally separate underclass: the 'other kind of poor people', who were 'seduced by generous social welfare regimes into criminal, indolent, welfare dependent, anti-social lifestyles'.[26] Naturally, Murray's account attracted staunch criticism, and politicians became wary of using the label.

However, New Labour's first term in office in the late 1990s brought with it a renewed focus on the underclass, with Tony Blair seeking to tackle what he deemed to be an underclass element resultant from Thatcher's failed economic and welfare policies. This group was to be tackled through an emphasis on addressing the multiple forms of deprivations facing the poorest in our country.[27] Here of course, the language shifted away from directly using the underclass label to the rubric of 'social exclusion'. Yet, as Fairclough has argued, 'the behavioural and moral delinquency which it [underclass] suggests has carried over into the construction of social exclusion'.[28] In itself, 'social exclusion' is a highly contestable concept, reflecting competing ideas to explain the circumstances of the poorest, and what ought to be done about it. Levitas for example, highlights a range of different discourses of social exclusion, where accounts diverge from each other in relation to the causes of, and therefore the necessary *solution* to the multifaceted and connected problems that some people face. Competing accounts vary according to their focus, based on individual moral and behavioural traits of those *suffering* social exclusion, or instead, iniquitous societal processes.[29] The 'moral underclass discourse' (MUD), one of those discourses examined by Levitas, associates those social problems as products of the moral and behavioural characteristics of individuals and groups, and this viewpoint continued to have currency in the late twentieth and early twenty-first centuries. This can be seen in relation to welfare policies - as Simon Prideaux was led to conclude in his analysis of New Labour's welfare policies, the 'welfare politics of Charles Murray are alive and well in the UK'.[30]

Another label emerged towards the end of the twentieth century which not only reflected the economic precarity and the moral and behavioural traits of some of the poor, but also pathologies of consumption and related cultural traits of the poor. The 'chav', become an important byword in the press and popular culture for a subculture of the lower classes, usually the young, who were anti-social in their manner, and vulgar and conspicuous in their consumption patterns. In a similar vein to earlier parodies of the poor, such a conceptualisation caught the public imagination and it served to inform a moral panic type process. Hayward and Yar explore this new label in some detail, highlighting the apparent links between the decline in the use of the term 'underclass' with rise in the use of the term 'chav' as we progressed in to the twenty-first century.[31] More recently,

[24] Dan Stone, 'Race in British Eugenics', *European History Quarterly*, 31:3 (2001), 397–425 (p. 419)

[25] For an account of both Dahrendorf and Murray on the 'underclass' see Dean and Taylor-Gooby.

[26] Robert MacDonald, 'Disconnected Youth? Social Exclusion, the 'Underclass' & Economic Marginality', *Social Work and Society,* 6:2(2008), 236–248 (p.238)

[27] For a discussion of how the policies of New Labour appear to reflect an underclass discourse, see Welshman.

[28] Cited in Paul Watt, 'Underclass' and 'ordinary people' discourses: Representing / representing council tenants in a housing campaign', *Critical Discourse Studies,* 5:4 (2008), 345–357 (p.347)

[29] Ruth Levitas, *The Inclusive Society? Social Exclusion and New Labour,* 2nd edn. (Basingstoke: Palgrave Macmillan, 2005).

[30] Simon Prideaux, 'The welfare politics of Charles Murray are alive and well in the UK', *International Journal of Social Welfare,* 19, pp.293–302.

[31] Keith Hayward and Majid Yar, 'The "chav" phenomenon: Consumption, media and the construction of a new underclass. *Crime, Media, Culture,* 2:1 (2008), pp.9–28.

this issue has been explored further, and prominently so, by the journalist Owen Jones.[32] Another label which emerged in this period, particularly focused on some segments of youth, was that of 'NEET' -not in education, employment or training. This reflected concerns around the productivity and value of young people, in a similar vein perhaps to the utilitarian commentary of the poor in the nineteenth century. As we moved in to the twenty-first century, NEETS began to attract further attention, encapsulated in debates regarding the future prospects of young people.[33] The direction of travel for the related policy initiatives has sought to extend compulsory education, embed a more vocational feel to education, offer training schemes, and for instance, offer a 'Youth Contract'.

The *underserving* poor in the twenty-first century

The political and cultural landscapes of the late twentieth and early twenty-first centuries have led us back to many of the same issues grappled with in previous eras. Namely, a fascination with the existence of and practices of elements of a *welfare-class* portrayed as occupying separate moral and normative positions to that of mainstream society. Within this, perceptions concerning the role of welfare, and perverse incentives resultant from the functioning of the benefit system have permeated popular cultural, reminiscent of Murray's underclass account. Most notably perhaps, this is reflected in recent the rise of 'poverty porn', and also within popular politics, where there is an assumed requirement to *tighten-up* the system and implement tough revisions to the welfare system (such as the 'bedroom tax'). In such a context, we have witnessed the political and cultural creation of the 'NEETs' ('not in education, employment or training') and the 'problem/troubled-families'. In such instances, there has been interplay between political discourses of the poor and wider public attitudes. Thus ironically, the poor seemingly provide politicians and policymakers with the validation they require to target the poor. This appears to operate in the same vein as within policing and sentencing practices, where public concerns over law and order issues, often driven from the lower-middle or working classes, provide a mandate for the punitive handling of elements of the poor.

The recent rise of 'poverty porn' demonstrates a public appetite for naming and shaming of elements of the poor, those deemed to be *milking the system*, and those who demonstrate troublesome moral and behavioural traits. Popular television shows such as 'On Benefits & Proud', 'Gypsies on Benefits and Proud', 'Benefits Street' and 'Skint' have caught the public imagination and appear to reflect some attitudes of the public towards welfare recipients, whilst simultaneously actively influencing such perceptions. The recent controversy surrounding the 'bedroom tax' for instance, or 'Removal of Spare Room Subsidy' as it is formally known, reflects a political desire to make welfare more efficient, where it is presently perceived to be overly generous. It also, perhaps, reflects the 'less eligibility' principle explicit within the nineteenth century Poor Law revisions, where a legacy of housing shortages and an inflated property market, have created public anxieties concerning the issue of housing, and thus given the Government some initiative for action.

Earlier, the 'problem-families' label emerged from the Coalition Government. Those groups were viewed as a heavy burden on the public services required to support them and to deal with their problem behaviours, and there are parallels here with commentary on the 'social problem group' of the first half of the twentieth century.[34] The 'problem' families were quickly re-named 'troubled', but the crux of the agenda was the same. Those families deemed to be 'troubled', estimated to be approximately 120,000 households, were those involved in crime or anti-social behaviour, and who have children absent from school, who have adults claiming unemployment benefits, and those deemed to be costly to the taxpayer. Just as with the earlier accounts of the poor in the nineteenth and early twentieth centuries, a heavy focus was placed on the behaviours and attitudes of the poor, as opposed to wider economic policies which have shaped the lives of the poor.[35]

Furthermore, recent c*rises* have often resulted in the media harking back to the language of the 'underclass', and the moralistic and responsibilising conceptualisation of the poor that goes with it. Following the 2011 riots in London and other cities around the country, headlines such as 'the return of the underclass' appeared in the press, in this instance, Ian Duncan Smith noted the emergence of a 'more menacing underclass' within British society.[36] Another headline, 'London's riots: the underclass lashes out' ran in the national press.[37] The label 'underclass' was used to make sense of why people had looted, burned and damaged their communities. The Prime Minister, David Cameron, noted of the rioters that they held 'a twisted moral code', demonstrated a lack of restraint, and they showed 'indifference to right and wrong'. In his response, Cameron summoned up arguments about moral crisis and decline in line with a 'Broken Britain'.[38] There was reluctance on the part of the Government to commission a formal and thorough investigation in to the riots, and subsequently there has been a failure to grapple with the root causes.[39] In response to the riots, we saw political and media narratives of the events driving disproportionate sentencing as a means of dealing with those problematic elements of the poor who took part, and as a means to

[32] Owen Jones, *Chavs: the Demonization of the Working Class,* (London: Verso, 2011).

[33] For example, see Jeevan Jasagar, 'Ten percent of teenagers at risk of joining underclass, says study', *Guardian* [online], 7 July 2010, (accessed 10 April 2015)

[34] See Welshman for a comprehensive discussion of this agenda.

[35] Ruth Levitas, ' The government has misrepresented research findings on 'troubled families', blaming the poor, not coalition policies, for rising poverty levels', *LSE British Politics and Policy* [blog], http://blogs.lse.ac.uk/politicsandpolicy/troubled-families-misrepresentation-levitas/ 14 June 2012.

[36] Mark Easton, 'England riots: The return of the underclass', *BBC News* [online], 11 August 2011.

[37] Mary Riddell, 'London riots: the underclass lashes out', *the Telegraph* [online], 08 August 2011.

[38] David Cameron, *PM's speech on the fightback after the riots* (gov.uk, 2011), https://www.gov.uk/government/speeches/pms-speech-on-the-fightback-after-the-riots [accessed 10 April 2015]

[39] See John Lea and Simon Holdsworth, 'Understanding the riots', *Criminal Justice Matters* 87:1 (2012), pp.30–31.

warn others. This also pandered to publics anxieties. The context and aftermath of the riots have been widely examined.[40] Thus, rather than dealing with the real causes of the riots,[41] it was politically more expedient to utilize the underclass concept, and thus, the events were understood by some politicians, policymakers and elements of the press through a neo-liberal political lens which placed the responsibility for what happened at the feet of the troublesome poor, in the same manner that the caricatures of the *underserving* poor had done in earlier periods.

Other representations of the underclass have propagated the use of the concept in the context of other, less overtly dangerous activities - not offending, rioting or anti-social behaviour, but in relation to council tenancy for instance. Watt explains how this has occurred with images of council tenants, where the very fact that an individual claims support towards their housing costs might mark them out as a member of the problem poor.[42] Tracy Jensen relates much of what we see in this context to what might be described as 're-writing a crisis of economy to a crisis of welfare', where the distinction between 'striver' and 'skiver' is played-out in popular discourses. Jensen demonstrates how populist ideas around problem groups have been created and proliferated through hegemonic processes of media reporting and 'common-sense making' related to policy processes, which serves to tighten-up welfare regimes, and shift the focus away from economic crisis. Poverty porn is one emergent mechanism for the propagation of such hegemonic processes, and this also reflects the commodification of the problem poor discourse. In a similar vein to Murray's responsibilising and judgmental account of the poor, poverty porn unhelpfully simplifies and misrepresents the reasons for why people face the problems they face.[43] It is perhaps possible to view this in the context of work by Cohen and others on moral panics,[44] where inaccurate representations of such groups, pitching them as a threat to civilised society, serves to both inform and validate political and policy responses - in this instance, measures designed to deal with those seen to be abusing the welfare system by virtue of being dependent on it. Guy Standing has offered a more expansive exploration of processes of marginalisation that the poor face, where the rise of *precarity* in employment and threats to social citizenship more widely, serve to devalue the poor and exacerbate their plight. As Standing notes, those suffering such a process are deemed to be the 'new dangerous class'.[45]

Conclusion

A body of literature has demonstrated how, throughout history, elements of the poor have been subject to processes of suspicion, labelling and calls for action in relation to their perceived problem behaviours and characters. In a similar vein, this paper has explored some of the contexts within which the problem poor have been labelled and caricatured, and examined this in relation to more recent processes. Such marginalisation has been an enduring feature of British society, which has served to exacerbate, not remedy, the complex problems faced by the poorest in society. The underclass concept, associated with Charles Murray, but earlier propagated in all but name by others authors, remains a conceptual tool used within politics, the media and amongst the general public to make sense of the behaviours of the most unfortunate. Such a notion conveniently sidesteps the real problems that society faces, resultant from iniquitous social and economic relations which serve to propagate the unfortunate situations that many of the poorest find themselves in. Thus, it is possible to conclude that there has been an enduring history of marginalisation of the poor in keeping with the *undeserving* principle explicit within the Poor Law system. The future is unclear, yet the fallout from the 2015 General Election has re-installed a Conservative government, and so prospects do not look good - a stated desire to 'make work pay' and to do away with 'welfare as a lifestyle choice' can surely only reflect the rhetoric examined in this paper, and present unhelpful caricatures of the poor.

[40] For example, See Lewis, Paul, Newburn, Tim, Taylor, Matthew, Mcgillivray, Catriona, Greenhill, Aster, Frayman, Harold and Proctor, Rob, 'Reading the riots: investigating England's summer of disorder: Reading the riots', *The Guardian* [online], Dec 14th; Tim Newburn, 'The 2011 English Riots in Recent Historical Perspective', *British Journal of Criminology*, 55:1 (2015), pp.39–64.

[41] See Lewis et al; Lea and Holdworth.

[42] Watt, p.347.

[43] Tracey Jensen, 'Broken/Benefits Britain' in the attention economy: policing precariats and precarious policy', [presentation], *The Precarious Precariat Workshop,* Department of Sociology, London School of Economics and Political Science, 26th March 2014.

[44] For example see Stanley Cohen, *Folk Devils and Moral Panics,* Routledge Classics, (London: Routledge, 2011).

[45] Guy Standing, *The precariat: The New Dangerous Class*, (London: Bloomsbury, 2011).

Back to the Future: Neoliberalism as Social and Political Regression

John Lea[*]

Abstract

From the perspective of the current regime of neoliberal government the period of the welfare state appears as something of an exception to the continuity of forms of social policy stretching back to the nineteenth century. It will be argued that a focus on some aspects of the relationship between crime control, social policy and the state illustrates these continuities and enables the issues involved in future policy developments to be more clearly grasped.

Key words: *labour force; neoliberalism; precariat; welfare state.*

It has been clear for some time, though underlined by the economic crisis of 2008, that western capitalist societies are undergoing profound change. It is also clear that the changes taking place as part of the dismantlement of the welfare state settlement by neoliberalism involve in many respects a return to social policies and forms of social structure reminiscent of earlier stages of capitalist development.[1] Indeed, the term neoliberalism itself implies some form of return in emphasis to the policies of the era of classical liberalism which preceded the rise of the Keynesian Welfare State.[2]

The focus of this paper is limited. Firstly, it is focused on the English case and aware that this is only one of several trajectories of development in Europe. Secondly, the aim is limited to some roughly outlined ideal typical representations of certain features of early capitalism, welfare state, and neoliberal capitalism. The complexities of gradual transition between these ideal types will be largely overlooked in the interests of making the argument that the relationships between these agencies characteristic of the early stages of industrialisation have been progressively reappearing as aspects of recent development. From such a standpoint the welfare state and the forms of social organisation integral to it, appear as an interregnum.

Early capitalism

England from the last decades of the eighteenth century to the middle of the nineteenth was a society in dynamic transition to urban industrial capitalism. Rapid social change produced profound social conflicts associated both with the chaotic conditions of the new urban environment and with the emergence of new social classes - wage labourers and owners of manufacturing capital - as political actors. In this process of change crime and the institutions of policing and criminal justice played a central role in the development of social policy.

Crime (including riot) has an important role as resistance by the mass of the labouring population to the development of urban capitalism. The study of eighteenth and early nineteenth century riots by historians such as Thompson and his colleagues showed that many were less rampages than mass interventions attempting to reverse market-oriented behaviour by merchants such as raising grain prices. Meanwhile 'social crimes' such as poaching were attempts to defend traditional communal rights in the face of private enclosure of common land. The Luddite movement and machine-smashing were similarly interventions aimed at impeding the impoverishment of traditional craft production in the face of industrialisation.[3] Thompson et al. showed that the masses attempted - ultimately unsuccessfully - to resist subordination to capital and its market processes from the standpoint of a pre-capitalist *moral economy* of traditional norms of agricultural distribution. The restricted parliamentary franchise and the outright criminalisation of worker organisation by the Combination Acts of 1799 and 1800 excluded the newly developing working class from formulating and articulat-

[*] Professor John Lea, Honorary Professor of Criminology, Department of Criminology, University of Leicester, United Kingdom.

[1] Lea J (2002) *Crime and Modernity*. London: Sage Publications.

[2] Dardot P and Laval C (2014) *The new way of the world: on neoliberal society*. London: Verso. Wacquant L (2012) Three steps to a historical anthropology of actually existing neoliberalism. *Social Anthropology /Anthropologie Sociale*, 20(1), 66–79.

[3] Thompson E (1968) *The Making of the English Working Class*. Harmondsworth: Penguin. Thompson E (1971) The Moral Economy of the English Crowd in the Eighteenth Century. *Past and Present*, 50, 76–136. Hay D, Linebaugh P, Rule J, et al. (1975) *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*. London: Allen Lane. Lea J (1999) Social Crime Revisited. *Theoretical Criminology*, 3, 307–325.

ing its interests as part of a process of political compromise, and reinforced the conditions in which recourse to riot and criminality were likely.

Meanwhile the industrial society into which the masses were being rapidly drawn was, during the first half of the nineteenth century, was one of precarious (insecure) wage labour, poverty, urban chaos, including disease due to lack of sanitation, high and rising levels of interpersonal violence and ruthless exploitation. The effects of the extension of the working day to the point of destruction of family life were famously documented by Frederick Engels and the novels of Charles Dickens.[4] Rising rates of urban interpersonal crime, optimistically read by Engels as a precursor to proletarian revolution, existed alongside urban forms of social crime such as shoplifting, machine smashing and all manner of smuggling and illegal economies as the masses as a whole, rather than a distinct criminal group or class, attempting to resist the worst ravages of early industrial capitalism.

Crime and resistance and crime as social breakdown combined with a third dimension: criminalisation as a mode of response by the urban bourgeoisie and middle classes to the new, rapidly expanding working population now on their doorstep. Thus "the whole world of the poor tended to be accommodated within a system of criminal labelling not only to express the social fear of the respectable, but also to justify a broader strategy of control to cope with that fear."[5] This 'broader strategy of control' of the working class was indeed initially heavily focused on criminalisation and coercion until a more sophisticated mechanisms developed as the nineteenth century progressed. Just as criminality and riot were major forms of working class resistance to capitalism so coercion and violence were the major weapons in the hands of the state. Thus "until the 1840s almost all the measures directed towards control over the labour force were ... penal and repressive."[6]

But the most important process on which the success of expanding capitalism depended was the habituation of the working class to the discipline of wage labour and the working day. In this task the state was ultimately successful. The labour force for industrial capitalism was a combination of skilled workers - previously independent craftsmen - and a mass of what would now be called a 'precariat' of a highly mobile workforce prepared to offer itself for employment at little more than starvation wages. Thus "rootlessness, which engendered much sanctimonious moralising by the Victorian middle classes who saw it as a symptom of a feckless, ill-disciplined spirit, was, paradoxically, a basic requirement for Britain's still immature industrial economy… the general context of precarious employment opportunities, vigilant rent-collectors and overcrowded, insanitary tenements."[7] Meanwhile skilled craftsmen had to be subordinated to the discipline of the wage and the authority of the employer.[8] The labour process demanded discipline, obedience and punctuality.[9]

This great task of habituation was initially conceived as a variety of policing and its earliest practical theorist was the London merchant Patrick Colquhoun who, at the beginning of the nineteenth century, founded his own private police force to stop pilferage in his warehouses at Wapping. But his theory embraced 'police' in a wider and older sense of the term. He distinguished 'Municipal' and 'Criminal' aspects of police.[10] The former referred to what became the notorious New Poor Law which, from the 1840s, enforced the principle of 'less eligibility' which secured the compulsion to work by ensuring that living conditions for those on 'relief' (social security) were below the lowest wages. Criminal police (police in the modern sense), dealt with those who refused the discipline of the first and turned to crime as survival. Colquhoun's unifying concept, as Neocleous notes, was 'indigence', the inability or unwillingness to work for subsistence wages and which would be dealt with by one or other, or both arms of police. The working class, in Colquhoun's view, were a 'general army of delinquents' in need of 'humane improvement by police'.[11]

Indeed urban policing took on a much more moralising and all-embracing task than simply catching criminals - but functioned rather as an "all purpose lever of urban disciple" regulating the streets, pubs, leisure time activities, fairs etc. of the working people.[12] On the one hand Peel considered the new police founded in 1829 as very much oriented to public order rather than simply crime control,[13] while on the other hand these newly organised urban police forces "brought the arm of municipal and state authority directly to bear upon key institutions of daily life in working class neighbourhoods" and became "a direct complement to the attempts of urban middle class elites to mould a labouring class amenable to the new disciplines of work and leisure."[14]

Before leaving the central role of criminal justice agencies in establishing the conditions for capitalist expansion, mention must be made of the capitalist class itself. Outside the tradi-

4 Engels F (2009) *The Condition of the Working Class in England*. London: Penguin Classics.
5 Gatrell V (1988) 'Crime, authority and the policeman state', in F. Thompson (ed.), *The Cambridge Social History of Britain*, vol. 3. Cambridge: Cambridge University Press. (page 270).
6 Saville, J (1994) *The Consolidation of the Capitalist State*. London: Pluto Press. (page 28).
7 Evans E (1996) *The Forging of the Modern State: Early Industrial Britain, 1783–1870*. London: Longman (page 134).
8 Linebaugh P (2003) *The London Hanged: Crime and Civil Society in the Eighteenth Century*. London: Verso. (pp 417–8)
9 Thompson E (1967) Time, Work-Discipline and Industrial Capitalism. *Past and Present*, 38, 56–97.
10 Neocleous M (2000) Social Police and the Mechanisms of Prevention: Patrick Colquhoun and the condition of poverty. *British Journal of Criminology*, 40, 710–726.
11 Linebaugh P (2003) *The London Hanged: Crime and Civil Society in the Eighteenth Century*. London: Verso (p. 428).
12 Storch R (1976) The Policeman as Domestic Missionary; Urban Discipline and Popular Culture in Northern England 1850–1880. *Journal of Social History*, 9, 481–509. (p 481) see also Brogden M (1982) *The Police: Autonomy and Consent*. London: Academic Press.
13 Silver A (1967) The Demand for Order in Civil Society. In: Bordua D (ed.), *The Police: Six Sociological Essays*, New York: Wiley; Rawlings P (1999) *Crime and Power: A History of Criminal Justice 1688–1988*. London: Longman.
14 Storch R (1976) The Policeman as Domestic Missionary; Urban Discipline and Popular Culture in Northern England 1850–1880. *Journal of Social History*, 9, 481–509 (p 483).

tional merchants and financiers the manufacturing and industrial bourgeois also expanded rapidly as a class and it can easily be forgotten that habits of restraint and foresight had in many respects to be learned by wilder spirits oriented only to quick short term profits. With the spread of limited liability, traditions of restraint and judicious use of shareholders funds assumed increased importance. The penalisation of fraud and embezzlement in the face of a wave of business criminality which was noted by Engels[15] became increasingly the focus of legislation in the latter half of the century.[16]

But as urban society developed and the majority of the working class came to inhabit more stable and settled urban communities, and as rates of interpersonal crime fell continuously,[17] habituation to the discipline of wage labour became increasingly 'second nature' transmitted through a 'micro-policing' of everyday life in an archipelago of disciplinary and learning institutions - the factory, prison, school and family.[18] By the end of the nineteenth century the old (Colquhoun) sense of police continues to apply only to the very poorest and itinerant sections of the working class where precarious labour continues and where police (and expanding welfare agencies) find their targets, while the bulk of working class communities look on in 'grudging acceptance'.[19]

Such developments required, finally, a massive expansion in the size and competence of the state machinery. The state was never absent from the process of industrial development and the liberal principles of the free market, the regime of "*laisser-faire* itself was enforced by... an enormous increase in the administrative functions of the state."[20] It is true that aspects of the growth of the state - such as the expansion and reform of the police force were resisted by sections of the ruling elites. Tory Prime Minister Robert Peel in 1829 faced opposition to his new Metropolitan Police (which was soon to absorb Colquhoun's private force) from rural landed interests quite happy with their own private system of retainers and gamekeepers and suspicious of anything which smacked of a Napoleonic *gendarmerie.*[21] But such resistance was against the gathering tide of the expanding and increasingly efficient state.

Throughout the nineteenth century the size of the state expanded while the recruitment of its personnel moved away from personal contact and patronage towards open competition for civil service entry. The institutions of the Poor Law had required an army of inspectors and commissioners and many of the more modern functions of the welfare state including, the population census, public utilities, public health, elementary education, and social benefits which developed towards the end of the nineteenth century required an expanding bureaucracy. Many of these, such as social work, probation, elementary education began as forms of private or religious philanthropy and were subsequently regulated, inspected and finally absorbed by the state in the early twentieth century. The repressive apparatus of the state did not decline but was rather supplemented by and expanding and increasingly competent state bureaucracy which developed its own knowledge gathering mechanisms such as the Royal Commission of Enquiry inaugurated during the 1830s.[22]

The overall tendency of development during the last third of the nineteenth century was towards the strengthening state, the recognition of the working class and its forms of organisation as part of the social and political community and the marginalisation of issues of crime and crime control to the problematic periphery of 'social problems'. The working class ceased to be an object - of fear and police and became part of society and the political system through extension of the franchise and legitimate political and industrial organisation. The institutions of welfare, education and health were forms of socialisation rather than the repression of recalcitrant moral economies and were part of the apparatus of social rights or citizenship. Class conflict between labour and capital, at times violent, continued. But it was no longer about the capitalist urban life as such but about the more restricted issues of wages and conditions within it. The high point of this development, achieved only after the trauma of two world wars, was the welfare state.

A crucial factor encouraging the leading sections of the capitalist class to accommodate to the demands of the skilled sections of the working class for incorporation into the political system (through voting and trade union rights) was imperialism and colonial expansion. The state and the working class provided the military means for colonial expansion while the latter provided surplus profits which enabled rising incomes for the skilled workers.[23]

The welfare state as interregnum

During the period from 1945 to the end of the1960s the welfare state and its accompanying Keynesian-inspired economic management (the Keynesian Welfare State) was seen by most

[15] Engels F (2009) *The Condition of the Working Class in England*. London: Penguin Classics.

[16] Wiener M (1990) *Reconstructing the criminal: Culture, law, and policy in England, 1830–1914*. Cambridge: Cambridge University Press; Robb G (1992) *White Collar Crime in Modern England: Financial Fraud and Business Morality 1845–1929*. Cambridge: Cambridge University Press; Taylor J (2013) Why have no bankers gone to jail? *History and Policy*: Policy Papers, Available from: http://www.historyandpolicy.org/policy-papers/papers/why-have-no-bankers-gone-to-jail (accessed 13 November 2014); Wilson S (2014) *The Origins of Modern Financial Crime: Historical foundations and current problems in Britain*. London: Routledge.

[17] Gatrell V (1980) 'The decline of theft and violence in Victorian and Edwardian England', in Victor Gatrell et al. (eds.), *Crime and the Law*, pp. 238–337. London: Europa Publications.

[18] Foucault M (1977) *Discipline and Punish: The Birth of the Prison*. London: Allen Lane; Donzelot J (1991) The Mobilization of Society. In: Burchell G, Gordon C, and Miller P (eds), *The Foucault Effect: Studies in Governmentality*, Brighton: Harvester Wheatsheaf, pp. 169–179.

[19] Brogden M (1982) *The Police: Autonomy and Consent*. London: Academic Press; Cohen P (1979) Policing the Working Class City. In: Fine B, Kinsey R, Lea J, et al. (eds), *Capitalism and the Rule of Law*, London: Hutchinso.

[20] Polanyi K (1957) *The Great Transformation: The Political and Economic Origins of Our Time*. Boston MA: Beacon Press. (p 139).

[21] Hay D, Linebaugh P, Rule J, et al. (1975) *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*. London: Allen Lane.

[22] Evans E (1996) *The Forging of the Modern State: Early Industrial Britain, 1783–1870*. London: Longman. (p 299).

[23] Screpanti E (2014) *Global Imperialism and the Great Crisis: The Uncertain Future of Capitalism*. New York: Monthly Review Press.

as a natural and irreversible outcome of the processes recounted above. Increasing state intervention guaranteed welfare rights, employment security and rising living standards which were seen as the necessary price paid by capital for stable relations with a powerful working class whose incorporation into the political system had proved inevitable and with the result that capitalism had been "reformed out of all recognition."[24] Conflict between capital and labour seemed to have been resolved by sharing economic growth between wages and profits while state spending on welfare was both a guarantee of social rights and also a source of economic stability by creating demand for goods and services produced by the private sector. The state, the working class and capital were now seen to be mutually involved in a virtuous circle or new 'social contract' however tentative and reinforced by joint participation both through parliament and in various regional and industrial forums of political compromise.

Underlying these developments was the period of sustained economic expansion from the immediate post Second World War years to the early 1970s which fostered the growth of a 'Fordist' working class of high-wage, secure production-line jobs, well organised trade unions and rising wages and an orientation to family and consumption.[25] Meanwhile expanding state-funded higher education increased the opportunities for upward social mobility into the expanding white collar middle class itself a product of industrial expansion and technological change. The result was a slight tendency towards the equalisation of incomes,[26] but in any case rising wages and consumption led to some homogenisation of culture and lifestyles. This was enhanced by access to welfare services such as education and health care delivered on a universal basis, irrespective of income. This strategy was conceived to encourage a shared commitment to the welfare state irrespective of social class. The integration of the working and middle classes would be consolidated by housing and urban reform. New housing estates and 'new towns' built on the periphery of existing conurbations involved a strategy of the uprooting and relocation of the poorest sections of the working class in new housing estates, often of high-rise flats. The aim was the breakdown of class ghettoisation and the creation of a common, 'classless' living space.[27]

But precarious labour had not entirely disappeared. Rather it took the form of migrants from former colonial dependencies. The demand for unskilled labour and the upward mobility of native workers was sufficient to draw in substantial numbers of unskilled migrants but weak in enabling the latter to overcome ethnic discrimination and move up into more secure employment.[28]

In this scenario crime and criminal justice tended to sink below the political horizon being seen largely as a concern of specialist penal administrators, police, probation and prison administration.[29] The old notion of 'police' was relegated to the history books, the issue of habituation of the working class to capitalism having been replaced by that of the incorporation into a socially cohesive society through welfare citizenship. Meanwhile police forces were seen as a *supplement* to informal social control of criminality by working class communities themselves.[30] Riots as forms of social protest declined from the end of the nineteenth century giving way to a politics of 'industrial citizenship'.[31] The latter could periodically breakdown - spectacularly in the case of the General Strike of 1926 - but such violence was a consequence of the breakdown of negotiation between capital and labour rather than the main weapon of the latter and it was assumed that the more sophisticated structures of negotiation and communication after 1945 would prevent such breakdowns - which they did until the great miners strike of 1984–5. Riot would return to significance at the beginning of the 1980s.

Meanwhile 'social crime' remained as little more than the informal toleration of some forms of petty theft in poor communities.[32] The criminal justice apparatus, together with the expanding apparatus of social work, probation and other forms of social assistance were focused on marginal social problem groups who had 'fallen on hard times' or whose criminality was a matter of consensually defined harm shared across the social classes. The Fordist mass working class with rising incomes and consumption would share with the middle classes and capitalists' common attitudes to theft. The last residues of 'social crime' would be eliminated except among the socially powerless, the marginal poor who were the focus of the various agencies of criminal justice and social work. One consequence, perhaps, of this view of the criminal as the weak, marginal deviant

[24] Crosland A (1956) *The Future of Socialism*. London: Jonathan Cape. (p 517).

[25] Jessop B (1992) 'Fordism and post-Fordism: a critical reformulation', in A.J. Scott and M.J. Storper, eds, *Pathways to Regionalism and Industrial Development*, London: Routledge, 43–65; Lea J (1997) Postfordism and Criminality. In: Jewson N and MacGregor S (eds), *Transforming Cities: contested governance and new spatial divisions*, London: Routledge, pp. 42–55.

[26] Titmuss R (1964) 'Introduction' to R.H. Tawney, *Equality*. London: Allen & Unwin.

[27] Young M and Willmott P (1957) *Family and Kinship in East London*. London: Routledge & Kegan Paul.

[28] Lea J (1980) The Contradictions of the Sixties' Race Relations Legislation. In: Conference ND (ed.), *Permissiveness and Control: The Fate of the Sixties Legislation.*, London: Macmillan; Rex J and Tomlinson S (1979) *Colonial Immigrants in a British City: A Class Analysis*. Routledge & Kegan Paul; Jordan B (2013) Authoritarianism and the precariat. *Global Discourse*, 3(3–4), 388–403.

[29] Downes D and Morgan R (1994) Hostages to Fortune? The Politics of law and order in post-war Britain. In: Maguire M, Morgan R, and Reiner R (eds), *The Oxford Handbook of Criminology*, Oxford: Oxford University Press; Lea J (2002) *Crime and Modernity*. London: Sage Publications.

[30] Reiner R (2000) *The Politics of the Police*. Oxford: Oxford University Press.

[31] Marshall T (1950) *Citizen and Social Class: And Other Essays*. Cambridge: Cambridge University Press; Bagguley P (2001) *Industrial Citizenship In Britain: Its Neglect And Decline*. (unpublished paper) Department of Sociology and Social Policy, University of Leeds. Available at www.leeds.ac.uk/sociology/people/pbdocs/Industrial%20Citizenship.doc (accessed 20/11/2013).

[32] Humphries S (1981) *Hooligans or Rebels? An Oral History of Working Class Childhood and Youth 1889–1939*. Oxford: Blackwell; Benson J (1989) *The Working Class in Britain 1850–1939*. London: Longman; Lea J (1999) Social Crime Revisited. *Theoretical Criminology*, 3, 307–325.

was that, despite an increase in fraud prosecutions immediately after the Second World War,[33] the image of the bourgeois criminal remained focused on small-time racketeers and businesses, particular crimes such as long-firm fraud committed by groups of professional criminals *against* legitimate business, rather than criminality internal to the world of big business and finance.[34]

The expansion of the Keynesian Welfare State of which the criminal justice system was now a small part required a substantial increase in the competence and knowledge-gathering capabilities of the state machinery. Indeed the famous Beveridge Report of 1942,[35] the founding document of the post second world war welfare state exemplified the expanding knowledge gathering and planning competence of the state. The necessities of wartime planning provided a powerful impetus, although elements were in place well before the war. The political relations of the stable compromise between capital and labour on which the welfare state was built themselves enhanced the competencies of the state by providing mechanisms of interest representation and consultation and creating an environment in which research organisations both independent and politically aligned could function. The Royal Commission expanded its role as a key mechanism for knowledge gathering and the bringing together of experts. Inaugurated during the nineteenth century (as noted above) Royal Commissions were appointed at the rate of one per year between 1950 and 1980.[36]

However, as the 1960s progressed the contradictions and problems faced by the Keynesian Welfare State became increasingly apparent. The exhaustion and declining performance of the British Economy and the weakening of manufacturing industry undermined the high wage mass consumption of key sections of the working class. The lack of symbiosis between financial capital and industry - a phenomenon of crucial importance in the present period - was widely seen as responsible.[37] But more fundamental issues such as increasing competition between the capitalist countries now that Western Europe had recovered from the war combined with the loss of protected imperial markets due to the end of the British colonial empire. The result was a gradual shift from a manufacturing to a service economy and this was not only leaving many areas economically depressed but began to undermine the regime of high wages for the organised working class. As the 1960s progressed the political compromise between labour and capital came under increasing threat.

Meanwhile new statistical studies showed that the tendency to income equality had been exaggerated and in any case now reversed,[38] and that economic growth in general had been suffered severely uneven distribution. Much rehousing and slum clearance appeared to have had the effect of weakening rather than strengthening communities while uneven economic expansion led to the departure of the skilled working class - social mobility involved geographical mobility - from traditional communities often meant a decline of local trades unions and Labour parties, the organs of working class interest articulation and political integration and in the general level of informal social control of deviance and petty crime. The diffusion of the cultural values of consumption combined with the weakening of employment opportunities led to rising relative deprivation amongst the young and, in the face of these weakening controls crime rates climbed steadily.[39] These problems were as yet at the margins but would not remain there for long.

The current crisis: neoliberalism as historical regression

The so-called neoliberal revolution is based on the view that "the welfare state (propelled by working- class reaction to the Depression of the 1930s and the popular mobilisation of World War Two) mistakenly saw its task as intervening in the economy, redistributing wealth, universalising life-chances, attacking unemployment, protecting the socially vulnerable, ameliorating the condition of oppressed or marginalised groups and addressing social injustice."[40] The key mistake, according to neoliberalism is to imagine that the state could substitute for the market and individual decision making as a solution both to economic and social matters. The Keynesian Welfare State was seen to have failed economically in that intervention in the economy failed to offset economic decline and socially in that welfare citizenship programmes both necessitated crippling taxation and produced a culture of dependency,[41] which demotivated individuals from the responsibility to present themselves for work. In short that it had undone the work of habituation to wage labour begun in the earlier period.

An alternative reading of the development of neoliberalism agrees that the Keynesian Welfare State failed, not because it undermined individual initiative but because it depended on a rate of capitalist economic expansion that was no longer available and indeed had entered into deep crisis, as evidenced by the global financial crash of 2007–8 and the very slow subsequent recovery. Capitalism needs, in the interests of restoring the profitability of investment, to shift the burden of taxation to the working class through low wages, and the elimination of welfare citizenship.

Neoliberalism in Britain is generally regarded to have been inaugurated with the first government led by Margaret Thatcher in 1979. It is often, mistakenly seen as simply a rolling back of the Keynesian Welfare State through privatisation of welfare and public utilities in order to reduce taxation (particularly on capital and the wealthy), to provide increased opportunities to private capital and also to restore a sense of individual responsi-

[33] Taylor I (1982) *Law and Order: Arguments for Socialism*. London: Macmillan.
[34] Levi M (1981) *The Phantom Capitalists: The Organization and Control of Long Firm Fraud*. Aldershot: Gower.
[35] Beveridge W (1942) *Social Insurance and Allied Services*. Cmnd 6404. London: HMSO.
[36] Leys C (2006) The Cynical State. In: Panitch L and Leys C (eds), *Socialist Register 2006*, London: Merlin Press, pp. 1–27.
[37] Gamble A (1988) *The Free Economy And The Strong State*. London: Macmillan.
[38] Nicholson J. (1967) 'The distribution of personal income', *Lloyds Bank Review* (January).
[39] Lea J and Young J (1984) *What Is To Be Done About Law and Order? - Crisis in the Eighties*. Harmondsworth: Penguin.
[40] Hall S (2012) The neoliberal revolution. In: Rutherford J and Davison S (eds), *The neoliberal crisis*, London: Soundings/Lawrence Wishart, pp. 8–26 (p 10).
[41] Murray C (1990) *The Emerging British Underclass*. London: Institute of Economic Affairs.

bility throughout society. But this is only part of the story. Neoliberals, unlike many classical nineteenth century liberal theorists, foreground the steps that the state must take to reproduce and enforce market relations and individual responsibility. This is not a one-off process of abolishing the previous regime but a constant process of renewal.[42] Thus alongside the rolling back of the Keynesian Welfare State is the emergence and consolidation of what might be called the Neoliberal Security State.[43]

It is the argument of this final section that the Neoliberal Security State resembles in crucial respects the regime of early capitalism discussed in the first section. There are, it will be argued, four similarities in particular. Firstly, the replacement, in the relations between the working class, the middle classes and the wealthy owners of finance capital, of social cohesion and welfare citizenship with something resembling the nineteenth century fear of the mob to which the neoliberal state responds with a focus on security. Secondly, the return of the major task of the neoliberal state as the coercive habituation of large sections of the working class to low wage precarious labour. Thirdly, the re-emergence of riot and social crime as forms of protest by the poor marginalised from the forms of political representation and interest articulation which reached their highest development during the welfare state period. Finally, the loss of much of the expertise and planning capacity of the state machinery that, again, reached its highest point during the welfare state.

A marked characteristic of the current neoliberal phase of capitalist development is the intensification of wealth inequality. At the global level it is estimated that by 2016 the wealth of the richest one per cent of the world's population will overtake that of the remaining ninety-nine per cent.[44] These developments are well reflected in the changing distribution of income within the UK.[45] There are several general reasons for such an unprecedented development. There is a general tendency for wealth derived from interest on capital to increase faster than that derived from wage labour.[46] Tax increases on middle and lower income groups tend to find their way, particularly since the crisis of 2007–8 into schemes to compensate banks for loss of profits. Slow economic growth, augmented by state legal repression of trade union organisation (see below) has further reduced wage levels. This, combined with the shift from manufacturing to more profitable financial enterprise and the growth of the digital knowledge economy has crucially broken the link between profits and labour. Investment bankers and Hedge Fund managers do not need to justify their bonus payments to trade union negotiators representing a large well organised workforce.

The lack of oversight by the old mechanisms of integration and political compromise which characterised the welfare state, combine with the increasingly globalised and digital nature of financial transactions to seriously blur the distinction between fraud and legitimate transactions in the financial world.[47] The effortless global mobility of finance partly explains the lack of political will on the part of governments to confront investment banks considered 'too big to fail' and "has led to the effective decriminalisation of fraud."[48] While the subculture of banking shows a resistance to - or indeed reversal - of those forms of habituation to restraint which was the aim of nineteenth century reforms.[49] The global mobility of the financial elite has been in process for some time,[50] and is the polar case of the disconnection and anomie which characterise the relations between not only the global rich but also substantial sections of the domestic middle class and the increasingly fragmented and precarious working class.

The old universalistic welfare structures which were the aim of the welfare state are being progressively dismantled. A middle class, itself heavily in debt, feels increasingly less willing to contribute to taxation to fund a welfare system which it perceives (and is told repeatedly by the mass media and neoliberal politicians) as largely funding a feckless underclass. There is still considerable support for collective universalist welfare institutions such as the health service. However "in the 1980s, a large majority of people (more than eight in ten) believed it was the job of government to provide a decent standard of living for the unemployed. By 1996, support for this view had fallen to less than three-quarters and, by 2006, to just half." [51] The weakening of social cohesion has been reinforced by radical changes to the housing market. Cuts to welfare benefits, reduction in public housing and rising costs in the private rented sector "could mean that 60 per cent of local authority areas would be unaffordable to [Housing Benefit] claimants by 2030."[52] In London, which attracts global super-rich this process of 'social cleansing' is particularly acute.[53] The result is increasing geo-

[42] Dardot P and Laval C (2014) *The new way of the world: on neoliberal society*. London: Verso.

[43] Hallsworth S and Lea J (2011) Reconstructing Leviathan: Emerging contours of the security state. *Theoretical Criminology*, 15, 141–157; Lea J and Hallsworth S (2012) Bringing the State Back In: understanding neoliberal security. In: Squires P and Lea J (eds), *Criminalisation and advanced marginality: critically exploring the work of Loic Wacquant*, Bristol: Policy Press.

[44] Oxfam (2015) Wealth: Having it all and wanting more (Oxfam Issue Briefing). Oxfam GB, Available from: http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf (accessed 15 January 2015).

[45] Dorling D (2014) *Inequality and the 1%*. London : New York: Verso Books.

[46] Piketty T (2014) *Capital in the Twenty-First Century*. Cambridge Massachusetts: Harvard University Press.

[47] Monaghan L and O'Flynn M (2012) The Madoffization of Society: A Corrosive Process in an Age of Fictitious Capital. *Critical Sociology*, 39(6), 869–887.

[48] Taylor J (2013) Why have no bankers gone to jail? *History and Policy*: Policy Papers, Available from: http://www.historyandpolicy.org/policy-papers/papers/why-have-no-bankers-gone-to-jail (accessed 13 November 2014).

[49] Cohn A, Fehr E and Maréchal M (2014) Business culture and dishonesty in the banking industry. *Nature*, (516), 86–89.

[50] Lasch C (1995) *The Revolt of the Elites and the Betrayal of Democracy*. London: Norton.

[51] Park A, Bryson C, Clery E, et al. (eds) (2013) *British Social Attitudes : the 30th Report*. London: NatCen Social Research. (p 37).

[52] Tate A, Lloyd T, Sankey S, et al. (2012) *The Housing Report. Edition 2*. London: Chartered Institute of Housing/ Shelter. (p 30).

[53] Twycross F (2014) The benefit cap is making central London a no-go zone for low income families. *New Statesman*, 22nd December.

graphical segregation of rich and poor and an end to the welfare state aim of multi-class housing areas.[54]

Mirroring the rise of the global super-rich has been the demise of the high wage, securely employed working class and the return of low wage precarious labour. Neoliberal governments welcome this as a return to labour market flexibility and have taken steps to reduce the powers of trade unions. Thatcher's successful battle with the mineworkers in the mid-1980s was iconic,[55] but union membership has been declining steadily from 55 per cent of all employees in 1980 to 28 per cent in 2006. This is less due to the shift away from mass production manufacturing as such and more related to the fact "that after 1980, firms are much less likely to recognise unions than firms that employed the same number of people in the same region and in the same industry in 1980."[56] This was encouraged by legislation increasing the obstacles to strike action, something that the Conservative party promises to reinforce if successful in the 2015 General Election.[57] This decline has marginalised large sections of the working class from industrial citizenship and paved the way for the consignment of large numbers of working class - particularly young people - to "insecure forms of labour that are unlikely to assist them to build a desirable identity or a desirable career."[58] This process is part of a fragmentation of the working class in which both high and low skill employment is expanding with middle level skilled jobs declining. It is estimated that in the UK that the proportion of workers aged under 30 in low paid employment has expanded from 8 per cent in 1975 to almost 30 per cent in 2014. An increasing proportion of these are 'zero-hours' jobs that do not guarantee a fixed number of working hours or pay and this phenomenon has accelerated since the economic crash of 2008.[59] At the same time the rate of social mobility, a crucial component of welfare state cohesion, has drastically declined.[60] The young poor have become increasingly priced out of housing markets as already noted.

In this context neoliberal social policy has adopted orientations more in common with the early nineteenth century than with the welfare state period. There has been a shift away from social citizenship towards combatting 'indigence' and developing mechanisms of security and surveillance of the young poor. Neoliberal social policy sees the welfare state period as having encouraged a culture of dependency (on state guaranteed income irrespective of employment) which must be broken such that young people take responsibility for their lives and commit themselves enthusiastically to flexible low wage labour. Old habits must be broken. Accordingly, since the 1990s forms of 'conditionality' (the necessity to demonstrate job-seeking behaviour in return for receipt of unemployment benefits) were progressively strengthened under the neoliberal New Labour governments.[61] The most recent iteration is a harsh regime of workfare or 'less eligibility' involving withdrawal of benefits for having excessive housing space, or failing to work for a period without pay (work experience) when instructed to do so by benefit officers or for other manifestations of 'work shy' behaviour. For the latter one may substitute 'indigence' in precisely the manner intended by Colquhoun. The current (2015) state of affairs has raised concern among parliamentarians in the UK.[62]

Meanwhile the fear of the 'mob' takes its modern form in the orientation of urban and social policy towards exclusion and suppression. Firstly by surveillance mechanisms such as closed circuit television and private security guards keeping poor and unemployed young people whose appearance and behaviour is defined as anti-social or nuisance out of private housing estates, shopping areas and city centres generally.[63] Secondly by the effective criminalisation and repression of such behaviour by a battery of anti-social behaviour orders, curfews, dispersal zones, parenting orders, and high levels of police surveillance and 'stop and search' which blur the boundaries of criminality.[64] These surveillance and repressive measures may solve the problem of nuisance but are usually unaccompanied by welfare oriented measures designed to reintegrate such populations into community life through employment or democratic participation. Government rhetoric about 'community cohesion' "has become less about socially integrating those who live at the margins of society and more about guarding the boundaries between the established and the outsiders."[65]

These developments are compounded by the political marginalisation of the poor, again especially the young. Peter Mair has documented the "the twin processes of popular and elite withdrawal from mass electoral politics."[66] Withdrawal by the financial elite of super-rich to focus on global circuits of capital accumulation has been noted. This has reduced the capacities of the national state in the areas of economic and social policy (see below). From the standpoint of the masses there is less point in political activism at the national state level. The result

54 Dorling D (2014) Class Segregation. In: Lloyd C, Ian Shuttleworth, and Wong DW (eds), *Social-spatial segregation: Concepts, processes and outcomes*, Bristol: Policy Press, pp. 363–388.
55 Milne S (2004) *The Enemy within: Thatcher's Secret War Against the Miners*. New edition edition. London ; New York: Verso Books.
56 Bryson A and Blanchflower D (2008) *The end of trade unionism as we know it?*. London: CentrePiece. (p 27).
57 Mason R (2014) Unions furious at Tory plan to make it more difficult for workers to strike. *the Guardian*, 18th July
58 Standing G (2011) *The Precariat: The New Dangerous Class*. London: Bloomsbury Academic. (p 17).
59 Plunkett J and Pessoa JP (2013) *A Polarising Crisis? The changing shape of the UK and US labour markets from 2008 to 2012*. London: Resolution Foundation.
60 D'Arcy C and Hurrell A (2014) *Escape Plan: Understanding who progresses from low pay and who gets stuck*. London: Resolution Foundation.
61 Trickey H and Walker R (2000) Steps to compulsion within British labour market policies. In: Ivar Lødemel and Heather Trickey (eds), *'An Offer You Can't Refuse' Workfare in international perspective*, Bristol: Policy Press.
62 Harris J (2015) Do you want people bullied off benefits? Because that's what's happening | John Harris. *the Guardian*, 21st January.
63 Minton A (2009) *Ground Control: Far and Happiness in the twenty-first-century city*. London: Penguin Books; Hatherley O (2012) *A New Kind of Bleak: journeys through urban Britain*. London; New York: Verso.
64 Squires P (2006) New Labour and the politics of antisocial behaviour. *Critical Social Policy*, 26, 144–168; Crawford A (2009) Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice. *British Journal of Criminology*, 49, 810–831.
65 Rodger J (2008) *Criminalising Social Policy: Anti-social behaviour and welfare in a de-civilised society*. Cullompton: Willan. (p 165).
66 Mair P (2013) *Ruling The Void: The Hollowing Of Western Democracy*. London: Verso. (p 25).

is declining membership of political parties and voter turnout at elections. The precariatisation of work has, as already noted, distanced young people from trade unions which, during the welfare state period, were key mechanisms linking working class people to the political system. Add to this the massive cuts in welfare state services oriented to young people and a rise in political alienation is hardly surprising. Alienation from politics must be distinguished from apathy[67] or a complete subordination to the values of consumption.[68] It is important to understand the role of political organisations such as parties and trade unions in channelling and formulating social grievances into clear policies and demands. In the absence of these mechanisms anger at the conditions of precariousness facing large numbers of young people may assume more diffuse forms of rage and anger which may find expression in criminality, riots and even terrorism. It would be logical to suppose therefore that forms of resistance such as riot and social crime will increase for similar reasons to the eighteenth and early nineteenth centuries.

But the picture is more complex. As regards crime for example the current period of economic recession throughout the industrialised countries presents a picture of generally falling crime rates. Paradoxically it was during the period of the Keynesian Welfare State that steep crime increases occurred. This can be accounted for in terms of the welfare state having generally raised expectations of social mobility and rising incomes which were in fact very unevenly distributed.[69] The present period might be expected to exhibit similar dynamics as young working class people now experience precariatisation and workfare from the standpoint of a 'moral economy' of welfare citizenship derived from their parents who grew up, at least partially, during the welfare state and economic expansion. It has been noted that in mature industrial capitalism 'social crime' becomes simply the community tolerance of some forms of petty crime and young people in some deprived areas do seem to make a rough and ready distinction between more harmful forms of (violent) crime and 'social' crime such as shoplifting, burglary or smuggling such that "certain forms of crime... appear to represent a collective survival strategy and [are] considered as 'social'."[70]. Yet it is precisely the latter type of crime which has most reduced due to advances in surveillance and crime prevention technology in recent years. There has also been a substantial shift to various forms of cybercrime which both require a degree of technological expertise and are extremely under-reported.[71]

As regards riot there is certainly a statistical relationship between economic downturns and such disturbances.[72] The English riots of 2011 were certainly the largest for many years,[73] but considerably controversy exists as to whether any analogy can be made with eighteenth and early nineteenth century protest riots. Looting of shops and stores featured prominently in these riots and some researchers have concluded that the riots should be seen less as any form of protest than an exhibition of rampant consumerism.[74] Firstly it is clear that many other themes besides looting were strongly present in the riots. Many young people saw themselves as rioting both against repressive policing and surveillance which had driven them progressively out of public spaces and against the cuts in welfare and education as part of the neoliberal rolling back of the welfare aspects of the state.[75] Moreover, looting can be seen as more than simply a criminal desire to acquire free consumer goods but much more of a symbolic albeit inchoate protest against a neoliberal social and political order which places a high value on wealth and consumption from which it has progressively excluded the young poor, the precariat.[76] In this sense it is not inaccurate to speak of the young rioters starting from moral economy of expectations derived from older ideas of welfare citizenship.[77]

There is a final aspect of a return to the past, underlined graphically by the 2011 riots, and that is the declining competence of the state in the area of social policy. Globally mobile financial capital is less interested in organs of political compromise with an organised labour movement while the super-rich elite of bankers and financiers are less interested in social policy and development.[78] Neoliberal ideology accommodates to these developments through its focus on security and removing obstacles to the smooth function of markets, including the labour market and the deprioritisation of welfare citizenship. Declining state competence is not restricted to social policy areas as witnessed by a decreased ability to collect taxes (from particularly from transnational corporations). This begins to resemble the

[67] Marsh D, O´Toole T and Jones S (2006) *Young People and Politics in the UK*. Palgrave Macmillan.

[68] Hall S, Winlow S and Ancram C (2008) *Criminal Identites and Consumer Culture; crime, exclusion and the new culture of narcissism*. Cullompton: Willan publishing.

[69] Lea J and Young J (1984) *What Is To Be Done About Law and Order? - Crisis in the Eighties*. Harmondsworth: Penguin; Currie E (1985) *Confronting Crime: An American Challenge*. New York: Random House.

[70] Yates J (2006) 'You Just Don't Grass': Youth, Crime and 'Grassing' in a Working Class Community. *Youth Justice*, 6(3), 195–210 (p 181).

[71] Fitzgerald M (2014) The curious case of the fall in crime. *Centre for Crime and Justice Studies*, Available from: http://www.crimeandjustice.org.uk/resources/curious-case-fall-crime (accessed 13 November 2014).

[72] Ponticelli J and Voth H-J (2011) *Austerity and Anarchy: Budget Cuts and Social Unrest in Europe 1919–2008*. Discussion Paper, London: Centre for Economic Policy Research.

[73] Newburn T (2015) The 2011 England Riots in Recent Historical Perspective. *British Journal of Criminology*, 55(1), 39–64.

[74] Treadwell J, Briggs D, Winlow S, et al. (2013) Shopocalypse Now: Consumer Culture and the English Riots of 2011. *British Journal of Criminology*, 53(1), 1–17.

[75] Newburn T (2015) The 2011 England Riots in Recent Historical Perspective. *British Journal of Criminology*, 55(1), 39–64; Slater T (2015) The Neoliberal State and the 2011 English Riots: A Class Analysis. In: Thörn H, Mayer M, Sernhede O, et al. (eds), *Understanding Urban Uprisings, Protests & Movements*, Basingstoke: Palgrave-Macmillan; James M (2011) Behind the riots: what young people think about the 2011 summer unrest. *the Guardian*, 10th May.

[76] Tyler I (2013) The Riots of the Underclass?: Stigmatisation, Mediation and the Government of Poverty and Disadvantage in Neoliberal Britain. *Sociological Research Online*, 18(4), 6.

[77] Harvie D and Milburn K (2013) The Moral Economy of the English Crowd in the Twenty-First Century. *South Atlantic Quarterly*, 112(3), 559–567.

[78] Screpanti E (2014) *Global Imperialism and the Great Crisis: The Uncertain Future of Capitalism*. New York: Monthly Review Press.

incompetence of the pre-welfare state era while state interest in key institutions of welfare citizenship amounts to little more than considerations of privatisation and outsourcing. There is a mutual reinforcement of neoliberal lack of concern for social policy in the old sense of welfare citizenship and a declining competence in the knowledge-gathering mechanisms at the disposal of the state for the formation of such policy. There has emerged, gradually and unevenly, a specific neoliberal policy regime in which increasingly key roles are played by personnel seconded from the private sector and politicised special advisors rather than traditional civil servants. The result is a decline in the use of older impartial knowledge gathering institutions such as the Royal Commission and an overt politicisation of policy making.[79] The privatisation of the probation service in England in 2014 was, for example, entirely driven by neoliberal political ideology in the face of opposition from senior professionals and administrators.[80]

A final example can be seen in the government response to the riots of 2011. There was an initial reluctance on the part of government to take any steps at all to find out why such events had occurred but simply to identify the rioters as criminals.[81] In 1981 when young rioters took to the streets to protest about racist policing and in particular the use of stop and search, the recently elected government of Margaret Thatcher conceded the necessity of a high profile inquiry led by a senior judge, Lord Scarman. His report[82] required a response from government and indeed legislation followed (the Police and Criminal Evidence Act 1984) which at least attempted to moderate and regulate police use of stop and search.[83] The contrast with 2011 could not have been clearer. When an inquiry was finally established,[84] it was relatively low key and there was little sense in which government awaited its recommendations as the basis for policy formulation.[85] Its eventual recommendations conformed to a neoliberal emphasis on self-responsibilisation - by stressing, for example, the need for greater 'strength of character' among young people in the riot areas. Even these were soon forgotten by central government.[86]

A much higher profile was given, in a separate report by the Metropolitan Police, to policing issues. But here there was relatively little concern - by comparison with Lord Scarnan's 1981 report - with the way in which the riots had revealed a breakdown in relations between police and young people. Insofar as police relations with poor communities were discussed the emphasis tended to emphasise the fact that police-community liaison "did not enable the disorder to be predicted" [87](Metropolitan Police Service 2012: 6). There was little rethinking of basic policing methods such as stop and search - a major issue among young roisters - but rather a simple restatement of the aim "to achieve the highest level of trust and confidence in the MPS's use of stop and search as a tactic for keeping London's streets safer". The question of making the streets safer for the young people who had rioted, yet alone guaranteeing their participation in public space and community life seemed entirely absent, not just from police but general policy thinking on the significance of the riots, at least at the level of central government.

Conclusion

By comparing the recent neoliberal inspired development of social policy with that of the early nineteenth century the welfare state period has been cast as an interruption occasioned by several features which no longer appear to be characteristics of capitalist society, at least in England. The combination of a strong sense of social solidarity derived from the experience of the second world war and the preceding depression was reinforced by a strong well organised labour movement made it inevitable for governments to orient themselves to issues of welfare citizenship. But in the periods before and following the welfare state we have located continuities: a weak fragmented working class, the role of some types of crime and riot as a form of episodic and rudimentary protest and a state overwhelmingly concerned with security and surveillance and the habituation of the working class to the rigours of the labour market.

The first period, was of course superseded precisely by the social changes that led to the welfare state. The question is whether the mounting challenges faced by neoliberal capitalism (which include, besides the issues discussed here, pressing matters such as climate change and terrorism) will be sufficient to shift the direction of travel back in the direction of something more akin to the welfare state and the types of citizenship which it, at least in theory, celebrated.

---

[79] Marquand D (2004) *The Decline of the Public: The Hollowing Out of Citizenship*. Cambridge: Polity Press; Leys C (2006) The Cynical State. In: Panitch L and Leys C (eds), *Socialist Register 2006*, London: Merlin Press, pp. 1–27.

[80] Fitzgibbon W and Lea J (2014) Defending probation: Beyond privatisation and security. *European Journal of Probation*, 6(1), 24–41.

[81] Cooper C (2012) Understanding the English 'riots' of 2011: 'mindless criminality' or youth 'Mekin Histri' in austerity Britain? *Youth and Policy*, (109), 6–26.

[82] Scarman LJ (1981) *The Brixton Disorders 10–12 April 1981 Cmnd 8427*. London: Her Majesty's Stationary Office.

[83] Lea J (2004) From Brixton to Bradford: Ideology and Discourse on Race and Urban Violence in the United Kingdom. In: Gilligan G and Pratt J (eds), *Crime, Truth and Justice*, Cullompton: Willan Publishing.

[84] Singh D (2012) *After the riots: The final report of the Riots Communities and Victims Panel*. London: he Riots Communities and Victims Panel.

[85] Lea J and Hallsworth S (2012) Understanding the Riots. *Criminal Justice Matters*, 87(1), 30–31.

[86] Lammy D (2013) Eric Pickles has treated riot victims as if they do not exist. *The Guardian*, 5th August

[87] Metropolitan Police Service (2012) *4 Days in August:: Strategic Review into the Disorder of August 2011 (Final Report)*. London: Metropolitan Police Service. (p 8).

Policing and the Reproduction of Local Social Order: a case study of Greater Manchester

Bob Jeffery[*], *Waqas Tufail*[**], *Will Jackson*[***]

Abstract

In light of increasing concerns in relation to police accountability, this article reviews the history of public order policing for one large provincial force (Greater Manchester Police). Explaining our misgivings about those narratives that discern a trend towards 'negotiation' and 'facilitation' between protestors and the police, we outline a critical framework for the analysis of police practice. This account is centred upon an understanding of the development of policing as the cornerstone of the fabrication of bourgeois social order, but stresses that this is mediated through its formal subservience to the rule of law, conflicting priorities and the need to establish 'patterns of accommodation' with the populations that are to be policed. All of this makes for the reproduction of 'local social orders', influenced by particular urban political contexts, as well as wider cultural currents. This article suggests that this is clearly evident in the facts surrounding the four major riots, and numerous other public order policing engagements, that mark the history of this particular provincial force.

Key words: *public order policing; social order; police community relations; riots.*

Introduction

This article seeks to contribute to debates around police practice and accountability by exploring the recent and contemporary history of a large provincial force in England (Greater Manchester Police) over a relatively extended period of time (1974–2014). Firstly, the need for such an article arises from an appreciation of a dearth of other histories, beyond the more general academic treatments of authors such as Critchley,[1] and Emsley,[2] and Reiner,[3] which, for obvious reasons, tend to prioritise both the overarching national picture and the London Metropolitan Police. Secondly, as is recognised in much of the literature, police-community relations have become increasingly fraught in recent decades, coincident with the emergence of neoliberal forms of governance. Arguably such processes are intensifying, whether this is seen through the prism of the criminalisation of nuisance embodied by Anti-Social Behaviour legislation, the War on Terror and the associated surveillance and stigmatisation of Muslim communities, or concerns in relation to police accountability, particularly in the context of the use of lethal force and public order policing.[4]

It is this final concern, around public order policing, which will be the focus of our historical account. This builds on previous work by the present authors that has raised questions about the policing of antifascist protest[5] and the police role in triggering the Pendleton Riot of 2011.[6] Some authors have stressed a shift from 'escalated force' to 'negotiated management'[7] as characterising the general trajectory of public order policing in the aftermath of the Miners' Strike and Poll Tax Riots of the late 1980s and early 1990s. In our view, such a narrative of the 'de-politicisation' of public order policing, ignores the more

[*] Dr. Bob Jeffery, Department of Law and Criminology, Sheffield Hallam University, United Kingdom.
[**] Dr. Waqas Tufail, Leeds Beckett University, United Kingdom.
[***] Dr. Will Jackson, Liverpool John Moores University, United Kingdom.

1 Crithcley, T. A, *A History of Police in England and Wales*, London: Constable, 1967.

2 Emsley, C. *The English Police: A Political and Social History*, London and New York: Longman, 1996.

3 Reiner, R. *The Politics of the Police (4th Edition)*, Oxford: Oxford University Press, 2010.

4 Greer, C. and McLaughlin, E. 'We Predict A Riot?', *British Journal of Criminology*, vol. 50 (2010) no. 6. pp. 1041–1059.

5 Gilmore, J. and Tufail, W. 'Police Corruption and Community Resistance,' *Criminal Justice Matters*, vol. 93 (2013) no. 1 pp. 8–9.

6 Jeffery, B. and Tufail, W. '"The riots were where the police were": Deconstructing the Pendelton Riot', *Contention: the Multidisciplinary Journal of Social Protest*, vol. 2 (2015) pp. 37–55.

7 Joyce, P. *Policing: Development and Contemporary Practice*, London and New York: Sage Publications, 2011. Gorringe, H. Stott, C. and Rosie, M. (2012) 'Dialogue Police, Decision Making and the Management of Public Order During Crowd Protest Events', *Journal of Investigative Psychology and Offender Profiling*, vol. 9 (2012) pp. 111–125. Waddington, D. *Policing Public Disorder: Theory and Practice*, Cullompton: Willan, 2007. Waddington, D. 'A "kinder blue": analysing the police management of the Sheffield anti-'Lib Dem' protest of March 2011', *Policing and Society: An International Journal of Research and Policy*, vol. 23 (2013) pp. 46–64.

recent experience of the policing of the protest movements of marginalised groups,[8] as well as the extent to which public order police have been prepared to use violence in the interests of the established economic order.[9]

In the first section of this article we develop our theoretical framework, which is grounded in an appreciation of the 'dual function' of policing, that is; as the neutral arbiter of justice and the highly partial defence of the propertied. We discuss the centrality of the police to the fabrication of the bourgeois social order through the work of Neocleous and review the work of Fassin as a contemporary study of the police role in reproducing a particular kind of social order, inflected by histories of imperialism and racism.[10] We then draw on the work of Marenin and Cohen to explore the ways in which the contradictory functions and practices of policing serve to mediate the social order imperative and produce contingent outcomes.[11] In the third section of the article, we present our extensive, but by no means exhaustive, review of academic, journalistic and other secondary accounts of the recent history of public order policing in Greater Manchester. In order to make the research manageable, we have selected our period of interest as beginning with the establishment of the Greater Manchester Police in 1974 (following the mergers of the Manchester and Salford forces with parts of Cheshire, Lancashire and West Yorkshire Constabularies), continuing up to the present day. Finally, and by way of conclusion, we explore the shifting influence of the prevailing social order on the practices of public order policing, and relate this back to our interest in contemporary debates concerning police practice and accountability.

Public Order, Parking Tickets and Class Repression

Neocleous' history of the 'police' concept seeks to go beyond standard Marxist accounts that have viewed the police as a purely repressive force aimed at silencing working class dissent. Instead he argues for a view of the institution as 'productive', that is, as playing a central role in the fabrication of bourgeois social order. That such a notion was fundamental to the 'police science' which developed in Europe from the 17th century onwards, is beyond dispute, and is linked by Neocleous to the need of the state to 'manage society to greater prosperity' and to finance standing armies in the aftermath of the Peace of Westphalia. Dissecting the canon of Liberalism, Neocleous draws attention to the rhetorical sleight of hand in Adam Smith, whereby in the course of his career the pioneer of political economy replaces "police" as supreme regulatory mechanism of society with the notion of a 'self-generating and self-regulating commercial society'.[12]

That the police were created to assist in the fabrication of bourgeois social order is evident in the writings of those who established the 'new' professional police forces which appeared between the late 18th and early 19th centuries in England. Colquhoun, the founder of the Thames River Police, thought poverty to be absolutely essential in compelling people to sell their labour power, but that policing was necessary to prevent indigence (extreme poverty engendered through an inability or refusal to work) leading to crime.[13] As Neocleous argues, the 'stability' of the market-system ultimately relies on the insecurity of economic actors and of a class of poverty "forever on the edge of falling into the state of indigence".[14]

Beyond the various clues as to the primary function of the police found in Enlightenment political philosophy, we can also point to tasks to which the 'new' police forces were set. As is evident in various histories of policing, the Police of the Metropolis (established in 1829) acted as a 'national riot squad', being deployed around the country and particularly to the northern towns and cities in order to quell dissent. Manchester saw its own force established in 1839, though political wrangling ensured local opposition continued through to 1842.[15] Scarcely a year later that force would face a major antipolice riot beginning with a dispute involving soldiers drinking in the inner-city area of Ancoats. Storch provides a vivid account of working class resistance to the new police in such places, centred on the suspicion that the police were a "political, not a protective" force, intent on the criminalisation of working class street cultures, informal economic exchange, and in the suppression of political agitation.[16]

Bringing the discussion up to the present, Neocleous argues that the while the organisation of the police is designed to reinforce the view that their primary role is crime prevention through law enforcement, this is essentially a myth.[17] Such a claim is indeed belied by those studies that have demonstrated that 'crime' constitutes a minority of police work.[18] Rather than viewing changes in policing in the twentieth century as illustrative of a shift in the focus of policing from a 'force' to a 'service', Neocleous notes that both derive from the wider mandate of 'order maintenance'.

---

8 Gilmore, J. 'Policing Protest: an authoritarian consensus', *Criminal Justice Matters*, vol. 82 (2010) pp. 21–23.

9 Jackson, W. and Monk, H. 'Police violence at anti-fracking protests: pacifying disruptive subjects', *Criminal Justice Matters*, vol. 98 (2014) pp. 12–13.

10 Neocleous, M. *The Fabrication of Social Order: A Critical Theory of Police Power*, London: Pluto Press, 2000. Fassin, D. *Enforcing Order: An Ethnography of Urban Policing*, Cambridge: Polity, 2013.

11 Marenin, O. 'Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice', *Contemporary Crises*, vol. 6 (1983) pp. 241–66. Cohen, P. 'Policing the Working-class City' in *Rethinking the Youth Question: Education, Labour and Cultural Studies*, Baskingstoke, Hampshire: MacMillan Press, 1997 [1981].

12 Op. cit. p. 25.

13 Op. cit. p. 54.

14 Op. cit. p. 59.

15 Joyce, P. 'The Transition from „Old" to „New" Policing in Early 19th Century Manchester', *Police Journal*, vol. 66 (1993) pp. 197–210.

16 Storch, R. D. 'The Plague of Blue Locusts: Police Reform and Popular Resistance in Northern England, 1840–1857', *International Review of Social History*, vol. 20 (1975) pp. 61–90. See also Emsley, C. *The English Police: A Political and Social History*, London and New York: Longman, 1996, p. 61.

17 Op. cit. pp. 92–93.

18 Bittner, E. *Aspects of Police Work.* Boston: Northeastern University Press, 1990; Brodeur, J. *The Policing Web*. Oxford: Oxford University Press, 2010; Karn, J. *Policing and Crime Reduction: The evidence and its implications for practice*, London: The Police Foundation, 2013.

Fassin's account of the undercover Anti-Criminality Brigades in the deprived Parisian suburbs relates this conception of order maintenance to the practice of stop-and-search, which, serving little practical purpose (i.e. the infinitesimally small amount of crime that is detected in this way), is better thought of as an act of signification, a call to 'social order', which in the context of economically marginalised and politically disenfranchised non-white populations in Europe, is one of 'inequality and injustice'.[19] Bringing his account to life through a rich anthropological approach, Fassin implores his reader not to ignore the "ethical dimension" of stop and search as call to social order, a reminder of one's place in the system, as purely quantitative analyses of such practices tend to ignore the component of ritual humiliation that inflects police interactions with their "property".[20] Crucially, Fassin's account directs us to an appreciation of the *specificities of social order*, and how this relates to the positions of particular classes and ethnicities within particular societal contexts (i.e. what it means to be a Frenchman of North African decent in a deprived peripheral housing estate, in the context of the history of French colonialism).

Nonetheless, a crucial aspect of the legitimation of the police, is clearly the necessity to be seen as an impartial arbiter of the social order. This is where such mechanisms as police discretion and the semblance of formal submission to the rule of law[21] combine to produce contradictory and contingent outcomes, not explicable in terms of class repression alone. Marenin perhaps goes further, basing his work on the notion of the "relative autonomy" of the state, he distinguishes between a *general order*, the "common interest of all groups in the maintenance of regularity and the protection of lives and property", and a *specific order*, "[...] the reproduction of ordered social relations, and the maintenance of those institutions and resources which allow for reproduction".[22] This leads to the author's famous formulation of the 'dual function' of the police as one of "parking tickets and class repression", yet also points to the need to excavate the precise socio-historical contexts in which policing is embedded:

> The police, a priori, are neither repressive nor deserving of support as defenders of a universal consensus on the public good. What the police defend depends on the concrete situation in which they work and the degree of control, through ideology or power, by the state over them.[23]

This suggests to Marenin, that police actions must be investigated in order to adjudicate the point at which they indicate 'domination', but that this cannot be read off from the mere existence of a police agency.

The idea of contingency in policing outcomes also features strongly in the work of Phil Cohen, who, in exploring relations between police and a particular working class community (Islington, London) over decades, draws attention to the contradictory practices stemming from a combination of conflicting "expressive" and "repressive" functions, or the signification of the maintenance of a benign general order and the "dirty work" of "real policing".[24] For Cohen this occurs when a capitalist state develops forms of representative democracy and public accountability "which reproduce the conditions of bourgeois hegemony through a process of active consent".[25] The problem for the police, on their introduction, was that they had to actively work to produce this consent through the semblance of impartiality, while at the same time being able to introduce discipline to urban populations resistant to the emerging social order.

The police were thus required to develop strategies to maintain legitimacy in 'difficult neighbourhoods' that accommodated particular working class practices, while outlawing others, and this led to the *differentiation in policing between urban contexts* whereby the statutory norms were routinely enforced in the city-centre, but increasingly only used in emergencies, in the working-class inner-cities.[26] In his historical elaboration of these arguments Cohen explores how working class resistance to the "policing of their usage of social space and time'[27] gave way to patterns of tacit negotiation in the post-World War I period, and that this was also supported by the expansion of the lower middle-class, who, through a politics of Labourism, were being incorporated into the State, and into dominant conceptions of good order and 'public propriety".[28]

Nonetheless, Cohen makes the important point that such accommodations must be continually renegotiated, given the "continual recomposition and relocation" of the labour force in accordance with the demands of capital[29], and that one barrier to this is the increasing emphasis on productivity in police work, which may lead police towards more rigorous enforcement: "The more resources allocated to increasing the efficiency of repressive policing, the more manpower has to be poured into "community relations" to re-stabilise the public image of the force".[30]

In this section, we have explored the roots of the police as a productive agency in the fabrication of bourgeois social order, the central role assumed by the 'new police' in quelling working

[19] Op. cit. p. 92.
[20] Op. cit. p. 129. See also Lee, J. A. 'Some Structural Aspects of Police Deviance in Relations with Minority Groups', in Shearing, C. (eds) *Organisational Police Deviance*, Toronto: Butterworth, 1981.
[21] Neocleous, M. *The Fabrication of Social Order: A Critical Theory of Police Power*, London: Pluto Press, 2000, pp. 100–118.
[22] Marenin, O. 'Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice', *Contemporary Crises*, vol. 6 (1983) p. 258.
[23] Op. cit. p. 259.
[24] Op. cit. pp. 126–127.
[25] Ibid.
[26] Op. cit. p. 129.
[27] Op. cit. p. 114.
[28] Op. cit. p. 119.
[29] Op. cit. p. 131.
[30] Op. cit. p. 132.

class dissent during the Industrial Revolution, and the fact that much police work seems to be more concerned with order maintenance than crime prevention. Such a review is an important corrective to liberal accounts such as Joyce, which downplay the police's role in class repression and suggest that working class resistance to the police is a relatively new phenomena emerging *from* the early twentieth century onwards[31], rather than, as we have seen in Cohen, something markedly declining from then up until the late twentieth century. Fassin meanwhile has provided us clues into how the specificities of social order inflect local forms of policing, and how this relates to societal context, which is a vital insight in terms of the present study.

Yet at the same time, for reasons of ideological legitimation, we have also noted how the police must present a semblance of submission to impartial (legal) authority, which leads Marenin to argue that the extent to which the police be seen as repressive agency must be answered by empirical investigation, not a priori assumption. Finally, Cohen, in his own take on the contradictions at the heart of the police function, points to the contingent factors that may allow patterns of accommodation between the police and working class communities to develop, as well as highlighting the inherent instability of such accommodations.

Public Order and Greater Manchester Police

In this section we present our data; as full a picture as we have been able to reconstruct of public order policing engagements occurring over the history of Greater Manchester Police (GMP), contextualised in relation to other policing events and developments, culled from academic work, journalistic and other secondary sources, and informed by discussions with a range of activists and local historians. We make no claims that this historical narrative is exhaustive and we recognise the dangers of air-brushing a great number of incidents of public order policing that did not give rise to antagonism or violence from the historical record. Nonetheless, given the police propensity to celebrate their successes (as any other bureaucratic institution), and given our extensive archival research in the Greater Manchester area and interviews with residents, police officers and significant local state actors, we would expect to be able to identify major examples of positive police community relations, even if these do not necessarily relate to public order policing function per se. In interpreting the historical manifestations of public order policing, we begin with basic questions of what happened, where and why, with a particular focus on any possible police role in precipitating disorder, as well as their statements and actions in the aftermath of disorder. We are particularly interested in how this relates to the general societal context (debates about policing at the national level) and specificities of a local social order (i.e. within the County of Greater Manchester[32]).

The Manchester Police Museum states that the first Chief Constable of GMP, William James Richards, 'took over the force at a time when there was unprecedented growth in crime such as robbery and assault'.[33] Clearly the 1970s was period of period of political instability, coupled with rapid social and economic change. In terms of the policing function, spectacular threats to public safety represented by the Irish Republican Army's mainland bombing campaign (there were a spate of bombings in the city in 1974 and 75, including the bombing of Manchester Magistrates Court and Lewis' department store), while an increasing concern with drug trafficking had replaced the more muted fears relating to "coffee bars", northern soul and the corruption of youth that had characterised the previous decade.[34]

Significantly at this time, the early decades after the Empire Windrush brought the first large groups of post-war immigrants to the UK, far-right extremism was growing to an extent not seen since the de-legitimation of the British Union of Fascists through the association with Hitlerism in the 1930s.[35] In Greater Manchester, as elsewhere, the far-right had been mobilising under the banner of the National Front since 1967. The National Front attacked a meeting at the University of Manchester Institute of Science and Technology (UMIST) in November 1975, and one eye witness reported police inaction when the neo-Nazis lined up for a publicity shot in front of an Ulster Volunteer Force banner.[36] As Manchester Trades Council issued a demand for an inquiry into the incident, the Director of Public Prosecutions refused to press charges on the advice of then Deputy Chief Constable James Anderton (who would later blame the 'race relations industry' for generating tensions between ethnic minorities and the wider community). Nonetheless, UMIST brought a private action against four NF members, who were eventually found guilty of assault and criminal damage.

The very next year, Anderton, an outspoken moral crusader whose political perspectives will be untangled below, was appointed Chief Constable. One of his first acts was to preside over the establishment of the Tactical Aid Group (TAG), an extra-territorial paramilitary force - not tied to specific divisions or routine policing duties - modelled along the lines of the Metropolitan Police Service's Special Patrol Group (which was established in 1961 and had performed controversial roles, leading to the deaths of protestors, at Red Lion Square in 1974 and Southall in 1979). Joyce refers to a number of difficulties associated with such paramilitary units: that they lack local knowledge and sensitivity to local concerns; they are frequently associated with heavy-handed or aggressive policing; and in possessing their own command structure they often act independently of larger policing operations of which they are part.[37] Nonetheless, while the SPG was eventually replaced by Territorial Support Groups (organised at the divisional level)

[31] Op. cit. pp. 182–183.

[32] This is not to treat space 'as a container' and we will attempt to specify some of the relationships between the political actors and contexts operating at a local level and the national context within which they are embedded.

[33] 'History of Greater Manchester Police', GMP Museum and Archive, last accessed 21st January, 2015, http://www.gmpmuseum.co.uk/?page_id=913.

[34] Jackson, L. ,"The Coffee Club Menace": Policing Youth, Leisure and Sexuality in Post-War Manchester', *Cultural and Social History*, vol. 5 (2008) pp. 289–308.

[35] Copsey, N. *Anti-Fascism in Britain*, Basingstoke: Palgrave Macmillan, 2000.

[36] Renton, D. K. 'Anti-fascism in the Northwest 1976–1981', last accessed 21st January, 2015, http://www.dkrenton.co.uk/anl/northw.htm

[37] Op. cit. p.186.

in the London Met, GMP retains a centralised unit up to the present. Another important early intervention by Anderton was to establish the "Community Contact Department"[38], aimed at fostering good relations with the community, though McLaughlin makes clear that the nature of this engagement was very much on the new Chief Constable's terms.[39]

Nonetheless, the new force within a force (the TAG) was to receive its first outing in October 1977 in policing a National Front mobilisation on the outskirts of Hyde. The march had already been approved by Tameside Council, whose Tory majority had won out over Labour opposition and whose leader had stated that the National Front were after all only 'marching for free speech and against red terror'.[40] Anderton played a key role in facilitating the march through secret negotiations with the NF leadership.[41] While announcing a ban on the march in public, the Chief Constable had secretly agreed to police the NF demonstration along a different route to that which had originally been proposed. GMP deployed nearly 6,000 officers to police the eventual march, of whose passing Renton ironically reports:

> In Hyde, Martin Webster of the National Front conducted a one-man march [...] As he walked, nervous and sweating past the distant jeers of the protesters, it must have occurred to him that rarely in the history of public order have so few people owed so much to so many. Without the police to protect him, his 'march' could not have begun. Ramila Patel of the Asian Youth Movement walked in front of him the whole way with a placard, saying 'This man is a Nazi'. Anti-fascists were able to heckle Webster and disrupt his parade, but could not prevent such a large contingent of police officers from demonstrating.[42]

A further NF demonstration in Bolton in February 1978 led to brawls, mainly between police and antifascists, with Renton reporting mounted police charges against the main antifascist protest outside of the Town Hall and eighteen antiracists being arrested under public order statutes and 'charged without access to a solicitor'.

While later in 1978, the tide seemed to be turning against the National Front, with a huge Anti-Nazi League march and rally attended by some 35,000, and featuring a performance by the Buzzcocks, in July, the focus of concerns relating to policing had already shifted to the discriminatory practices endured by the conurbation's African-Caribbean community. In 1979 for instance journalist Darcus Howe was arrested for obstruction by Vice-Squad officers, reflecting the widespread misuse of discretionary police power in neighbourhoods such as Moss Side. In that same year, Anderton's blend of religiously-inspired conservativism was on display on the BBC's Question Time, when he stated that over the coming decade the primary role of the police would not be crime prevention, but tackling politically motivated attempts to overthrow the state.[43] Moreover, while 1981 was to mark a milestone in the post-industrial resurrection of Greater Manchester's economy (through the establishment of an 'Enterprise Zone' covering the former docklands), it was also a year in which widespread police repression was to return to levels perhaps not seen since the inter-war period.

In the first instance, Anderton intervened in an industrial dispute at the Laurence Scott engineering works in Openshaw[44], recovering materials from an occupied warehouse to allow for the continuation of production. In the second instance, tensions in relation to racist policing practices boiled over and precipitated the Moss Side Riots. These broke out on the 8th July when a crowd of 1,000 youths surrounded Moss Side police station, smashing windows and destroying 12 police vehicles. A policeman was shot through the leg with a crossbow bolt and over the following nights looting and the burning of premises occurred around Moss Side and neighbouring Rusholme. Further disturbances are also reported at Reddish, Clayton, Salford Precinct and in Eccles.[45]

The riots came to an end when on the 11th July the Chief Constable responded with a mobile task force of 500 officers who made 150 arrests within 24 hours, rising to a total of 470 in the weeks following. As McLaughlin records, the Hytner Inquiry into the disturbances reported later that year and confirmed that tensions over racist policing were at the core of the summer's rioting; the Moss Side Defence Committee went even further in its 'Hytner Myths' report.[46] The response of the Greater Manchester police committee lay in attempts to establish appointed, non-accountable 'community liaison panels' to help restore fragile relationships between the police and inner-city residents. While 1982 was a year of relative quiet, with the policing of a visit by Pope John Paul II to Heaton Park passing off without major incident, 1984–85 was to mark a particular nadir in the status of the police with a range of marginal groups.

In the first instance, the 'New Left' Labour regime at Manchester Town Hall was at war with the local force over the discriminatory behaviour of officers, politicised policing, and a lack of accountability. GMP officers were extensively deployed to mining areas under mutual-aid agreements through the centralised mechanism of the National Reporting Centre, where they were often seen to be at the forefront of aggressive actions.[47] It was in part to punish the Chief Constable for his costly deployment of officers outside of the conurbation that

[38] Broady, D. and Sawkill, C. (1989) *The Police!: 150 Years of Policing in the Manchester Area*, Manchester: Archive Publications Ltd, 1989, p. 63.
[39] McLaughlin, E. *Community, Policing and Accountability: The politics of policing in Manchester in the 1980s*, Aldershot: Avebury, 1994.
[40] Renton, D. K. 'Anti-fascism in the Northwest 1976–1981', last accessed 21st January, 2015, http://www.dkrenton.co.uk/anl/northw.htm.
[41] McLaughlin, E. *Community, Policing and Accountability: The politics of policing in Manchester in the 1980s*, Aldershot: Avebury, 1994, p. 40.
[42] Renton, D. K. 'Anti-fascism in the Northwest 1976–1981', last accessed 21st January, 2015, http://www.dkrenton.co.uk/anl/northw.htm. See also Broady, D. and Sawkill, C. (1989) *The Police!: 150 Years of Policing in the Manchester Area*, Archive Publications Ltd: Manchester, 1989, p. 64.
[43] Walker, M. (1986) With Extreme Prejudice: An Investigation into Police Vigilantism in Manchester, London: Canary Press.
[44] McLaughlin, E. Community, Policing and Accountability: The politics of policing in Manchester in the 1980s, Aldershot: Avebury, 1994, p. 65–66.
[45] Op. cit. p. 45.
[46] Op. cit. p. 51.
[47] Waddington, D. Jones, K. and Critcher, C. (1989) *Flashpoints: Studies in Public Disorder*, London and New York: Routledge. While GMP officers were mostly deployed outside of the conurbation during the Miners' Strike 1984–85, there were local deployments, such as Agecroft Colliery, Salford.

the county-wide police committee took the decision to abolish the police band. Furthermore, the same year also witnessed the establishment of two grass roots organisations campaigning for police accountability, the Youth and Allied Workers Monitoring Group and the Gay Men's Police Monitoring Group[48], the latter formed in response to a police raid on the Napoleon's bar in Manchester's emerging 'Village'. 1984 also witnessed a continuation of racist action on the part of the police, most notably the alleged rape of Jackie Berkeley by GMP officers while she was held in custody.[49]

In the April of 1985, police lost control of fans at a Liverpool - Manchester United game being played at the 'neutral ground' of Manchester City in Moss Side, in an event that became known as 'The Battle of Thornton Road'.[50] At the same time, student activists and others watched the trial of Jackie Berkeley (for wasting police time) unfold. Those student activists were to play a key role in the most important public order policing engagement of that year, the 'Battle of Brittan', and the ensuing campaign of police vigilantism.[51] The sequence of events was as follows: Home Secretary Leon Brittan responded to an invitation to speak at the University of Manchester Student's Union on the 1st of March 1985. This was subsequent to an earlier visit by Michael Heseltine, where the minister was greeted by a hostile crowd and splattered with red paint. As Pullen and Abendstern note, such stage-managed set piece engagements (whereby Ministers refused to enter Students' Unions through side entrances, in an unobtrusive manner) with student protesters seemed designed to de-legitimate a major source of opposition to Conservative Party policies, but more than this, that the level of brutality witnessed during the Home Secretary's visit was an attempt by GMP to compensate for their earlier failure to protect Heseltine.[52]

During initial meetings with GMP commanders, the Student's Union officers were persuaded to relinquish control of the steps leading up to the University's main entrance, allowing it to be treated by police as a 'public highway' for the duration of the Home Secretary's visit. After allowing a group of around 300 students to occupy the steps to the building on the night of the visit, the Tactical Aid Group, assisted by other uniformed and plain clothes officers proceeded to violently assault the gathered crowd to clear the steps for Brittan's entrance. A witness cited in Walker reports:

> 'I witnessed two girls being dragged by their hair and reduced to tears. I saw several people kicked and punched down the stone steps. Several plain clothes police were indulging in gross physical violence. In the crush when Brittan arrived I witnessed one officer removing a girl from the crowd, calling her "nigger", and saw him hit her while dragging her towards the van'.[53]

More serious still, was the campaign of 'police vigilantism' that developed in the aftermath of the 'Battle of Brittan', as junior GMP officers waged a campaign of intimidation against Steven Shaw and Sarah Hollis, two students involved in the demonstration outside the Students Union, to ensure their silence.[54]

In the years following the 'Battle of Brittan', GMP was rocked by a number of scandals. In 'The Stalker Affair' of 1986, Deputy Chief Constable of GMP, John Stalker, was removed from his position at the head of an official investigation into the existence of a "shoot-to-kill" inquiry in Northern Ireland and suspended from the force following allegations of his links to organised crime in Manchester. Stalker claimed that Anderton was involved in his dismissal and the affair caused significant local and national public outcry. Also in 1986, Anderton continued a pattern of ill-advised public statements by commenting that those with HIV/AIDS were 'swirling about in a human cesspit of their own making', following this in 1987 by stating, in his last major speech to the Association of Chief Police Officers, that rapists should be castrated. Not only had the Conservatives been extremely effective in associating 'anti-police sentiments' with the stigmatising label of the 'loony left', but the abolition of the Metropolitan County Councils in 1986 had emasculated the police committee's ability to hold the force to account. In this context McLaughlin explains that the 'battle for police accountability' within GMP was increasingly being lost.[55] Finally, in reference to Anderton's AIDS comment, it is now known that the Prime Minister herself intervened to protect his job[56], illustrating that his brand of moralistic social conservatism was not out of step with contemporaneous national political elites.

Nevertheless, the end of the 1980s and the beginning of the 1990s were not without incident, as rave culture spread through the region, and a minor moral panic loomed in relation to the new drug-related subculture. In 1990, on the 1st of April, a day after the Poll Tax Riots had rocked London, serious disorder broke out at Her Majesty's Prison Strangeways. The disturbances, triggered by resentment due to overcrowding and the ill-treatment of prisoners by staff, lasted for 25 days. Two people died and 194 prisoners and staff were injured. Damage estimated at £60 million was caused.[57] Despite this, and recalling Cohen's contention that an increase in repression necessitates an intensified public relations offensive to stabilise the image of the force, the 1990s was, broadly speaking, a period of retrenchment for Greater Manchester Police. The divisive figure of James Anderton was finally replaced by David Wilmot in

[48] McLaughlin, E. *Community, Policing and Accountability: The politics of policing in Manchester in the 1980s*, Aldershot: Avebury, 1994, p. 98.
[49] Walker, op. cit.
[50] McLaughlin, op. cit.
[51] Walker, op. cit.
[52] Pullen, B. and Abendstern, M. *A History of the University of Manchester*, Manchester: Manchester University Press, 2004, p. 197–198.
[53] Op. cit. p. 39.
[54] Op. cit.
[55] Op cit. p. 104.
[56] Qureshi, Y. 'Secret documents show how Margaret Thatcher helped save ex-Manchester police chief Sir James Anderton after row over Aids comments', *Manchester Evening News*, 4th January, 2013.
[57] Carrabine, E. *Power, discourse and resistance: An analysis of the Strangeways prison riot*, PhD thesis, Salford: University of Salford, 1998.

1991, who immediately set about attempting to establish more of a 'service' ethos for the force.[58]

Over the course of the 1990s the Greater Manchester conurbation underwent a post-industrial rebirth (albeit a partial and fragmentary one), and the concerns relating to trends in crime and policing seemed to reflect this. On the one hand there was the growing significance of the secessionist suburbs, (socially) constructed as being in opposition to "those inner cities" of job loss, riot and decay[59], while on the other, was an increasing concern with the city as "growth machine", necessitating the securitisation of space in order to attract capital and the middle classes to the core of the city-region.[60] Both of these trends were associated with the proliferation of private policing.

Moreover, it is important to understand the local dimension to the ways in which post-industrial restructuring has been articulated. In the early 1980s, Manchester (as noted above) had been a bastion of the New Left; of municipal socialism constructed in an explicitly antagonistic relationship to the Conservative national government. When the 1987 election produced a third consecutive defeat for the Labour party, a pervasive sense of defeatism set the scene for an embracing of neoliberal pragmatism and the downgrading of social objectives as secondary to the drive to secure inward investment.[61] Tickell and Peck have described how this led to a re-gendering of local politics, as the role of male and business dominated quangos was expanded to by-pass local democratic structures.[62]

Yet while the 1990s appear as a moment of economic growth and relative stabilisation in police-community relations, new fractures were emerging. If 'patterns of accommodation' with the constabulary had ever persisted amongst the most deprived sections of the working class, after more than a decade of deindustrialisation, the closure of the docks and unprecedented job loss, working class forms of resistance appeared to be hardening and would be crystallised in the early days of July 1992 in a riot on the Ordsall estate. Campbell describes how the riot was rooted in resentment towards the indiscriminately heavy-handed policing meted out against men and boys in Salford, regardless of prior record.[63] In her wider excavation of the so-called 'Council Estate Riots' of 1991–1992, Campbell centres her explanation on deindustrialisation, the feminisation of work, and heavy handed police incursions *following prolonged periods of non-intervention*.

That the neighbourhood of Ordsall, alongside other inner-city neighbourhoods, was undergoing significant crime waves seems to be beyond dispute. A particular Salford crime outfit, having secured lucrative security contracts for city-centre venues that provided access to newly emergent drugs markets[64] were quite explicit in their attempts to set themselves up as an alternative authority structure in the neighbourhoods where they lived, and those seen speaking to the police were subject to public shaming as 'grasses'. The spokesperson of the 'Firm', interviewed in the early 1990s, espoused a local politics of class conflict whereby politicians were the reasons people in his area committed crime, while the incoming 'yuppies' at Salford Quays were identified as the proper targets for victimisation by local people.[65]

The disorder in the neighbourhood began on the 1st of July with an attack on the offices of a tenants' cooperative. The following evening a Carpet World store was set on fire, with one local resident interviewed in the aftermath linking this to the employment of 'outsiders'.[66] A sales executive with the Manchester Evening News, who was present at the event, describes what happened next:

> There were lots of people around but it was very peaceful. Suddenly, just after midnight, eight vanloads of police arrived and started wading into the crowd, telling them to get back even though they were not in danger. One man sitting on his fence was coshed in the face and fell. I have no doubt that if I had not moved I would have got a baton in my face. There was no riot when the police arrived. I am convinced they started it.[67]

In the following weeks community buildings elsewhere in Salford were attacked and on the 6th July a job centre in Ordsall was torched, with shots taken at the fire appliance that was dispatched to the scene, leading to the saturation of the neighbourhood with armed officers. While the disorder disappeared as soon as it had come, the incident fed into Salford's increasingly national reputation as a 'no-go area'[68], and the links to organised crime allowed the various authorities to de-politicise the problems facing the inner city.

The late 1990s were punctuated by the largest IRA bomb detonated in England, which tore through Manchester city-centre. Mercifully a timely evacuation averted any loss of life and the damage to the retail infrastructure was greeted as an opportunity for continuing 'regeneration'. Elsewhere, GMP faced

---

[58] Loader, I. and Mulcahy, A. 'The Power of Legitimate Naming: Chief Constables as Social Commentators in Post-War England', British Journal of Criminology, vol. 41 (2001) pp. 41–55.

[59] Taylor, I. 'Fear of Crime, Urban Fortunes and Suburban Social Movements: Some Reflections from Manchester', Sociology, vol. 30 (1996) pp. 317–337.

[60] Taylor, I. 'New York/Manchester: Zero Tolerance or Reclaim the Night', City, vol. 2 (1997) pp. 139–148.

[61] Peck, J. and Ward, K. *City of Revolution: Restructuring Manchester*, Manchester: Manchester University Press, 2002.

[62] Tickell, A. and Peck, J. 'The return of the Manchester Men: men's words and men's deeds in the remaking of the local state', *Transactions of the Institute of British Geohraphers*, vol. 21 (1996) pp. 595–616.

[63] Campbell, B. Goliath: Britain's Dangerous Places, London: Metheun, 1993, p. 289.

[64] Hobbs, D. Hadfield, P. Lister, S. and Winlow, S. *Bouncers: Violence and Governance in the Night-time economy*, Oxford: Oxford University Press, 2003, p. 71–108.

[65] Evans, K. Fraser, P. Walklate, S. 'Whom can you trust? The politics of 'grassing' on an inner city housing estate', *The Sociological Review*, vol. 44 (1996) p. 372.

[66] Brotherston, I. and Hughes, R. *Barbary Coast Revisited: A Book by Ordsall about Ordsall- Heart of Salford Docklands*, Manchester: Bridging the Years, 1994, p. 79.

[67] Ian Kearney, cited in Campbell, op. cit. p. 289.

[68] Walklate, S. and Evans, K. *Zero Tolerance or Community Tolerance: Managing crime in high crime areas*, Aldershot: Ashgate, 1999. See Fraser (1996) on similar processes of the construction of a Greater Manchester inner-city neighbourhood as a 'national problem', in her case, Moss Side.

a major public order engagement in the form of environmental protests over the construction of Manchester Airport's second runway. Protestors forming encampments and digging tunnels to prevent construction taking place were removed on a number of occasions between 1997 and 1999, with GMP allowing eviction orders to take their course through the courts, before taking action. The GMP Museum's narrative of events notes that "the operation drew universal praise for the sensitive way that the work had been done".[69]

Towards the end of 1990s issues of racism began to reassert themselves on the public agenda. In 1996 Amer Rafiq lost his sight in one eye, alleging brutality by GMP[70], while in 1997 it emerged that a black policeman, Martin Harding, had been passed over for promotion 56 times.[71] In the context of the ongoing MacPherson Inquiry into the murder of Stephen Lawrence, Chief Constable David Wilmot admitted to the existence of 'institutional racism' within his force. It is difficult to escape the conclusion that this acknowledgement constituted the high watermark of GMP's admittance of discriminatory practices, for, in the years following, the force was shown to be stoking conflict with minority ethnic communities in another part of the conurbation; actions that were to be substantial causal factors in the triggering of riots in the Metropolitan Borough of Oldham. It could be argued that social disorder was all but inevitable in the context of GMP's history of racist discrimination towards minority ethnic communities. This discrimination, first against the black community and then against British Asians[72], developed against the backdrop of a media induced moral panic concerning asylum seekers and the opportunism of the British National Party and other far-right splinter groups in inflaming antagonisms.[73] Yet GMP were to play a very particular role in the developing tensions by lending credence to a growing belief that the white majority of Oldham were in fact the disproportionate victims of race attacks by Asians.

The GMP statistics on which this narrative was based (showing 60 per cent of the victims of racist assault to have been white), and on which sensationalistic *Oldham Chronicle* headlines were based[74], should be seen as a result of the low levels of trust in the local constabulary by the Asian communities of the town, and not in fact as evidence of the persecution of the white community. Yet even without this interpretation, given that ethnic minorities comprise only 11 per cent of the population of Oldham, they were still more than 6 times as likely as a white person to be a victim of attack (according to the official figures).[75] Such subtleties escaped the divisional superintendent of GMP, who in a number of public statements focused on the growing resentment felt by (white) residents towards 'Asian gangs'.[76] Nonetheless, the immediate precipitants of the riot in May 2001 were far right incursions into Oldham attempting to win local legitimacy through a discourse of 'rights for whites', demonstrations for which the police were seen to be providing de-facto protection.[77]

Perhaps the most important outcome from the 2001 Oldham Riots (alongside Burnley and Bradford, the misleadingly titled 'Northern Race Riots') were more active attempts by state actors to de-politicize public disorder through a language of 'self-segregation' that stressed a lack of 'common values' and 'community cohesion'.[78] Webster has articulately rebuffed such claims, noting that it has been the specificities of failing housing markets in northern former textile towns (a surfeit of inner-city terraced housing abandoned by the white majority) that have combined with racist discrimination (white flight and the unwillingness of Asians to move to peripheral white working class housing estates) to produce neighbourhood decline, geographical immobility and more marked patterns of ethnic segregation.[79] All of this has occurred in the context of deindustrialisation that has disproportionately affected minority ethnic populations. In this context, it is noteworthy that the conclusions of the Cantle Report, the official exploration of the summer of disorder, and the Ritchie Report, the earlier Home Office sponsored study specifically on Oldham, contained no substantive acknowledgement of the kind of systematic discrimination that Scarman had identified 20 years earlier in his report on the Moss Side Riot, but instead reproduced a blaming-the-victim narrative of a (racialised) 'dysfunctional community'.[80]

The policing of the Commonwealth Games in Manchester in 2002 passed off without incident and Police Community Support Officers were introduced to provide "a friendly face for the public, creating safer and more confident neighbourhoods".[81]

[69] Op. cit.

[70] Amnesty International, 'Alleged ill-treatment of Amer Rafiq', 5th March, last accessed 15th February, 2015, http://www.amnesty.org/en/library/asset/EUR45/005/1996/en/80abf203-eb0c-11dd-aad1-ed57e7e5470b/eur450051996en.html.

[71] Anon, 'Black policeman was passed over for promotion 56 times', *The Independent*, 2nd April, 1997.

[72] Ahmed, N. M. Bodi, F. Kazim, R. and Shadjareh, M. *The Oldham Riots: Discrimination, Deprivation and Communal Tension in the United Kingdom*, London: Islamic Human Rights Commission, 2001.

[73] Copsey, N. *Contemporary British Fascism: The British National Party and the Quest for Legitimacy*, Basingstoke: Palgrave Macmillan, 2004. Bagguley, P. and Hussain, Y. *Riotous Citizens: Ethnic Conflict in Multicultural Britain*, Aldershot, Hampshire: Ashgate, 2008.

[74] Waddington, D. *Policing Public Disorder: Theory and Practice*, Cullompton: Willan, 2007, p. 99.

[75] Copsey, op cit. p. 125.

[76] Kalra, V. S. 'Police lore and community disorder: diversity in the criminal justice system', in Mason, D. (eds) *Explaining Ethnic Differences: Changing Patterns of Disadvantage in Britain*, Bristol: The Policy Press, 2003.

[77] Waddington, op. cit. p. 101.

[78] Bagguley and Hussain, op. cit. p. 162.

[79] Webster, C. 'Race, space and fear: imagined geographies of racism, crime, violence and disorder in Northern England', *Capital & Class*, vo. 80 (2003) pp. 95–122. Webster also draws attention to overlapping patterns of residential and work based segregation in the northern textile towns (including those in the north of Greater Manchester) that served to reinforce ethnic boundaries and social distance. For example, the practice of employing Pakistanis and Bangladeshis on night-shifts, while employing whites on day shifts.

[80] Op cit. p. 164.

[81] Greater Manchester Police, 'PCSOs', last accessed 6th March, 2015, http://www.gmp.police.uk/live/recruitv2.nsf/WebPages/ADB986F175B3E4E3802574B0004612AF?OpenDocument.

However, in 2003, the new Chief Constable Michael Todd faced a major scandal when GMP officers were shown to be engaging in 'racist banter' in the television documentary *The Secret Policeman*. The scandal surrounding police racism continued in 2003 following the savage beating (including the use of CS spray) of Delbo King, a 33 year old black man, which was caught on CCTV.[82] Large scale public order engagements in the decade included a total lockdown of Manchester city-centre in 2004 for the Labour Party conference[83], in scenes that would become a regular feature in the years to follow. In response to shifting crime concerns GMP launched its anti-gang unit, Operation XCalibre, in the same year, and in 2005 the chief Constable allowed himself to be hit by a taser, in a bid to reassure the public in relation to the growing deployment of officers armed with these weapons. Todd was also notable in making explicit the link between policing and the 'regeneration' of the conurbation, incorporating it into his "guiding principles for transforming GMP".[84]

In 2005, the rebranded Tactical Aid Unit was deployed to protect the Glazer family, the new owners of Manchester United, as they arrived at Old Trafford in the face of widespread animosity from ordinary fans for their debt financed purchase of the club.[85] In 2006, and in the wake of the terrorist attacks in the USA and UK in 2001 and 2005, there were a series of highly publicised 'terror raids' in the city, and in April 2007 the Counter Terrorism Unit (CTU) was established to tackle terrorism and extremism, one of four CTUs nationally dedicated to combating 'violent extremism and radicalisation'.[86] The last years of the new millennium also saw an apparent intensification of the processes of the 'securitisation' of urban space (noted above), with the establishment of dispersal orders on Salford Quays in 2007, prefiguring the BBC's move to a new northern headquarters at MediaCityUK. The following year, GMP saw a further change of Chief Constable as Peter Fahy of Cheshire Constabulary succeeded Michael Todd, who died in mysterious circumstances on Mount Snowden.

The major public order event in that year related to the policing of the Glasgow Rangers - Zenit St Petersburg UEFA Cup Final being staged at Manchester City's Etihad Stadium (to the east of the city centre). The policing of this event came in for criticism, after the handling of spectator discontent following the failure of large screens in a specially created 'fan zone' and an unwillingness by officers to allow the gathered throng freedom of movement, which precipitated outbreaks of disorder.[87] Eye witness reports describe the Tactical Aid Unit responding aggressively, meting out indiscriminate violence against the crowds focused on the city centre. The TAU made the headlines again in March 2009 by arresting and breaking the fingers of Andrew Sinclair for 'driving too slowly past Manchester airport'.[88]

In a sign of Conservative Party efforts to recover their traditional strength on issues of law and order, 2009 also saw Shadow Minister Chris Grayling, at his Party's annual conference, make the comparison between Manchester (where the conference was being held) and the Baltimore of US TV serial *The Wire*, in terms of the extent to which the two cities have been blighted by crime. This was despite the fact that at the time Baltimore, with a substantially smaller population than Greater Manchester, had a 'gang-related' murder rate exponentially greater than its UK counterpart.[89]

More recently, concomitant with the financial 'crisis' unfolding since 2008, Greater Manchester has seen an upsurge in far right activity, with clashes taking place between Islamaphobic street organisations such as the English Defence League, and antifascists loosely organised around the group Unite Against Fascism. The uncompromising approach of the police towards antifascists was highlighted by the arrests and subsequent compensation claims ensuing from the policing of the EDL UAF clashes in Bolton in 2010[90], as well as the use of controversial tactics such as 'kettling'. The policing of large-scale protests in Manchester regarding increases in tuition fees in 2010 passed off with relatively few arrests, in contrast with the significant clashes that took place in London.

Nonetheless, it is clear that economic recession, a major reduction in welfare state spending, and, a breaching of the implied moral economy upon which aspirational neoliberalism had been sold[91], formed the context in which the fourth major riot in the history of GMP unfolded. The events of Tuesday 9th of August, precipitated by the killing of a black man, Mark Duggan, by the Metropolitan police service (but which became emblematic of widespread discontent felt by working class and ethnic minority populations) were initially triggered by a misguided attempt by GMP to put on a show of force in the vicinity of Salford Precinct, Pendelton.[92] This disorder

[82] Stevens, R. 'Britain: The beating of Delbo King highlights police racism and brutality', *World Socialist Website*, 24th March, 2004, last accessed 15th February, 2015, http://www.wsws.org/en/articles/2004/03/brit-m24.html.

[83] Coaffee, J. and Rogers, P. 'Rebordering the City for New Security Challenges: From Counter-terrorism to Community Resilience', *Space and Polity*, vol. 12 (2008) pp. 108–109.

[84] Todd, M. 'Transforming Greater Manchester Police', Society of Personnel Directors Scotland Annual Conference, 2007.

[85] Barnwell, M. and Burleigh, J. 'Man Utd owners flee Old Trafford under police escort', *The Telegraph*, 30th June, 2005.

[86] Coaffee and Rogers, op. cit. p. 111.

[87] Millward, P. 'Glasgow Rangers Supporters in the City of Manchester: The Degeneration of a „Fan Party" into a „Hooligan Riot", *International Review for the Sociology of Sport*, vol. 44 (2009) pp. 391–392.

[88] Cooper, R. (2013) 'Father-of-three assaulted and wrongly arrested by police in front of his partner and young children „for driving too slowly past airport", *Mail Online*, 16th July, last accessed 15th February, 2015, http://www.dailymail.co.uk/news/article-2365353/Father-assaulted-wrongly-arrested-police-partner-young-children-driving-slowly-past-airport.html.

[89] Watt, N. and Mulholland, H. 'Baltimore's mayor rebukes Tory Chris Grayling over Wire remark', *The Guardian*, 28th August, 2009.

[90] Gilmore and Tufail, op. cit.

[91] Harvie, D. and Milburn, K. 'The Moral Economy of the English Crowd in the Twenty-First Century', *The South Atlantic Quarterly*, vol. 112 (2013) pp. 559–567.

[92] Jeffery, B. and Jackson, W. 'The Pendleton Riot: A Political Sociology', *Criminal Justice Matters*, vol. 87, (2012) pp. 18–20. Jeffery, B. and Tufail, W. '"The riots were where the police were": Deconstructing the Pendelton Riot', *Contention: the Multidisciplinary Journal of Social Protest*, vol. 2 (2015) pp. 37–55.

quickly spread to Manchester city-centre and resulted in widespread looting and destruction of property. The present authors have not been alone in describing these events as "anti-police riots"'[93] and have joined Spalek et al in linking the specific geographies of the August 2011 English Riots to patterns of gentrification, socio-economic polarisation and the securitisation of urban space.[94] In Salford, where three decades of 'regeneration' has failed to make any appreciable impact on the lives of those working class communities rendered without purpose by deindustrialisation, the response to the riots was, rather predictably, more regeneration.

The final public order engagement of our narrative relates to an environmental protest beginning in 2013, at Barton Moss in Salford on the western periphery of the conurbation. The protest against exploratory hydraulic fracturing (or 'fracking') by IGas followed earlier protests in Sussex and the Fylde Coast and centred on opposition to a process widely seen as harmful and polluting. Research by local investigative journalists, as well as by academics at Liverpool John Moores University and University of York, attests to the levels of police violence meted out to demonstrators in this secluded corner of Greater Manchester, with Tactical Aid Unit officers being at the centre of allegations of unlawful arrest and the inappropriate use of force.[95] The fact that almost every one of the some 200 arrests that took place have ended in acquittal or dismissal surely demonstrates the illegitimacy of the police approach, while evidence has subsequently come to light of the close levels of cooperation between the police and the private company over the running of the 'operation'. Acquitting the defendants in one of the many cases that followed the policing operation at Barton Moss, the judge accused Greater Manchester Police of exceeding its powers by intervening on IGas' behalf during a civil trespass and of "acting as civil enforcement officers" for the company'.[96] None of this prevented the nominally independent Police and Crime Commissioner for Greater Manchester, Tony Lloyd, from presiding over a white-wash investigation of the policing operation.

Conclusion

In this final section we want to draw out how the forgoing account relates to the construction and reproduction of local social order. Firstly, we must return to Cohen's contention that the continual re-composition and relocation of the workforce under capitalism leads to a constant need for the re-negotiation of patterns of accommodation, and that the very presence of outsiders 'threatens the delicate equilibrium of existing tolerances'.[97] This seems an apt description of 1970s Greater Manchester, where despite the beginning of the major ravages of deindustrialisation, the primary targets of repressive policing were seemingly New Commonwealth migrants, and this was legitimated through the better or worse concealed racism of local institutions and authority figures (not least the force's Chief Constable). The entirely predictable outcome of such policing was the 1981 riots, which while centred on Moss Side, saw sporadic outbreaks of disorder in white working class communities such as Clayton and Eccles.

As we move further into the 1980s, antagonism towards the police clearly became more general, with Greater Manchester developing into a key battleground between social democracy and the 'New Right', and this is illustrated through GMP deployments against the miners, the politicised policing of student protest evident in the 'Battle of Brittan' or the (lost) battles for police accountability waged by the municipal New Left. Yet by the late 1980s, we can talk of a relative stabilisation in police-community relations. Public order policing was refocused on more marginal social groups such as youth subcultures (rave), while the 'service' role was stressed by a far more conciliatory, less demagogic Chief Constable (David Wilmot). At the same time however, 'patterns of accommodation' could not be restored with those sections of the white working class who had experienced precipitous levels of downward social mobility under the emerging conditions of neoliberalism. So much is evident in the 1992 Ordsall Riot, but also in the increasing levels of crime and politicised antagonism of those residents towards attempts to 'gentrify' the inner-city.

While the conditions of such marginal inner-city neighbourhoods, inhabited by an increasingly multi-ethnic working class, may have continued to decline (relative to the rest of society), the relatively long economic boom of the 1990s and 2000s saw the transformation of the conurbation's core as Manchester attempted to compete as a global city or 'city-region'. While accusations of racist policing continued to emerge (lent credence by Wilmot's admission to the MacPherson Inquiry), the policing of the environmental protests against the airport's second runway produced no major disquiet. Nonetheless, racist policing, coupled with a media moral panic in relation to asylum, and failure by the police to prevent incitement by far right groups would be enough to lead to rioting in Oldham in the summer of 2001. The response to 'Northern Riots' reflected an increasing tendency at the national scale to de-politicise social disorder in terms of a lack of 'cohesion', while the roughly concomitant terrorist attacks in New York and ensuing 'War on Terror' served to move the Asian community up several points in the hierarchy of 'police property'.[98]

As the new millennium advanced, we saw the re-emergence of popular protest in opposition to the Iraq War, which coalesced around large demonstrations against Labour Party conferences in the city. These largely disciplined protests unfolded without major outbreaks of disorder. Nonetheless, amidst

[93] Reicher, S. and Scott, C. *Mad Mobs and Englishmen: Myths and Realities of the 2011 Riots*, London: Constable and Robinson, 2011.

[94] Spalek, B. Isakjee, A. and Davies, T. 'Panic on the Streets of Birmingham: Struggles over space and belonging in the revanchist city', *Criminal Justice Matters*, 87 (2012) pp. 14–15.

[95] Jackson, W. and Monk, H. 'Police violence at anti-fracking protests: pacifying disruptive subjects', *Criminal Justice Matters*, vol. 98 (2014) pp. 12–13.

[96] Netpol, 'Police and fracking companies - in each other's pockets?', 5th August, 2014, last accessed 6th March, 2015, https://netpol.org/2014/08/05/police-fracking-collusion/.

[97] Cohen, op. cit. p. 131.

[98] Tufail, W. and Poynting, S. 'A Common „Outlawness": Criminalisation of Muslim Minorities in the UK and Australia', *International Journal for Crime, Justice and Social Democracy*, vol. 2 (2013) pp. 43–54.

a context of increasing scare-mongering in relation to the twin problems of 'domestic extremism' and 'gangs'[99], and a stated policing commitment to support the regeneration (gentrification) of the urban core, the fractures in police-community relations clearly widened. Recalling Reiner's claim that the "class repression" function is bound to predominate over the enforcement of "parking tickets" amidst periods of systemic crisis[100], a more confrontational style of policing is evident in the years immediately prior to the August 2011 English Riots. As we enter the second decade of the new millennium, the use of the police in defence of the established order and elite interest has become quite naked, and perhaps this is what provoked Chief Constable Fahy to warn that it is not the police role to define 'what counts as extremism', while airing unease that Britain may drift into 'a police state'.[101]

The response by GMP to anti-fracking protests at Barton Moss, Salford between November 2013 and April 2014 demonstrated the enduring concern with the maintenance of order over and above a regard for the law. The policing of this protest relied heavily on the use of Tactical Aid Unit officers and was heavily criticised by campaigners, journalists, legal observers and the local MP for the way in which the right to protest was curtailed through the policing operation.[102] This most recent episode in the history of GMP's response to public 'disorder' demonstrates the significance of GMP at the national level in influencing the development of public order policing[103], but also reinforces GMP's role at the local level in the (re)production of social order. The policing of protest in the manner experienced at Barton Moss was of course not new. The policing of those populations who are portrayed as a threat to order, has always involved the exercise of violence, and the history of GMP set out above demonstrates that this is as true in Greater Manchester as it is anywhere else. But it is important that the productive dimension of the exercise of police power in this sense is understood both in its relationship to the wider bourgeois order and its local specificities. The policing of the anti-fracking protests as Barton Moss demonstrates how the demands of the local order, in this case the imposition of policies drafted at the national and local level in the face of local opposition, are attended to through the exercise of police power. The presentation of police as impartial arbitrators has been central to the representation of the institution from its inception, and remains central to the police narrative of the Barton Moss protests. This presentation serves a key legitimating function, but its veracity is not borne out in the everyday experiences of policing by those who are marked out as threats to the social order. The construction of the threat and the police response clearly draw from a wider national, and even global context, but are both really only intelligible in the local setting. The specificities of the representation of protesters, as with that of working class and minority ethnic communities, need to be understood in the local context; and equally, the police response to these populations, how the police act and how it is justified, needs to be considered in its particular historical, political, economic and social contexts, without losing sight of the relationship to the national and global levels.

In this article we have situated the need for more attention to be paid to local histories of policing within a context of increasing concerns relating to police accountability. While we follow Neocleous in suggesting a productive role for the police in the fabrication of social order, we have drawn attention to the various contingencies produced by the peculiarities of the police role and the need to attain a level of hegemonic acceptance in the communities that are policed, and hence to explore how particular kinds of social order are constructed in particular places. By taking one aspect of a local force's responsibilities, namely public order policing, we have demonstrated how the unfolding of particular events can be seen to both be determined by, as well as actively reproducing, a local social order, embedded in an evolving national political context overwhelmingly characterised by processes of repressive neoliberalisation.

[99] Smithson, H. Ralphs, R. and Williams, P. 'Used and Abused: The Problematic Usage of Gang Terminology in the United Kingdom and Its Implications for Ethnic Minority Youth', *The British Journal of Criminology*, vol. 53 (2013) pp. 113–128.

[100] Reiner, op. cit. p. 33.

[101] Dodd, V. 'Chief constable warns against „drift towards police state"', *Guardian*, 5th December, 2014.

[102] Jackson, W. and Monk, H. 'Police violence at anti-fracking protests: pacifying disruptive subjects', *Criminal Justice Matters*, vol. 98 (2014) pp. 12–13.

[103] Netpol 'Senior public order police commanders train for future anti-fracking protests', *The Network for Police Monitoring*, 16thDecember 2015, last accessed 12th March 2015, https://netpol.org/2014/12/16/gold-command-training-fracking/.

Zwischen Sisyphos und Herakles: Zu Heinz Barta: „Graeca non leguntur". Zu den Ursprüngen des europäischen Rechts im antiken Griechenland Band III Teil 1: Das griechische Recht in seinem kulturhistorischen Umfeld – Beispiele aus Dichtung, Geschichtsschreibung, Philosophie und (Kautelar)- Jurisprudenz.

Wiesbaden: Harrasowitz Verlag, 2014, 547 Seiten, € 58.00

Der Autor, emeritierter Ordinarius für Zivilrecht an der Universität Innsbruck, unternimmt eine Aufgabe, die tatsächlich Eigenschaften eines antiken Helden erfordert – würdig eines Sisyphos oder Herakles. Ein Werk dieses Umfangs erfordert wahrhaft ungewöhnliche Kräfte und Ausdauer, zumal es ohne finanzielle Förderung der großen Förderungsinstitute auskommen und sich mit der Förderung durch Institutionen des Landes Tirol begnügen musste. Ähnlich wie in Deutschland (Deutsche Forschungsgemeinschaft / DFG) wird auch von den Bundesinstanzen in Österreich, wie der Autor einführend beklagt, nur noch sog. Großforschung in Forscherverbünden unterstützt. Die Konsequenz: Einzelforscher – zumal im Bereich der Geisteswissenschaften – gehen meist leer aus (Anm. d. Rez.). Das Anliegen des Autors betrifft nun zwar gerade ein solches „Großprojekt", aber er ist „Einzelkämpfer". Es geht ihm darum, die Dominanz des römischen Rechts in Kultur- und (Rechts-) Geschichte zu erschüttern und zu zeigen, dass vieles im Römischen Recht von den Griechen übernommen wurde. Der Umfang des Projekts ist im Untertitel des vorliegenden Bandes (III, Teil 1) bereits angedeutet.

Der Autor schreibt, wie er im Vorwort ausführt, nicht nur für die Fachkollegen, sondern vor allem für Vertreter anderer Disziplinen (insbesondere Juristen) und interessierte Laien, was sich u.a. in dem lockeren Darstellungsstil des Werkes zeigt. Insofern geht die Kritik aus der „eigentlichen" Rechtsgeschichte (z.B. Th. Finkenauer, Tübingen etc.), die ihm mangelnde Systematik, ausufernde Texte und mehr assoziative als wissenschaftliche Darstellung vorwerfen, fehl. Der Autor kritisiert seinerseits diese Kritik aus der „Fachwelt" als ein „unter sich bleiben wollen", nur „für sich und seinesgleichen zu schreiben", und fährt dann fort: „Der Zustand der Rechtsgeschichte und des Römischen Rechts in Europa lässt daran zweifeln, ob das der richtige Weg ist." Im Übrigen sei es ein Irrtum zu glauben, dass alle Wissenschaftler das gleiche Verständnis von Wissenschaft und Rechtsgeschichte oder die gleiche Höhe des Verständnisses hätten. Er stimmt der Kritik hinsichtlich der Vorwürfe des „Essayistischen", des „Assoziativen" allerdings teilweise zu, indem er erklärt, dass der vorliegende Band „weniger juristisch" als die bisher erschienenen Bände sei.

Tatsächlich ist der Vorstoß Bartas in die Welt des Griechentums von fundamentaler Bedeutung. Den Griechen kommt eine einzigartige Stellung in der Geschichte zu. Sie waren die ersten, die das Individuum als historische Größe entdeckten und das Prinzip der Autonomie in die Geschichte des Zusammenlebens einbrachten und dann in den Auseinandersetzungen mit den Persern zu einer Kultur der Polis weiterentwickelten. Das ist ihre historische Leistung. Autonomie heißt: Regeln für das Zusammenleben in Dorf und Stadt zu entwickeln und in der Politik zur Zufriedenheit aller oder möglichst vieler zu kommen. Das ist Demokratie, die Grundlage der europäischen Zivilisation. Das dritte Merkmal – und das ist der Wesenskern von Bartas Werk – ist die Entwicklung des Rechts, d.h. die Geltungskraft der genannten Regeln für alle.

Der umfangreiche Band erlaubt keine Detailbeschreibung. Eine Darstellung der einzelnen Kapitel wird jedoch einen Überblick geben können. Das Werk beginnt mit den Eumeniden des Aischylos, in denen der Autor auf die Ursprünge des Rechtsgedankens – Recht als Mahnung zur „Mitte", Eindämmen von Selbsthilfe, Eigenmacht und Blutrache – eingeht. Das Recht ist heilig und hat mythische Wurzeln. Die Tragödie sieht er als Schule von Demokratie und Rechtsstaat. Anhand des Melierdialogs des Thukydides erläutert der Autor dann die Interdependenz von Macht und Recht. (Kap. III und IV) Kap.V behandelt Euripides und das Naturrecht. Der Dichter wird als Philosoph des Naturrechts beschrieben. Ein Ausflug in das moderne Naturrecht schließt das Kapitel ab.

In allen Abschnitten unterzieht der Autor das Römische Recht und seine Vertreter, die im deutschsprachigen Raum dominant waren (und sind) (M. Kaser etc.), einer besonderen Kritik, weil sie die griechische Ursprünge des römischen Rechts leugneten. Im letzten Abschnitt (Naturrecht) schlägt der Autor eine Brücke zur modernen Rechtsphilosophie und plädiert für ein aus dem modernen griechischen Recht stammendes Naturrecht, das als interdisziplinäres Naturrecht alle Wissensgebiete als Erben mit einbeziehen soll („Normatives Sensorium" S.325). Damit will er „Mittler zwischen Einst und Jetzt sein" (S.9).

Kritisch bleibt anzumerken, dass der Verlag nicht zugleich auch den Inhalt der ersten beiden Bände aufführt, der erst über das Internet erschlossen werden muss (Band I [2010] Archaische Grundlagen Teil 1; Band II [2012] Archaische Grundlagen Teil 2).

Während in Band III Teil 1 die aus der Gesamtheit der griechischen Kulturwelt erwachsenen Rechte hinsichtlich ihrer Voraussetzungen geschildert wird, soll im 2. Teil von Band III (der noch entsteht) die griechische Rechtspraxis erörtert werden.

Ein gravierender Fehler des Verlags begegnet dem Leser allerdings im Inhaltsverzeichnis des vorliegenden Bandes: Dort wird als *zweiter Teil von Band III* die o.g. Inhaltsangabe von Band III/1 aufgeführt (S.XI). Dies wiederholt sich dann auf S.XIV *mit der Überschrift: Band III/1*. Das schafft Verwirrung.

Das Werk ist eigentlich eine Gesamtschau der griechischen Wissens- und Kulturgebiete mit dem Schwerpunkt Recht und Rechtsideen. Ein Buch zum Nachschlagen, freilich manchmal zu ausufernd, aber auch den Leser behaglich in den Details der antiken Welt des Theaters, z.B. Komödien eines Aristophanes oder Tragödien eines Aischylos, schweifen lassend. Ein ausführliches Glossar sowie Quellen und ein in seiner Fülle überwältigendes Literaturverzeichnis (127 Seiten), ferner ein Sachverzeichnis, runden das Buch ab.

Diemut Majer*

* Prof. Dr. Diemut Majer. Die Verfasserin ist emeritierte Universitätsprofessorin. Sie ist Rechtsanwältin in Karlsruhe und Lehrbeauftragte für Europarecht und Umweltrecht an der dortigen Universität.

Hanno Rebhan

Österreich wird Verfassungsstaat. Entstehung und Entwicklung moderner Verfassungsstaatlichkeit (1918 – 1948)

Marburg: Tectum Verlag, 2011, 288 S., ISBN 978-3-8288-2788-2, 29,90 €

Beim vorliegenden Buch handelt es sich um die überarbeitete und redigierte Fassung der im Frühling 2011 am Wiener Institut für Politikwissenschaften eingereichten Diplomarbeit von Hanno Rebhan mit dem Titel „Die frühmodernen österreichischen Verfassungsstaaten in der Habsburgermonarchie. Die Pillerdorfsche Verfassung 1848, die Staatsgrundgesetze 1867 und deren Verfassungswirklichkeiten als Grundlagen staatlicher Ordnung“ [http://othes.univie.ac.at/14398/], die bei Univ.-Doz. Dr. Johann Wimmer eingereicht wurde.

Nach der Einleitung schildert der Autor in einem kleinen, vier Seiten umfassenden Kapitel die wesentlichen Aufgaben einer rechtsstaatlichen Verfassung mit demokratischen Elementen als Ausgangspunkt für den modernen Verfassungsstaat.

Wesentlich ausführlicher ist das dritte Kapitel. Es behandelt in der Summe elf Jahre österreichischer Rechtsgeschichte, die erste verfassungsstaatliche Periode auf Grundlage der Pillerdorfschen Verfassung von 1848 bis 1859. 1860 wird die Lombardei an Italien, das sich gerade im Einigungsprozess befindet, abgetreten. Abgerundet wird der dritte Abschnitt mit einer Bilanz, dass es sich um den ersten monarchischen österreichischen Verfassungsstaat handelt. Überdies geht Rebhan den Fragen nach, wo sich die Modernisierungsdefizite befinden und warum man von einem „schwachen frühmodernen Verfassungsstaat“ sprechen muss.

Im vierten Kapitel betont der Autor die zwischenverfassungsstaatliche Epoche, die die Jahre 1849 bis 1867 betrifft. Rebhan arbeitet gewissenhaft und versucht das Ende der Revolution 1848 und deren Einfluss für den besagten Zeitraum zu umreißen. Dabei werden alle sechs Verfassungsentwürfe bzw. Verfassungen auf Bestimmungen und Realitäten bzw. ihre Anwendung hin untersucht. Nach dem „Kremsierer Verfassungsentwurf“ geht es in den Folgeabschnitten um die „Oktroyierte Märzverfassung“ („Reichsverfassung für das Kaisertum Österreich“) 1849, die Silvesterpatente 1851, das Oktoberdiplom 1860, das Februarpatent 1861 und das Sistierungspatent 1865. Anhand dieser verfassungsgeschichtlichen Zählung wird dem Leser klar, dass der 1848 an die Macht gekommene, erst 18-jährige Kaiser Franz Joseph I. in den ersten Jahrzehnten seiner Regierungsgewalt sich mehrfach mit Grundgesetzen und verfassungsmäßigen Fragestellungen auseinandersetzen musste. Im Fazit „Die Nichtexistenz des Verfassungsstaates zwischen 1849 und 1867 und deren Bedeutung für den Verfassungsstaat ab 1867“ rundet Rebhan sein viertes Kapitel ab. Denn genau diese zwei Jahrzehnte waren es, die zeigen, dass die Monarchie trotz innen- und außenpolitischer Stabilität zu Beginn weder absolut regiert noch mit kleinen Zugeständnissen an das Volk zusammengehalten werden konnte.

Der Autor beschreibt im fünften Kapitel die zweite verfassungsstaatliche Periode auf Basis der Staatsgrundgesetze von 1867 und beendet dieses im Jahr 1914. Dabei werden wichtige historische Ereignisse erwähnt. Als Beispiele können sowohl die österreichische Niederlage im Deutschen Krieg 1866 und die einhergehende „kleindeutsche Lösung“ als auch der „Ausgleich“ mit Ungarn im Folgejahr angeführt werden. Auch kommen die „Dezemberverfassung“ von 1867 mit den Unterkapiteln Kaiser, Kabinettsregierung, Reichsrat, den Grundrechten, der Gerichtsbarkeit und den Ländern und Gemeinden zur Aussprache. Denn hier waren zwei Gerichte vorhanden, die die politischen Rechte der Bürger schützen konnten. Das waren zum einen das „Reichsgericht“ und zum

anderen der „Verwaltungsgerichtshof“. Obwohl der Reichsrat, das gewählte Gremium auf gesamtstaatlicher Ebene, mehr Macht als zwanzig Jahre zuvor besaß, blieb der Kaiser trotz allem immer noch die wichtigste, wenngleich mächtigste politische Autorität im politischen System. Genauso erwähnt wird im fünften Abschnitt die Verfassungswirklichkeit. So spricht Rebhan von der „geteilten Habsburgermonarchie“, dem Nationalitätenproblem und auch vom Ersten Weltkrieg und dem Ende des monarchistischen Verfassungsstaates. Im Fazit des fünften Abschnittes geht der Verfasser den Fragen nach, wieso von einem „modernen Verfassungsstaat“ die Rede sein kann, welche Modernisierungsdefizite (z.B. Fehlen der politischen Rechte für Frauen) offenkundig waren und aus welchem Grund man „nicht“ von einem „schwachen, frühmodernen Verfassungsstaat“ sprechen kann, zumal der vorherige Verfassungsstaat keinerlei Institutionen besaß. Die Aufgaben des Verwaltungsgerichtshofes können Antworten dazu geben.

Im Schlusskapitel spannt der Autor den Bogen bis in die Gegenwart. So kommt die Zeit nach dem Zerfall der Habsburgermonarchie zur Aussprache, so wie in einem Absatz die Abschaffung des demokratisch-republikanischen Verfassungsstaates durch den Putsch von Dollfuß, ehe durch den „Anschluss“ Österreichs an das Deutsche Reich 1938 die staatliche Souveränität eliminiert wurde. Von einem demokratischen Verfassungsstaat kann erst wieder ab 1945 die Rede sein. 50 Jahre später, nach dem EU-Beitritt der kleinen Alpenrepublik, bezeichnet der Autor den demokratisch-republikanischen Verfassungsstaat nicht mehr als „vollsouverän“, zumal das EU-Gemeinschaftsrecht mehr wert als das Bundesverfassungsrecht ist. Zudem ist Österreich durch die volle Integration innerhalb der Europäischen Union mit mehr als 20 anderen Staaten von einer supranationalen Organisation abhängig und muss auf die volle Souveränität verzichten.

Insgesamt ist das Werk, das am Ende auch drei schöne Karten und ein gut-übersichtliches Literaturverzeichnis aufweist, trotz des Themenkomplexes gelungen. Die Verfassungsstaatlichkeit in Österreich verlief keinesfalls in allen Linien wie am Schnürchen, Defizite und Verbesserungsmöglichkeiten sind nie auszuschließen. Der Verfasser war in der Lage, den holprigen Weg zwischen Märzrevolution 1848 und dem Zerfall der Donaumonarchie sieben Jahrzehnte später zu charakterisieren. Die Besonderheit der Staatsgrundgesetze verleihen der politischen Arbeit bestimmt auch rechtshistorische Elemente. Rebhan gelingen daher mehr als bloß interessante Ausführungen. Weshalb er mehrfach Joseph I. anstatt Joseph II. als Sohn Maria Theresias anführt, ist dem Rezensenten ein Rätsel und muss als offene Frage angesehen werden.

Andreas Raffeiner*

* Bozen, Italien.

Johannes Michael Rainer

Das Römische Recht in Europa. Von Justinian zum BGB. Kurzlehrbuch

Wien: Manz Verlag, 2012, 288 S.,ISBN 978-3-2140-0785-0; 53,50 €

So mancher fragt sich, warum man sich im Rahmen des Jus-Studiums überhaupt mit der Lehre des Römischen Rechts auseinandersetzen muss. Der Autor Johannes Michael Rainer versteht im Ziel und Zweck dieses juristischen Teilbereichs die Vermittlung der „universellen und kulturellen Grundlage aller modernen Rechte Europas.“ Und wer das Buch gelesen hat, gibt dem Verfasser in seiner Antwort recht.

Viele Bücher wurden über das Römische Recht geschrieben. In allen – hier spielt Rainer keine Ausnahme – bildet das Gesetzeswerk von Justinian die Grundlage. Interessant ist der Fall, dass der Verfasser, der in Innsbruck, Graz und Rom Rechtswissenschaften, Geschichte, Archäologie und klassische sowie moderne Philologie studierte und als Universalgenie gelten kann, nicht von Kodifikation sondern von Kompilation spricht. Darüber hinaus kommen die Entstehung der Digesten und die Arbeitsweise der Kompilatoren zur Aussprache.

Nach dem Ende der römischen Staatlichkeit, dem Lateinischen als Rechtssprache des nachrömischen Europas und die Bedeutung der nationalen Rechtssprache, den Westgoten, den Langobarden in Italien, den Franken und der Entwicklung von Staat und Recht in Frankreich, widmet sich Rainer in einem eigenen interessanten Kapitel der Wiedergeburt des Römischen Rechts in Italien und Frankreich zwischen 1100 und 1250. In dieser Zeit spielten sowohl die Glossen als auch die Summen eine keineswegs unwesentliche Rolle. Beide bieten in ihrer Form schon systematische Darstellungsweisen einer gewissen Rechtsmaterie. Als Basis der Gattung der Summa gilt Südfrankreich, doch auch die Codexsummen sind in ihrer Konzeption nicht wegzudenken. Rainer erwähnt in seinen Ausführungen den um 1160 in Montpellier lebenden Placentinus, der ohne Zweifel als Hauptvertreter der Glossatoren angesehen werden. Leider wurden diese Glossen wie etwa die mehr als bedeutungsvolle Glossa ordinaria des Accursius noch nie in einer modernen Edition herausgegeben. Dabei kann man dem Verfasser recht geben, wenn er meint, dass diese eine „Grundlage eines europäischen gemeinen Rechts“ darstellen.

Der folgende Abschnitt ist der Schule von Orléans gewidmet. Unter den Doctores ultramontani nehmen de Révigny und de Belleperche eine führende Rolle ein.

Rainer befasst sich im 14. Kapitel mit dem 14. Jahrhundert in Italien. Hier widmet sich der Verfasser anschaulich und klar strukturiert der Schule der italienischen Kommentatoren und Konsiliatoren. Das Dreigestirn Cinus, Bartolus und Baldus erfährt aus der Feder des Verfassers eine mehr als nur entsprechende Würdigung. Gerade die Kommentare von Bartolus und Baldus haben bis in die Neuzeit hinauf in Italien, Spanien und Deutschland eine wichtige Rolle in der Landesrechtsgeschichte gespielt.

Danach befasst sich der Autor mit dem Römischen Recht im mittelalterlichen Spanien. Hierbei unterstreicht er sowohl die Entstehungsgeschichte als auch die Bedeutung einer um 1250 in Kastilien entstandenen Kompilation, der Siete Partidas.

Im Folgekapitel wird die Rezeption des Römischen Rechts in deutschen Landen untersucht. Auf anschauliche Art und Weise beweist Rainer, dass die Rezeption in mancher Hinsicht zu einer Verwissenschaftlichung aller deutschen Rechtsgebiete führte und demgegenüber die buchstäbliche Rezeption eine Übernahme materieller Normen des kanonischen und römischen Rechts mit sich brachte.

Im nächsten Abschnitt wird das Wechselspiel zwischen Humanismus und dem Recht im 15. und 16. Jahrhundert angeschnitten. Nicht unwichtig ist hier die französische Stadt Bourges; dort erlebte der juristische Humanismus – und das ist keineswegs übertrieben – seine Hochkonjunktur.

Rainer, eine Koryphäe sondergleichen, ehrt im Teilabschnitt über das Römisches Recht und Naturrecht den niederländischen Rechtsgelehrten Hugo Grotius auf höchst kompetente Weise. Die Basis von Grotius' Denken liegt in den Augen des Autors im französischen Humanismus. Auch Naturrechtler Thomasius, der als „Vater der deutschen Aufklärung" in die Geschichte eingegangen ist, wird gewürdigt.

In einem weiteren Kapitel schreibt Rainer über Karl Anton von Martini, Franz von Zeiller und das österreichische ABGB. Dabei werden beide, für die österreichische Rechtsentwicklung und -geschichte so wichtigen, Männer gewürdigt. In der Folge widmet sich der Verfasser auch den Anfängen der französischen Kodifikation, Friedrich Carl von Savigny, Josef Unger und der Historischen Schule. Abgerundet wird das höchst interessante Kurzlehrbuch mit zwei Kapiteln über Italien und den Codice Civile bzw. das deutsche BGB.

Abschließend will der Rezensent betonen, dass es Rainer obwohl seiner schier unendlichen Forschungsschwerpunkte (Römisches Staatsrecht, Römisches Bau- und Nachbarrecht, Sklavenforschung, Römische Rechtsgeschichte vom Ende der Antike bis zur Moderne, Privatrechtskodifikationen, Romanische Rechte, Europäisches Privatrecht) gelungen ist, in allgemeinverständlicher und aussagekräftiger Art ein Buch herauszugeben, das den tiefgreifenden Einfluss des Römischen Rechts auf unsere Entwicklung des Rechts erklärt. Das Werk, obwohl es als Kurzlehrbuch deklariert ist, ist kein 08/15-Studienbuch, sondern eine bedeutende und akkurat recherchierte Bereicherung sowohl der Europäischen Rechtsgeschichte als auch der Privatrechtgeschichte. Nur schade, dass dem Römischen Recht im Vergleich zum Arbeits- oder Straf- oder Zivilrecht nicht so viel Zeit während des Studiums geschenkt wird. Eine Aufwertung der Rechtsgeschichte im Allgemeinen und dem Römischen Recht im Besonderen wäre sicherlich nicht schlecht.

Andreas Raffeiner*

* Bozen, Italien.

Katalin Gönczi/Wieland Carls, unter Mitwirkung von Inge Bily

Sächsisch-magdeburgisches Recht in Ungarn und Rumänien. Autonomie und Rechtstransfer im Donau- und Karpatenraum

Berlin/Boston: De Gruyter, 2013, 288 S., ISBN 978-3-11-029876-5; 102.80 €

Katalin Gönczi und Wieland Carls untersuchen die Wirkungen des sächsisch-magdeburgischen Rechts in Ungarn und Rumänien. Während sich Gönczi der Rechtsentwicklung, dem Rechtstransfer, der Stadtentwicklung und dem Landesausbau widmet, geht Carls auf die Rechtsquellen des sächsisch-magdeburgischen Rechts ein. Schnell wird klar, dass das Thema äußerst komplex ist und nicht in einem chronologischen Erzählstrang verstanden werden kann. Viele Einflüsse und Entwicklungen schufen ein Rechtsbewusstsein, eine Rechtsprechung und eine Rechtsanwendung, die über die autonome Rechtsgestaltung der Siebenbürger Sachsen hinausreicht und das ungarische Gewohnheitsrecht für die in Rumänien lebenden Ungarn und Szekler berücksichtigt.

Die Autoren setzen den Beginn städtischer Rechtsordnungen in die Zeit des 15. Jahrhunderts, gehen aber nicht weiter der Frage nach, ob und inwieweit bereits vor dieser Zeit städtisches Recht konzipiert und angewendet wurde. Es gab zwischen dem 13. und

17. Jahrhundert zahlreiche kriegerische Auseinandersetzungen, in deren Zusammenhang Quellen vernichtet wurden. Eine Traditionsgeschichte sollte diese Aspekte berücksichtigen beziehungsweise ihnen nachgehen. Des Weiteren könnte es für die Forschung interessant sein, die vorhandenen Quellen so weit zu untersuchen, dass eine einheitliche Überlieferungsgeschichte gestaltet werden kann. Neben Staats-, Privat- und Kirchenarchiven sind dabei auch Funde in Bibliotheken zu berücksichtigen. Beispielsweise können vorhandene Handschriften genutzt werden, um die Besitzgeschichte dieser Quellen bestimmen zu können. Daraus ließe sich die Bedeutung einzelner Quellen für die Rechtstradition des ungarischen Königreichs ableiten. Dabei wäre auch zu berücksichtigen, dass sich die Rechtsquellen, auf die sich die Überlieferungszeugen berufen, nicht mehr im Untersuchungsgebiet befinden. Im Umkehrschluss bedeutet dies, dass die im Untersuchungsgebiet vorhandenen Quellen nicht „historisch" bereits dort waren, sondern eventuell nachträglich von späteren Rechtsinteressierten dorthin gebracht wurden. In diesem Falle wäre kein Zusammenhang zwischen den vor Ort gefundenen Rechtsquellen und der Rechtsentwicklung im Untersuchungsgebiet auszumachen. Ein Beispiel dafür sind die drei Handschriften des Schwabenspiegels, die sich um 1830 im Besitz des Sammlers N. Jankovich befanden. Es ist sehr wahrscheinlich, dass sie zuvor in Bayern oder Österreich genutzt wurden und erst im Laufe der Zeit ihren Weg nach Ungarn gefunden haben. Diesem Beispiel könnten noch weitere angefügt werden. Eine detaillierte Studie zu den einzelnen Handschriften ist damit unausweichlich, wenn die Rechtsgeschichte des Untersuchungsgebiets quellengetreu rekonstruiert werden soll.

Unter Berücksichtigung der Vielzahl an Quellen und der verschiedenen Fundorte ist Inge Bilys zu würdigen, die zu der beiliegenden Landkarte einen Überblick über die Ortsnamen inklusive sämtlicher Varianten der Namen vorgelegt hat. Auch das wohldurchdachte Register ist sehr hilfreich, welches die Inhalte nach Orten, Personennamen, Sachen, Rechtsquellen und Handschriften filtert. Das Quellen- und Literaturverzeichnis ist äußerst umfassend und enthält einige Verweise auf digitale Präsentationen, die den Zugriff für die Leser erleichtern.

Andreas Raffeiner*

* Bozen, Italien.

Éva Jakab – Norbert Pozsonyi (eds.)

Essays in Honour of Professor Imre Molnár in Occasion of His Eightieth Birthday*

(Originally in Hungarian: "Ünnepi kötet Dr. Molnár Imre egyetemi tanár 80. születésnapjára")

In: Acta Iur. et Pol. Szeged, Mária Homoki-Nagy (series' ed.-in-chief), Tom. LXXVI.
Szeged, 2014, 516 p., ISBN 978-963-306-313-2, ISSN 0324-6523

I. The international companionship of legal and other social sciences' scholars celebrated the renowned Hungarian legal Romanist, *Imre Molnár*, *emeritus professor* of Szeged University (hereinafter: SzU) Faculty of Law in occasion of his 80th birthday. The ceremony was held on September 25, 2014 in the Szeged Committee of the Hungarian Academy of Sciences in the presence of the Jubilant's friends and colleagues. The celebration was crowned by the gala lecture of em.-Prof. *Andreas Wacke* (Cologne), after which a meritorious volume of essays in honour of the Jubilant published by the *Acta Facultatis* was presented. The volume has a decorative hardcover and a paperback edition as well. This book is the very object of my review also dedicated to octogenarian professor Molnár.

II. As the second born of his family, Imre Molnár saw the light of day on Sept. 22, 1934 in Tataháza, Bács-Kiskun County, Hungary. According to those days' political ambience towards farmers with larger acreage, the Jubilant as the son of such family could do his doctor's degree just in 1960. Then he was called to the Bar in 1964 and afterwards was employed as legal advisor in different positions by a public undertaking. His academic career could start in 1968 through his invitation for part-time lecturer by then head of Department of Roman Law, professor *Elemér Pólay*. After assistant (1971) and associate professorship (1979) Imre Molnár reached full professorship (1988), while attained CSc (1977) and also DSc (1987). The Jubilant became head of his dept. (1985–1999) and dean (1994–1998). He won visiting professorships in LMU (Munich), La Sapienza (Rome) and Cologne University. The Jubilant participated in academic and university public life as member of Hungarian Accreditation Committee (1996–2001) or that of SzU's Senate (1989–2003) or as head of the SzU Doctoral School. Imre Molnár was honoured by *emeritus professorship* of SzU (2004), he owns state decorations (the Officer's Cross of the Order of Merit of the Hungarian Republic, 2003)

* The review is dedicated to forthcoming 650th anniv. of University of Pécs (in Hung. 'Pécsi Tudományegyetem', abbrev. 'PTE', in Lat. Univ. Quinqueecclesiensis, estab. by Louis I of Hungary in 1367, letter patent issued by Pope Urban V).

and also many academic awards (Apáczai Award, 1999; Klebelsberg Award, 2005; Eötvös Wreath, 2007; Szent-Györgyi Prize, 2014). His Roman law research field embodies system of contracts, trifold character of *loc.-cond.*, order of private law liability and for the last two decades his interest has turned to penal law. His *śuvre* incorporates 6 monographs (3 in Hungarian and 3 in German language, out of which 2 were published abroad), a volume of his selected essays and a text-book, then many lexicon-articles and a review in the *Rom. Abt.* of *'Savigny Zeitschrift'*. The Jubilant's 57 independent papers were published either in periodicals (13, out of which 7 were published in international journals like Labeo, BIDR, Iura, Index) or in collections of essays (44, out of which 10 were published in German, Italian and English, 6 were released abroad among others in such volumes as St. Sanfilippo, Scr. Guarino, 28. Deut. Rechtshist.tag, FS Wacke 65, St. Litewski). The variegation of Jubilant's personality can be easily proved by the fact that he was member of the Hammer Throwing Team of the 1970's Hungarian Championship of Athletics.

III. The corpulent volume of essays dedicated to professor Molnár incorporates some 38 contributions from manifold fields of legal scholarship and other social sciences as well (see the classification below IV). Roman law – incl. private, public, penal and military law, the survival of Roman law – and related studies are represented by the vast majority of the papers, which are published majorly in Hungarian (30) but the spacious volume contains also contributions in English (4) and German (4). The essays are written mainly by legal scholars and academics of other social sciences but also practitioners appear in the book as well as the incumbent Minister of Justice and a judge of the Constitutional Court. The number of authors is 40, 38 of them are Hungarians while 2 Germans. After editors' foreword (p. 9), the volume contains also a brief biography (p. 10), and is ended up by em.-prof. Molnár's list of works (pp. 513–516).

IV. The very role of reviews lies in objective expression of critique and making resumed papers written in unreachable Hungarian internationally available. Compressing faithfully and estimating the values of theses of 38 different scientific contributions elaborated in some two dozens of diverse legal topics, furthermore, doing it all in a few pages of extent by a single reviewer of limited capabilities: The merits may wind up in the attempt. This review seeks to fill its role in finding and then epitomizing the essays' theses in thematic order (some papers may belong to two or even more categories). Titles appear solely in English with bracketed remarks of paper's original language and its page numbers in the volume.

(a) Roman law & related papers. 1. István Bajánházy, *Compulsory Military Service in the Epoch of the Roman Republic* (Hun; 23–41). The essay shows that introduction of mercenaries' army effaced compulsory military service, which had been a central question of Roman life theretofore. It proves that this transformation caused also remarkable changes in source materials. *Bajánházy* shows secondly the effects of getting out of service, which is then followed by the questions of general immunities (*immunitas*) and individual or group discharges (*vacatio*) from military service.

2. Elemér Balogh, *Some Principles of Roman Law in the Judicature of the Hungarian Constitutional Court* (Hun; 43–52). This paper confessedly analyzes rather Latin *proverbia* than Roman law principles. It shows first the role of principles in the decisions generally, then presents the past decades' emergence of *nemo plus iuris*, *nemo testis auditur in re sua*, *in dubio pro reo* and *clausula rebus sic stantibus*. *Balogh* points that Constitutional Court has always regarded living Roman law principles as axiomatic benchmarks in the constitutional assessment of laws and cases.

3. Gergely Deli, *Something of a Cosmology: The Notion of 'utiliter' in D. 3,5,9,1* (Hun; 77–95). This intellectual exercise points that Ulpian's antecessors like *Labeo*, *Proculus*, *Celsus, Iulianus* enthroned efficiency and/or objective expedience, usefulness, necessity (as different meanings of *utiliter*) of the benevolent intervention as required ground for claiming in well-known cases of *negotia gesta* in the investigated fragment. Ulpian held that *gestor*'s subjective view in respect of the usefulness of his own acting is the very aspect to be assessed. *Deli* guesses that stoical cosmology upon relationships between outcome and its interior and exterior causes may have helped Ulpian to see *'utiliter'* as a notion to be judged from this subjective perspective of the benevolent intervener.

4. Nadja El Beheiri, *The Relevance of Public Law Practice in the System of Roman Law: 'Herkommen' as Component of Theodor Mommsen's Legal Thinking* (Hun; 97–104). The paper shows direct and also *au contraire* role of ancient traditions (*altes Herkommen*) in Mommsen's reasoning about offences towards magistrates or their selection, installation, funeral or the correlation between place in hierarchy and right to propose etc. The author examines the contacts of *mores maiorum* or *auctoritas* and abstract notion of *Herkommen*. The paper shows lastly the selection of *Valerius Flaccus* to *flamen dialis* and Mommsen's thinking in institutions – leaning on *Kunkel* and *Behrends*.

5. János Erdődy, *The Notion and Significance of res incorporales in the Light of a New Civil Code* (Hun; 105–120). The paper shows a gradual banishment of the notion of *res incorporalis* and its derivatives from Pandectistics and Civilistics, afterwards it points out the notion's origins by *Cicero* and *Seneca* leaning on *Wieacker*. The author examines fragments from Digest (Paul. 41,3,4,26 and 8,1,14 *pr.*; Ulp. 5,3,18,2; Gai. 41,1,43,1 and 1,8,1,1) and from Institutions of Gaius (2,12-14) and Justinian (2,2 *pr.*-3). Readers unfortunately cannot become clearly acquainted with the author's thoughts on which particular new Civil Code is here considered, the sole question of modern legal thinking appearing in the paper is the remark of possible parallels of *res incorporales* and individual rights being subject to trade.

6. András Földi, *Competition Problems about the Standing (locus standi) of the actio iniuriarum* (Hun; 131–144). The author analyzes among others many fragments of *sedes materiae* in D. 47,10 (see this for *loci* below) for finding out, who got the *locus standi* of an *actio iniuriarum* in cases, according to the matters of fact of which there were more than one person hurt. He examines dogmatic considerations and 'legislative' aims shaped the thinking of jurists on the choice of one privileged or more equivalent plaintiffs. The paper deliberately passes the joinder of claims of a single injured. The author points that our sources neglect situations of concurrence

emerging in cases, in which a single action harmed multiple subjects, scil. *responsa* show that competition problems could emerge, if injured one was a person subject to the control of others (husband, father, master). *Földi* points that real competition could grow if injured ones were not slaves (but: Ulp. 15,47-49; Paul. 16;) though *alieni iuris* family members, because these could at all gain twofold (Ner. 41; Ulp. 30,1; 17,18) or trifold (Ulp. 1,9; Paul. 18,2) parallel or even independent *loci standi* (Ulp. 17,10; 17,13; 17,15; esp. 17,21). However, class actions were even here exceptional. The paper also investigates the competences between *sui iuris* family members (Ulp. 15,24; 1,3; 1,5; Paul. 2; Inst. 4,4,2) and the particularities of *libertini* towards *patroni* (Ulp. 1,7; 11,7-8; 7,2; Marcel. D. 23,2,32). *Földi* compares also the proportions of *aestimationes* (Ulp. 15,49; 30,1; Paul. 16 etc.).

7. Gábor Hamza, *Development and Codification of Austrian Private Law in the Light of the Roman Law Tradition* (Ger; 183–193). The paper starts with an evaluation of attempts for unifying Austrian private law from the 16th century: *Walther*'s treatises, the 'Entwurf *Püdler*', *Beckmann*'s *Doctrina iuris* and the plan of a *Corpus Iuris Leopoldinum*, then *Suttinger*'s *Consuetudines Austriacae*, the 'Four Doctors' Compilation' (from *Suttinger*, *Reiz*, *Hartmann* and *Leopold*). *Hamza* states that these drafts of Land Laws grounded a clear direction to an Austrian *Ius Romano-Germanicum*. The next chapter draws a line of ABGB-formation from 'Teil-ABGB' (1786) to *Martini/Zeiller*-Draft. This is followed by the Code's characterization and the influences of German Historical School of Jurisprudence through the works of *Unger*, *Michel*, *Krainz*, *Pfaff* and *Hofmann*. The last part sums up the 20th century reforms of the ABGB.

8. Éva Jakab, *Ancient and Modern Law of Contracts* (Ger; 221–229). The paper shows the formation of a general law of contracts by examining first a case (*Hyperides* Athenog. 3,15) for concluding that *'Vertragsrecht'* was as such irrelevant for Athenian lawyers: Such issues of justice galvanized rather philosophy. The strict types of contracts were obstructive by Romans. *Cicero* (off. 1,7,23) may convince us about the role of *fides* in 3rd–2nd c. BC praetorian law as a general ground of liability. In lack of a doctrine of consent (Inst. Gai 3,89), general enforceability of contracts was not yet grounded. That was *aequitas* and *conventio* (Ulp. D. 2,14,1 *pr.* and 3) and the soft constraint of form by *stipulationes* (Inst. Gai 3,92 and *Pedius*) which received a relevant role in the famous advent of *'obligatio est iuris vinculum'* (Inst. 3,13 *pr.*). Middle Ages' sources – like *Glossa Acc.* to Inst. 3,13 *pr.*, *Loisel*'s *Inst. Coutum.* 342, *Baldus* on *nuda pacta* (comm. decr. I de pactis 14), then X,1,35,1 of *Gratian*'s *Decr.*, *Thomas Aquinas'* Aristotelian views on *pacta* and the dissolution of distinctions of *bonae fidei* and *stricti iuris* contracts in Canon law, and at last *Grotius*'s *de jure belli ac pacis* (proleg. 8,15) – depict the bloom of an *'allgemeines Vertragsrecht'* for the time of Pandectistics.

9. János Jusztinger, *The Determination of Price by Thirds in Roman Law of Sales* (Hun; 239–254). The essay shows undecided pre-classical antinomies of Inst. Gai 3,140, then answers these open remained questions by Justinian's const. (C. 4,38,15 *pr.*-3; a. 530) by pointing that caveats appearing in the above mentioned Gaian text do not prove a Proculian–Sabinian debate at all, thanks to inter-school concords and in-school debates. Then, the author attempts to decide the all-the-time pendant question of declaratory or constitutive effect of third's statement by the examination of analogous cases of *loc.-cond.* (Cato agr. 144,2-3; 145,3) and *societas* (Proc. D. 17,2,76), after which seeks to elevate the definition of third's statement to a dogmatic range by qualifying it either suspensive condition or additional agreement. His responds are as follows. According to that *emptio* remains *imperfecta* until the third makes his constitutive statement, and to that the third's word is mandatory for the parties, and to that the third is free to name a value as well, and also to the lack of original sources for the *emp.-vend.*, *Jusztinger* shows that named parallel cases verify that the sale's *bonae fidei* character is about to get hurt, unless the third acts *arbitrio boni viri*. The clause of *'quanti T. rem aestimaverit'* is neither a *condicio* nor a *pactum adiectum*, since we have no direct sources for the first, and inasmuch the second would be a vicious cycle.

10. Éva Nagy, *The actio empti as Legal Remedy of Lack of Conformity by Movables' Purchase* (Hun; 277–290). The paper examines competition problems between four actions, i.e. the edictal *redhibitoria* and *quanti minoris* and *a. ex stipulatu* and *a. empti*. In D. 19.1, the author analyzes Ulpian-fragments (11 *pr.*–1; 13,1 and 3) and a Paulian one (4 *pr.*). The essay adumbrates a latent interdependent system of four relevant factors as follows: (1) the nature of the sold assets and the wrongs, scil. a *fur* or a *fugitivus* slave*, tignum vitiosum, pecus morbosus* and therefore their edictal or non-edictal wrongs; (2) then the vendor's knowledge about the lacks, viz. if he sold *scienter* or *ignoranter* of the shortages; (3) after it comes the extent of the sued interests by lack of conformity in case of further damages or without them or by a *stip. duplae* (positive or negative *interesse* or *duplum*), and (4) at last follows the question of selling with or without a special *dictum promissum* upon the good quality of the movable sold. The author guesses that Ulpian vested a *quasi a. quanti minoris* into the *a. empti* for the case of fugitive slave sold by nescient vendor. At last, a parallel is showed between modern and ancient laws according to objective and subjective sanctions by wrong performances.

11. Orsolya Márta Péter, *Cum pudicitia adtemptatur: The Reflections of Social Demands on Women's Morals in the Classical Roman Regulation of iniuria* (Hun; 347–358). The paper presents the cases of women's respectful pudency's injuries floating between modern criminal acts of indecent exposure and defamation or slander. The *iniuria*-cases compiled under D. 47,10 (use below) were relevantly broadened by the praetors' edicts from Twelve Tables to republican ages. The author refers to *Labeo*'s opinion (Ulp. 1,1-2) and widens the circle of *adtemptata pudicitia* (*convicium*, *abducere comitem*, *appellare ac adsectari contra bonos mores*; Ulp. 15,1; 15,15-23). *Péter* points that directly defended ones were unmarried young women (*virgines*) and *matres familiae* (Inst. Gai 3,220; Ulp. D. 50,16,46,1) on the first place, by which an indirect protection of Roman *familia* (Plin. Ep. 5,16; Plaut. Merc. 402-411; Sen. Contr. 2,7,3-4) could also materialize. The paper examines feminine virtues like *castitas* and *pudicitia* (Plaut. Amph. 925-934; Val. Max. 6,1,1; 6,3,10; Propert. 2,6,25; Iuv. Sat. 6,1-8; CIL I,1007; CIL VI,11602) and also the defense of female slaves (Ulp. 9,4; Ulp. D. 11,3,1,5).

12. Attila Pókecz Kovács, *The Presence of Economic Interests in Transactions Appearing in TPSulp 45* (Hun; 359–373). The paper shows a complex economic relationship appearing in TPSulp 45, 51, 52, 67, 68. After fixing the matters of fact, for pointing economic interests behind transactions, the essay depicts the operation of *horrea*, then the pledger's motivations for taking loans, and also the interests of money lenders. As credit protection, the money lender acquaints pledge on in-stock cargo of the merchant shipping grains as bottomry loanee. Pledge is affirmed by a storehouse lease for a symbolic rental of one sesterce per month to be paid until loanee refunds. The lessor attained the right for managing the storehouse for a consideration defined by an auction by the municipality of *Puteoli*. The lessor was interested in higher amounts of fee than the mentioned symbolic rental, so his real partner was the pledger (merchant) who paid *ad valorem* by stipulation of indefinite time and who speculated in the upward trend of grain prices for winter-sales. In lack of capital, the merchant was interested in going into such risky and costly transactions as bottomry loan at high interests, as pledge and also as storage on his own costs for a possibility of acquiring and warehousing Alexandrine grains. According to the author, this lucid construction was capable to serve the interests of each and every business partner.

13. Norbert Pozsonyi, *Lessor's Lien on Lessee's Assets in Flat Leases* (Hun; 375–385). The norm appearing in the title emerges in many civil codes as *hypotheca legalis*, however, the rule struck its roots into ancient Roman contracting practice upon leases of houses in *praedia rustica* (Cato agr. 149). Ulpian showed (D. 43,32,1 *pr.*) that rural life's such achievement was then taken over to urban praxis of flats' leases in Rome crowded up by post Punic War immigrants, and demonstrated also that the ground of pignoration was the parties' agreement (*lex horreorum*; cf. CIL VI,37795 and 33747), according to which the lien is ceased if movables were brought out from the storage. The movables, which were taken permanently (Pomp. D. 20,2,7,1) in tenement, could be either small ones (*illata*) or those which necessitated transport vehicles (*invecta*) or simple ambulatories (*inducta*). The steps in the line of development were: Lien no longer necessitated parties' expressed agreement (*conventio tacita*; Ner. D. 20,2,4; Paul. D. 2,14,4 *pr.*); then claims secured by lien widened from *'pro mercede'* to any damage caused by lessee (Marc. D. 20,2,2); after it tacit conventions could cover every kind of leases of urban immovables (Ulp. D. 20,2,3); and at last, the proceeding is ended up by the constitution of Justinian in 532 (C. 8,14,7), which elevated the institution to the range of a certain *hypotheca legalis* for the whole empire.

14. Pál Sáry, *Roman Senate's Procedural Order and Competence on Criminal Justice* (Hun; 409–419). The Senate as criminal court appeared most strenuous under Tiberius and totally lost this competence by the end of 2nd c. AD. The paper points that justice on *crimina maiestatis* and *repetundarum* cannot be based on *SCC ultimum* and *Calvisianum*: the first lacked the character of court proceeding, the second established civilian justice. Many standpoints – e.g. Senate operated as a consultative assembly of consuls or it received competence from *comitia* – mangles sources and proofs. The author holds for most acceptable that Senate's such competence is to be classified as delegated imperatorial power (Suet. Aug. 66; SHA Marc. Ant. 10). The author used some hundred of *loci* of legal and non-legal sources (e.g. from Tac. Ann., Hist.; Plin. Ep.; Dio; Suet. Tib., Vit., Cal.; Quint. Inst. or.) to compose the questions such as the admissibility and the accusation, the prosecution and the defense, the defendants' status, or the competences of *princeps*, the certain *crimina* under Senate's competence for criminal justice, the location of trials and the trials *in contumaciam*, the order of pleadings and *probatio*, the joining cases by the plurality of offenses, the way of judgments' delivery, the justice upon or contrary to the laws, the decisions on both criminal culpability and punishment, the punishments and their execution, or the questions of appeal.

15. Iván Siklósi, *Some Questions on Custodia Liability for Theft in Roman Law* (Hun; 421–435). The paper draws case-by-case (abbrev. *loci* below are taken from D. 47,2) the efflorescence of classical jurists' concept that after the owners also other interested ones (e.g. pawnees: Paul. 67[66]; Gai 3,204; Ulp. D. 42,2,19,5; Paul. D. 41,3,4,21; 41,3,49 / *fructuarii*: Ulp. 46,1 / *bonae fidei possessores*: Iav. 75; Ulp. 52,10; 12,1 / *coloni*: Ulp. 14,2) and *custodientes* as well got the *locus standi* in *actio furti* for the reason of their *'Eigeninteresse'* (Gai 3,203). The paper examines the existence of this 'own interest' by manifold cases: *commodatarius* (Ulp. 14,10), *depositarius* (Gai 3,207; cf. Ulp. D. 16,3,1,35), *emptor* (if *merx* was stolen by thirds before *traditio*; Ulp. 14 *pr.*-1; cf. PS 2,31,17); several *operis conductores* (*fullo*, *sarcinator*, *balneator*, *horrearius*; Ulp. 12 *pr.*; 14,12; D. 16,3,1,8; Gai. D. 4,9,5 *pr.*; Iav. D.19,2,60,2 and 9). *Siklósi* examines the competition of stands by complex cases: *conductor* gives *locator*'s chattels to *commodans* with no permission, then things were stolen, thus stand is granted for *conductor* towards *fur* and also for *locator* towards *conductor* (*furtum usus*), thus a joinder with *aa. locati* and *commodati directa* emerges (Ulp. 48,4); and the case of the stolen epistle being submitted by a postal service (Ulp. 14,17); and also the case of appreciators (*inspectores*; Pap. 79[78]; Ulp. D. 13,6,10,1; 19,5,17,2).

16. Andreas Wacke, *On Bridge Custom by Transportation Contract and on Litotes 'non ignorare' in D. 19,2,60,8: With Thoughts on Mixed Contracts and Profession of muliones* (Ger; 491–512). The one problem about the rarely analyzed text is that this ancient version of a certain rent-a-car can hard find its place in the trifold scheme of *loc.-cond.*, since the vehicle is driven by the lessor himself who is sourcelike denominated in such cases as *conductor*: The text does not help us a tittle, inasmuch it calls the driver *locator*. *Wacke* sees that the case may become unscrewed, if either we accept the text as argument for original unity of *loc.-cond.*, or the contract is a certain mixture of the *loc.-cond.*'s subspecies alleged first by *Voet*. Considering esp. the transport business, after the exegesis of Digest's *loci quasi paralleli* (9,2: 7,2; 27,23 / 14,2: 2 *pr.*; 10,2 / 17,2,52,2; 18,1,20; 19,2: 2,1; 9,5; 11,3; 22,1-2; 25,7; 26; 39; 61,1 / 19,5,1,1), the author states that nowadays accepted sharp distinction between service and labour contracts were among Roman jurists more vague. *Wacke* conceives that lessor's special obligation of vehicle driving must have come from a *pactum adiectum* regardless of its content may manifest also another type of contract. The other issue around the fragment lies in the litotes *'non ignorare'* (scil. not unknown) in connection with *Labeo*'s decision, according to the reading of which the carter (muleteer, *mulio*) is allowed to claim towards the other party for the cost of bridge custom in addition to cargo fee, if the muleteer's lack of knowledge by conclusion of contract about the costly bridge to be crossed over *en-route* was exculpable. After examining the meaning of the requirement

of *certum pretium* by such contracts, this *ignorantia*, as an excusable error in pricing (scil. carters should calculate the custom into the fee), seems to be an exemption of that requisite. Otherwise, profiting from this would harm *bona fides*. The litotes is to be explained as if carter had only 'some vague idea' on customable bridge, his claim shall be denied. After Digest, the author responds such questions as matters of fact remained in shadow like cargo-escort by owner, stand of carter and muleteer, the *portorium* and the comparison of bridge customs and export duties (Ulp. 2,11,2,7; 9,1,1,9; 9,2,27,33; 19,2,13 *pr.*; 24,1,21 *pr.*; 33,7,12,10; Paul. 8,2,1 *pr.*; 8,3,38; 39,3,17,2; Alf. 9,2,52,2; 50,16,203; Pap. 23,4,26,3; Scaev. 34,2,13; 43,12,4); the Roman system of customs and taxes; and transports executed by different quadrupeds.

(B) Legal history & comparative law. 17. Tamás Antal, *Ranulf Glanvill and the Birth of Common Law* (Hun; 11–22). The paper analyzes the formation, structure and characteristics of the *Tractatus*, then the traces of Roman law therein as well. About Glanvill's authorship, the essay emphasizes that it is probably original albeit incomplete. The Roman law fossils appear in the distinction of property and possession or in the parallelisms between *actiones* and writs or *brevia*. However, there is also a notable German law effect, e.g. in the contracts of transfers.

18. László Blazovich, *The European Municipalities between the Antiquity and the Middle Ages* (Hun; 53–61). The author defines first the notion of 'city' after *Summa legum Raymundi* and in modern thinking after *Weber* and *Haase*. A brief analysis of ancient municipalities is followed then by the problems of cultural continuity between ancient and medieval cities. This wider part of the paper is based upon the results of *E. Ennen* and *G. Dilcher*.

19. László Heka, *The Earliest Laws and Common Institutions of Slavonic Nations* (Hun; 195–208). At first, the paper presents the earliest Slavonic laws: Bulgarian *Зако́н су́дный лю́дем* (9-10th c.), the *Русская правда* (11th c.), Croatian *Vinodolski zakonik* (1288) and Serbian *Душанов законик* (1349). This chapter is followed by the description of penal law regulations of these very collections of laws. The author holds that common institutions of Slavonic nations appear mostly in the tribal state and administration, these are *князь*, *Дружи́на, боя́рин* and some parallel lower middle classes and also the analogues of national assemblies like *duma* or *sabor* as well. The last chapter introduces shortly the context of *opština* and *vražda* (blood-money), thus the community of lands along with the common responsibility.

20. Mária Homoki-Nagy, *Remarks on the Development of Hungarian Contract Law* (Hun; 209–220). The author found, along researches in archives, four interesting deeds about contracts for purchase of future goods (*res speratae*): 10 quintals of tobacco from Gyála in 1810; floating wool of 4-500 sheep, spring and autumn wool and 25 quintals of tobacco from Szegvár in 1828; 30 quintals of floating wool from Tótkomlós in 1848; future barley and wheat in Makó in 1854. The paper draws the line of development in the range of diligence by composing a contract, and it places to the centre the deed of 1828 and the civil process of several court instances came from it. The essay shows a conflict of laws: the customary law firmed by judicial practice, the Act VI of 1844 upon delivery contracts, and ABGB in force in Hungary in those days.

21. Ferenc Nagy, *Upon the Historical Background of Principles nullum crimen / nulla poena sine lege* (Hun; 291–300). The prerequisite of the principles' formation lies in emergence of *leges scriptae*. From this angle the author examines the laws of *Ur-Nammu*, *Hammurabi*, Twelve Tables and *Const. Crim. Carolina*. The pre-history is seen in *Magna Carta Libertatum*, which is followed by sources of state theory and penal law in the Age of Enlightenment [*contrat social*, separation of powers (*Montesquieu*, *Locke*, *Kant*), bonding judges to law (*Beccaria*) and cognizability of law]. The essay shows among the basic turnouts of the principles the Decl. of Rights, VA (1776); federal Const. (1787); Décl. des droits de l'homme (1789); French Constt. (1791-95); Code pénal (1810); Sanctio Crim. Joseph. (1787); ALR (1794); StrafGB of Bayer. (1813), Preuß. (1851) and Deut. (1871); Weimar Const. (1919), GrundG (1949) and at last in Hungary penal code drafts (1795, 1843) and Code of 1878, soviet model's reception (1950's), Code of 1961, and at last Const. of 1989.

22. Tamás Nótári, *Reflections on Legal Assessments of Medicine and Decease in Early Middle Ages' Sources of Law* (Hun; 301–312). The essay examines notions of medicine, certain deceases, physicians and patients in Visigoth, Lombard, Alemanni and Bavarian *leges* and also in non-legal sources. Its topics are: Medicine of early Middle Ages, legal status of physicians, legal consequences of deceases having affects on legal capacities or capacities to act (leprosy, cecity, hernia, psychoses) and at last cases appearing in legal texts about the need for doctors' involvement and methods of cure. Author used sources such as *Cassiod. Inst.* 1,31,1; *Pact. Leg. Alemann.* 1,2; *l. Alam.* 57,5; 59,7; 65,5-6; *l. Visig.* 2,5,11; 11,1,1-8; *Ed. Roth.* 78-79; 82-84; 87; 89; 94; 96; 101-103; 110-112; 118; 125; 128; 176; 180; 230; 323-324; *Isid. Etym.* 4,6,15; *l. Baiuv.* 4,4; 5,3; 16,9; *Concc.: Aurel.* 21, *Lugd.* 6, *Cabill.* 280; Charlemagne's *dupl. legat. edict.* 36; 44.

23. Béla Révész, *An Unknown Body of Power in the Epoch of the Single-Party State: the 'Coordinating Committe' (1957–1988)* (Hun; 387–399). After showing the etymology of *'co|ordinare'* and its origins in Hungarian language before and after 'sovietization', the author points that the term in its later sense suffered a gyration, because this kind of co-operation – which normally operates between the 'elements' – was to dissolve the parts in serving the monocracy of state party. After the history of no-specified coordinating committees, comes the mysterious, fortnightly sitting 'Coordinating Committee' established by a party resolution in 1957, the enigmatic existence of which could be analyzed indirectly by protocols of other bodies' or court cases, because no direct sources were available before 1964 (from then 225 sessions are cognizable). Its super-secret power was observably waving around the coordination of to-be-independent state powers.

(C) Private law & related essays, labour law. 24. Pál Bobvos, *Special Regulations on Insurance Cooperatives* (Hun; 63–76). After brief remarks on insurance brokerage, the paper investigates the legal and other conditions of insurance cooperatives' (IC) estab-

lishment on the border of the new Hungarian Civil Code and the Act LX of 2003 upon insurance undertakings and insurance business, which is followed by questions of public law connections, limitation and control of business, special rules on general meetings, managements, assets and on the termination of ICs.

25. József Hajdú, *Flexibilization of Employment Relationship in the New Hungarian Labour Code* (Eng; 169–182). Atypical employment forms, which came into being just by economic crisis what made people crowded out of labour market and escape just into these employment forms, are also chances for labour market participants to adjust situation. At the same time these caused hard problems, too: employees are forced to bear risks of job loss, wage variability, benefit gaps, skill obsolescence etc. *Hajdú* defines the notion of atypical works and then he briefly examines some 13 pcs. of them such as fixed-term, part-time, on-call and study contracts, then job- and employee-sharing, tele-, out-, agency and casual work etc. After this arborescent investigation, the author states that new Labour Code does not address these problems.

26. Márta Görög, *Thoughts on Claims for Solatium in Case of Slight Violation of Inherent Rights* (Hun; 159–168). The paper examines the route of solatium in the codification of new Hungarian Civil Code: From non-material damage to moral injury, from damages (*Schadenersatz*) to satisfaction (*Genugtuung*), compensation (*Schmerzensgeld*) and *solatium*, and from prevention to compensation. The author shows the legislative, jurisprudential and jurisdictional status of these trends – concentrating on the minor claims against slight violation of inherent rights at last.

27. Tekla Papp, *'Total Plan' of Hungarian Law of Contracts – with an International Outlook* (Hun; 337–346). The paper depicts a 'typology on typologies of contracts' in Europe. Although the author holds that atypical contracts belong to nominate ones and innominate ones are either mixed or '*de facto* innominate' ones, her manifold European examples show that continuously widening classes of atypical contracts are all extra-codical. The author draws a line, along which *de facto* innominate contracts are first tending to become mixed or atypical ones for a latter arrival to nominate types. The paper shows two tendencies: The emergence of *pseudo-atypical* contracts and the mixture of subspecies of hybrid transactions. The essay shows variations on the theme of classes of contracts in England, Switzerland, France Germany, Austria and Italy, while it is ended up by European Contract Law's new approaches of contractual chains, framework agreements etc.

(d) EU-law, international law, legal theory. 28. Bernd-Joachim Ertelt / András Zakar, *Vocational Guidance on the Border of Individual Rights and Social Responsibility* (Ger; 121–129). The essay starts with a show of diverse legal definitions of vocational guidance formed by different studies and decisions of OECD, EU-Commission and World Bank platforms. This part is followed by a theoretical grounding of the subject and brief remarks on the role of marketing in this service. A key for harmonizing individual rights and social responsibility is vocational guidance staffs' professionalizing.

29. Katalin Gombos, *Judicial Cooperation in the European Union* (Eng; 145–157). The contribution has a framed structure of retrospection and foresight with detailed analysis of secondary sources in the middle. This part contains 8 subdivisions as follows: rules upon jurisdiction, rules of applicable law, rules regulating the procedure, alternative European procedure rules, rules on structural issues, the sources of EU law related to the subserve of emergence of secondary sources by international conventions, then decisions and conventions with opt-out and opt-in clauses in case of late accessions to enhanced co-operations and lastly subsidiary rules. The author rates as future challenge: electronic jurisdiction, a European Model Code of Civil Procedure and at last a European Civil Procedural Law Code.

30. Krisztina Karsai, *The Principle of Legality in the European Penal Law Legislation* (Hun; 255–268). Rule of Law necessitates substantive legality, which won a constitutional character among general principles of EU-law by its Charter's codification. The boundaries of *jus puniendi* got an analysis of two levels: the ones which come from European integration and limit jus puniendi, and the ones which ensue from principle of legality and limit the EU-law's visionary jus puniendi itself. The contest of EU-law and Member State's law may lead to inapplicability of effective and 'legal' penal laws thanks to the fact that EU-law is also the source of national penal laws. This makes national courts obliged to apply law in EU-conform way, which is also bounded by the principle of legality. It is now just questionable that the principle of primacy will rise legality above other EU-laws, if these become in collision.

31. Barnabás Kiss, *The 'First' Sovereignty-Theory of József Szabó* (Hun; 269–275). This contribution attempts to compass 'State Sovereignty in Public International Law' (1931), a competition essay of 512 hand-written pages (!) elaborated by a 22-years-old, gifted law student, a later on discreditably neglected professor of his faculty (SzU). Its core issue is that sovereignty lies on the border of fact and right and on that of politics and law, and it is highly determined by the stand of public international law which faces an enormous development. *Szabó* saw that state sovereignty is the most modern form of power theories. Accordingly his foretimed view, the stand of sovereignty depends on states' power's primacy or its vicariousness to international law: International law and state sovereignty are mutually exclusive notions.

(e) Public law & constitutional law. 32. Zoltán Józsa, *Public Participation: Promise and Reality* (Eng; 231–238). The paper analyzes the engagement of citizens in decision making in respect of new pressures of demography, cultural diversity, economic decline, social polarization and environmental threats on the example of Milan and Hungary. The paper investigates the outcomes of SWOT-analyses and the new tool of citizens' Complain Desk conducted by Milan leadership. This is followed by the Hungarian example of public hearings, referenda and a new tool called consultations. The author points the low level of citizens' participation and drafts some advices towards the weaknesses.

33. László Trócsányi, *Constitutional Identity and European Integration* (Hun; 473–482). The incumbent Minister of Justice deals with drawing the boundaries between national constitutions as embodiments of sovereignty and the ongoing process of European integration. This battlefield of finding *modus vivendi* gave birth to such phenomenon as national and / or constitutional identity (henceforth:

NCI), esp. in Central and Eastern European countries. The author denominates sources of yet unclear notion of NCI. He guesses that preambles and introductory rules of constitutions show the certain content of this open notion, which can be typified after the ground questions of fiscal policy, social state, cultural policies of family, education, religion (*Chalmers*). The author shows some codified examples on the contents of NCI (Germany, France), which is held to be the point for break-out of national constitutional laws. According to *Trócsányi*, sovereignty is *rerum natura* incorporated to the NCI-notion of TEU Art. 4(2), thus sovereignty exerted by solely the given Member State behaves as a limit of EU-law. This sovereignty is, however, restricted by certain rules of national constitutions, which give therefore the framework also of NCI applicable by nation constitutional courts towards EU-law's primacy.

34. Norbert Varga, *Historical Legal Institutions in the New Hungarian Fundamental Law with Special Attention to the Incompatibility* (Eng; 483–489). The paper describes the historical process of Hungary's constitutionalization through the analysis of certain institutions of public law incorporated also in the new Fundamental Law (2012). The historical, unwritten, feudal 'Thousand Year Old Constitution' was fundamentally changed by the Acts of 1848 and terminated by Act XX of 1949 (former Const.). From angle of continuity, the essay examines the history of institutions such as ministerial responsibility according to Act III of 1848 and incompatibility in respect of the 19th century Acts (IV of 1869, XVIII of 1870, XXXIII of 1871, XXXV of 1874, I of 1975) and Act XXVI of 1925 and in former Const. of 1949.

(f) Other social sciences & Jurists' biographies. 35. Béla P. Szabó, *'With Indefatigable Diligence': The Studies of Károly Visky and Róbert Brósz in the 'István Tisza' Hungarian Royal University of Debrecen* (Hun; 313–336). This contribution dedicated also to the centenary of Debrecen Law Faculty aims to fill a frequent gap of portraits of Hungarian meaningful jurists: university years of the depicted personality. This is as interesting as in autobiographies is recognizable that scientists usually hold their most important years the ones spent in University. The law faculty of Debrecen University played a significant role in the life of three internationally renowned Hungarian Romanists: *Károly Visky* (1908–1984), *Róbert Brósz* (1915–1994) and their common master, *Géza Marton* (1880–1957). The primary sources were situated in local archives. The detailed paper shows the studies, rigorosa, doctoral theses and reviews, student research fields of Visky and Brósz, and also their promotion *sub auspiciis* and foreign scholarships in *'Scuola (di perfezionamento) di diritto romano'* of the *Istituto di Diritto Romano (Vittorio Scialoja)*, *La Sapienza*, Rome.

36. József Ruszoly, *József Szabó in Szeged Law School* (Hun; 401–407). This portrait pays tribute to the memory of an outstanding talented, much intended scholar of public international law, József Szabó (1909–1992). After a lustrous beginning of his career and foreign stipends in the Hague, Oxford, Vienna, Geneva and in France, Germany and Italy, the nefarious atmosphere of the 1950's political ambience made him disgracefully neglected and his academic life suddenly snapped. After two and a half years of imprisonment for unsuccessful attempt to escape and a half decade of physical and manual-labour he could return to the faculty for a few years until his enforced early retirement. After the change of regime, the faculty honoured him – as a second rehabilitation – by an *emeritus* professorship in 1990. This review also shares the salute to the memory of *Imre Szabó*: a European Democrat in times fraught with danger and the scholar of international and constitutional law in ages when official and factual professional hierarchy had not rarely differed.

37. Ildikó Szondi, / Tímea Cziráné Kőházi-Kis, *The Elements of Teachers' Carrier Model* (Hun; 437–455). The paper remarks the interdependence between pupils' achievements, quality of education and social support of teachers. This last depends on a complex system elaborated in Europe on the grounds of the outcomes of an OECD's research on teachers (2005). The essay depicts this framework through the analysis of social factors (demography, heterogeneity, competence-development, individualization), of education's and care's rebuilding (salaries, Brussels Strategy) and the investigation of Hungarian teachers' career model (with detailed charts and tables).

38. Sándor Máté Tóth, *'Quis sim, quis fuerim, paucis Te Musa docebit': Joachim Hödl, the Missionary, the Parish Priest and the New Latin Poet – Episodes from the Life of an 18th Century Jesuit* (Hun; 457–471). Thanks to the particular historical stand of Hungary, the effects of *latinitas* and *humanitas* upon national literature were palpable until the 19th century. The enormous legacy of this feracious era's new Latin poetry is, however, raw and unprocessed. The not much investigated second part of the 18th century was the time of last flare of new Latin traditions' pomp. The paper examines the Jesuit's Collection of Elegies (CE) of Ovidian style commemorating the 1789 recapture of Belgrade (Nándorfehérvár) by Joseph II. It analyzes esp. Hödl's *Epistula ultima* (CE II,7), which is to take as an autobiography of the poet.

József Benke[**]

** József Benke, Ph.D., Department of Civil Law, Faculty of Law, University of Pécs, Hungary.

Werner Ogris †

Am 13. Jänner 2015 verstarb in Wien Werner Ogris, der Doyen der österreichischen Rechtsgeschichte. Wie nur wenige andere Fachkollegen vermochte er es, wissenschaftliche Kontakte mit Rechtshistorikern in fast allen Ländern der einstigen Habsburgermonarchie zu pflegen, was nicht zuletzt seine Ehrendoktorate der Karlsuniversität Prag (1993), der Comenius-Universität Bratislava (1993) und der Universität Pécs (2013) zeigen.

Geboren wurde Werner Ogris am 9. Juli 1935 in Wien und studierte hier die die Rechtswissenschaften. Am 12. Dezember 1958 erfolgte seine Promotion. Schon zuvor hatte er als „wissenschaftliche Hilfskraft" bei Prof. Hans Lentze am Institut für Europäische Rechtsgeschichte zu arbeiten begonnen, und dieser motivierte ihn dazu, eine Monographie zum Thema „Der mittelalterliche Leibrentenvertrag" zu schreiben, die 1961 im Druck erschien. Fast unmittelbar darauf kam von der Freien Universität Berlin die Anfrage, ob der Verfasser dieses Werkes denn schon habilitiert sei, und in rekordverdächtiger Zeit sorgte Lentze dafür, dass Ogris am 16. Februar 1962 die venia legendi erhielt und so noch im selben Jahr, im Alter von 27 Jahren, zum ordentlichen Professor an der FU Berlin ernannt wurde. Hier wirkte er vier Jahre, bis er 1966 an seine Heimatuniversität zurückberufen wurde, wo er bis 2003 ununterbrochen forschte, lehrte und prüfte. 1966–1977 und 1997–2003 war er Vorstand des Instituts für Rechtsgeschichte, im Studienjahr 1972/73 Dekan der Rechts- und Staatswissenschaftlichen Fakultät, ab 1978 Präses der Ersten Staatsprüfungskommission, ab 1981 Präses der Ersten Diplomprüfungskommission.

Die Forschungsgebiete von Werner Ogris waren sehr weit gespannt: Sie umfassten verschiedenste Themen der mittelalterlichen Privatrechtsgeschichte (neben dem Leibrentenvertrag u.a. die Konventualenpfründe in Klöstern oder die persönlichen Sicherheiten), der Verfassungsgeschichte v.a. des 18. Jahrhunderts (besonders Maria Theresia, Joseph II. und Friedrich II.; aber auch Joseph v. Sonnenfels, J. W. v. Goethe und zuletzt W. A. Mozart beschäftigten ihn – übrigens auch die beiden zuletzt Genannten ausschließlich von ihrer juristischen Seite!) und auch der Strafrechtsgeschichte. Ein Standardwerk wurde seine umfangreiche, auch separat erschienene Abhandlung über „Die Rechtsentwicklung in Österreich 1848–1918" (1975). Für das Handwörterbuch zur Deutschen Rechtsgeschichte verfasste er mehr als 130 Artikel. Von 1968 bis 1992 war Ogris Mitherausgeber der „Zeitschrift der Savigny-Stiftung für Rechtsgeschichte" und betreute dort den überaus zeitaufwendigen Rezensionsteil für die Germanistische Abteilung. Ein besonderes Anliegen war es Ogris, rechtshistorische Themen auch einem größeren Leserkreis zu vermitteln, so etwa durch sein Buch „Vom Galgenberg zum Ringtheaterbrand. Auf den Spuren von Recht und Kriminalität in Wien", oder durch seine Reihe „Tatort Rechtsgeschichte" in der Zeitschrift JAP, in der er 25 „Fälle" aus der Rechtsgeschichte in verklausulierter Form und im darauffolgenden Heft die jeweilige „Lösung" präsentierte.

1972 wurde Ogris zum korrespondierenden, 1975 zum wirklichen Mitglied der Österreichischen Akademie der Wissenschaften gewählt und übernahm hier die Leitung der sog. Savigny-Kommission, die 1995 mit der Weistümer- und Urbarkommission zur Kommission für Rechtsgeschichte Österreichs (KRGÖ) fusionierte. Hauptaufgabe dieser Kommission war die Edition von Rechtsquellen in der Reihe „Fontes Iuris", und in den 35 Jahren seiner Obmannschaft (1975–2010) erschienen 21 Bände bzw. Teilbände in dieser Reihe. Als Ogris 2003 an der Universität emeritiert wurde, verlegte er seinen wissenschaftlichen Fokus immer stärker auf die KRGÖ und leitete hier u.a. zwei vom österreichischen Wissenschaftsfonds FWF geförderte Projekte zur Geschichte des kaiserlichen Reichshofrates.

1985 wurde Ogris zum auswärtigen Mitglied der Sächsischen Akademie der Wissenschaften, 1988 der Königlich Niederländischen Akademie der Wissenschaften gewählt. Die Ehrendoktorate wurden schon erwähnt; von der Republik Österreich wurde er mit dem Großen Silbernen Ehrenzeichen sowie mit dem Österreichischen Ehrenzeichen für Wissenschaft und Kunst ausgezeichnet.

2004, ein Jahr nach seiner Emeritierung in Wien, nahm Ogris eine Professur an der Bratislavská vysoká škola práva (ab 2010: Paneurópska vysoká škola) an und unterrichtete hier bis kurz vor seinem Tod; daneben hielt er auch rechtshistorische Vorlesungen in Prag, in Banská Bystrica und in Częstochowa und zog so auch slowakische, tschechische und polnische Studenten in seinen Bann. Denn dies, die Fähigkeit, junge Menschen für sein Fach zu begeistern, sei es durch Vorlesung, durch Vorträge oder Publikationen, war wohl die hervorstechendste Eigenschaft von Werner Ogris.

Thomas Olechowski*

* ao. Univ.-Prof. Mag. Dr. iur. Thomas Olechowski, Institut für Rechts- und Verfassungsgeschichte der Universität Wien, Österreich.

Drei Szegediner Rechtshistoriker und das Tripartitum (Tagungsbericht)

Am 27-28 November 2014 wurde eine Erinnerungstagung mit dem Titel „Drei Szegediner Rechtshistoriker“ vom Lehrstuhl für Rechtsgeschichte der Juristischen Fakultät der Universität Szeged veranstaltet. Diese Konferenz unterstützte die Tatsache, dass dieser Lehrstuhl die prominentsten Professoren der ungarischen Rechtshistoriker beschäftigte. Die Konferenz wurde nämlich aus Anlass des 100. Geburtstages von György Bónis (1914–1985), des 90. Geburtstages von Ödön Both (1924–1985) und des 50. Todestages von Béla Iványi (1878–1964) organisiert. Im Jahre 2014 war auch die Fünfhundertjahrfeier des das Gewohnheitsrecht von Ungarn zusammenfassenden Rechtbuchs, des Tripartitums. Die Professoren des Lehrstuhls für Rechtsgeschichte erzählten auch die persönlichen Gedächtnisse über die drei Rechtshistoriker vor dem Publikum der Konferenz, das aus deutschen, ungarischen Rechtshistorikern und auch interessierten Studenten stand.

Die Reihe der berühmten Rechtsgelehrten in Szeged wurde von Béla Iványi geöffnet. Béla Iványi leitete den Lehrstuhl für Rechtsgeschichte in Szeged zwischen 1927 und 1938. Da aber der Professor zwischen 1914 und 1927 an der Universität Debrecen unterrichtete, hielt Béla Szabó, Professor der Juristischen Fakultät der Universität Debrecen über seine wissenschaftliche Laufbahn einen deutschsprachigen Vortrag. Obwohl Béla Iványi im Jahre 1903 in Budapest ein juristisches Diplom erhielt, fang er im Ungarischen Staatsarchiv an, zu arbeiten. Die im Archiv verbrachten Jahre begründeten seine weitere Karriere. Béla Iványi ist bis heute der einzige Rechtshistoriker, der auch paläografische Kenntnisse hatte, also konnte er auch die feudalen Urkunden lesen und bearbeiten. Im Mittelpunkt seiner wissenschaftlichen Tätigkeit standen die Veröffentlichungen der Materialen der Archive der mittelalterlichen Städte. Im Zusammenhang der Arbeit in den verschiedenen Archiven von Prof. Iványi hielt Prof. Szabó ein weiteres Referat mit Titel „Die Bedeutung der bibliothekgeschichtlichen Materialsammlung von Béla Iványi in der Erforschung der ungarischen Rechtskultur der frühen Neuzeit.“

Prof. József Ruszoly, der seit 1959 nimmt in der Arbeit des Lehrstuhls teil, berichtete nach eigenen Erlebnissen über die Tätigkeit der Professoren des Lehrstuhls (Kelemen Óvári, István Eleki, Béla Iványi, Pál Madai), vor allem aber über den wissenschaftlichen Nachlass von György Bónis. György Bónis unterrichtete Rechtsgeschichte in Szeged zwischen 1947 und 1956, seit 1950 war er der Leiter des Lehrstuhls für Rechtsgeschichte, seit 1955 auch der Vizedekan der Juristischen Fakultät. Da er im Jahre 1956 in der revolutionären Kommission der Universität teilnahm, wurde er auf dem Disziplinarwege entlassen. Sein Nachlass wurde auch schlecht behandelt. Prof. Ruszoly erzählte, dass z.B. das Werk „Lehnswesen und Ständewesen im mittelalterlichen ungarischen Recht“, das im Jahre 1948 erschien, vom Regime vernichtet werden wollte, aber einige Exemplare des Buches blieben in den Kellern über, und sie wurden auch aus der USA zurückgebracht. Im Jahre 1998 wurde ein Handschriftenarchiv aus dem wissenschaftlichen Nachlass von György Bónis gegründet. Dr. Gabriella Bónis, Tochter und Rechtsnachfolgerin des Wissenschaftlers, hat nämlich diesen Nachlass im sog. Bónis Seminar des Lehrstuhls für Rechtsgeschichte in Szeged hintergelegt. In diesem Handschriftenarchiv sind die Sonderdrücke, Manuskripte, wissenschaftliche Briefe, Lehrbücher und andere Lehrmaterialien, Forschungsmaterialien und Miszellen von anderen Verfassern erhältlich. Das Material des Archivs kann geforscht werden. Im Rehabilitationsverfahren von György Bónis nahm auch Prof. Ruszoly im Jahre 1989 teil. Unter dem Verfahren erhielt er auch die Kopie eines Briefes, der von György Bónis seinem Meister, Ferenc Eckhart am 1. September 1939 geschrieben wurde. György Bónis wusste nämlich am Anfang des Weltkrieges nicht, was die Zukunft bringen kann, deshalb schrieb er in diesem Brief über seine Forschungspläne. Am Ende des Verzeichnisses des wissenschaftlichen Nachlasses kann dieser Brief gelesen werden, der als ein wissenschaftliches Testamen von György Bónis betrachtet werden kann. Zu diesem Brief hat Prof. Ruszoly eine ausführliche und sehr interessante Erklärung gefügt. Hier soll man bemerken, dass Péter Bónis, der Enkelkind von György Bónis auch an der Konferenz teilnahm, und er referierte über die Verbindung des Tripartitums und vom ius commune.

Ein Student von György Bónis war Ödön Both. Prof. Mária Homoki-Nagy, die gerade wegen Berufung von Ödön Both am Lehrstuhl für Rechtsgeschichte geblieben war, erinnerte sich an den ehemaligen Meister. Ödön Both war ein ziemlich rigoroser Professor des Lehrstuhls, aber er forderte die Leistung nicht nur von den Studenten sondern auch von selbst. Er leitete den Lehrstuhl seit 1965 bis seinem Tod. Die Forschungsmethode des Professors beruhte auf den Primärquellen, wovon er die allgemeinen Festsetzungen herleitete. Da er ohne archivarischen Forschungen nichts schreiben wollte, veröffentlichte er nicht zu viele Publikationen, aber seine Arbeiten sind mit großer Sorgfalt geschrieben worden, die zu unvermeidlichen Grundwerken der ungarischen Rechtsgeschichte geworden sind. Sein Forschungsgebiet war das spätfeudale Strafrecht, und er widmete viel Zeit auch den ortsgeschichtlichen Forschungen. Z.B. arbeitete er 20.000 Protokolle der Strafverfahren in Szeged aus den Jahren 1790-1848 auf. Auf dem Gebiet des Privatrechts interessierte er sich für den Feudaleigentum und die Pressefreiheit.

In der Reihe der Memorabilien erinnerte sich Károly Kisteleki, Dozent der Juristischen Fakultät der Eötvös Loránd

Universität in Budapest an seine Professorin, Katalin Nagy-Szegvári, die eine Studentin von György Bónis war. Die Professorin fang ihre wissenschaftliche Laufbahn am Lehrstuhl für Rechtsgeschichte in Szeged im Jahre 1952 auf Berufung von György Bónis an, nach einigen in der Praxis verbrachten Jahren unterrichtete sie allgemeine Rechtsgeschichte an der Juristischen Fakultät in Budapest. Károly Kisteleki, der ein Student der Professorin war, erzählte, wie die Professorin ihre Fächer unterrichtete. Die Professorin erhielt wegen ihrer wissenschaftlichen Arbeit mehrere Auszeichnungen, sie war auch eine akademische Doktorin.

Die weiteren Vorträge beschäftigten sich überwiegend mit dem Tripartitum. Im Tripartitum fasste sein Verfasser, István Werbőczy, das damalige ungarische Gewohnheitsrecht, und er legte sein Werk dem Reichstag im Jahre 1514 vor. Dieses Werk beeinflusste die ungarische Rechtssprechung bis zum 20. Jahrhundert. Aus der Reihe dieser Vorträge kann zwei erwähnt werden. Prof. Heiner Lück aus Leipzig hielt einen Vortrag über die mythischen Gesetzgeber. Zu den mythischen Gesetzgebern zählen die wahren oder nur imaginären Personen, die die Autorität zur Legitimation von Rechtsaufzeichnung und Rechtsetzung gaben. Werbőczy war natürlich kein mythischer Gesetzgeber, sein Rechtsbuch erhielt die Autorität von den alten, ungarischen Gewohnheiten. Es war interessant, wie Bernd Kannowski, als ein Ausländer, das Tripartitum interpretierte. Er hielt nämlich das Tripartitum für ein Eintopfgericht, das von den Engländern als „Hotchpotch" bezeichnet wird, also ein Essen worin man vielen, verschiedenen, am meisten zu Hause übriggebliebenen Essen zusammenkocht. Ich meine, dass diese Auffassung stammt aus der Unkenntnis von nur für die Ungaren klaren Verhältnissen im Mittelalter.

Die Veranstalter der Tagung, Prof. Mária Homoki-Nagy und Prof. Elemér Balogh, die als würdigen Nachfolger der gefeierten Professoren in Szeged die Rechtsgeschichte unterrichten, organisieren fast jedes Jahr eine rechtshistorische Konferenz. Diese Tagungen sind zu wichtigsten Treffpunkten der ungarischen Rechtshistoriker geworden, wo sie auch die wissenschaftlichen Ergebnisse und Gedanken austauschen können.

Magdolna Gedeon*

* Dr. Magdolna Gedeon, PhD, Universitätsdozentin, Institut für Rechtsgeschichte und Rechtstheorie, Juristische Fakultät der Universität Miskolc, Ungarn.

Das Symposium über den Einfluss des deutschen Rechtsdenkens in Mitteleuropa am 22. Oktober 2014 an der Andrássy Universität Budapest

Erster Teil – Verlauf der Tagung

Zur Eröffnung der Tagung begrüßte Herr Prof. Dr. Andras Masát, Rektor der Andrássy Universität Budapest, die Teilnehmer der Konferenz und bedankte sich für die Arbeit der Vorbereitung des Symposiums bei dessen Initiatoren.

Im Anschluss daran ergriff Herr Prof. Dr. Anderheiden, Dekan der Fakultät für vergleichende Staats- und Rechtswissenschaften, das Wort und begrüßte die Anwesenden und sprach seinen Dank ebenfalls den Veranstaltern der Tagung aus. Des Weiteren wies er auf die historische und aktuelle Bedeutung des deutschen Rechtssystems und Rechtsdenkens in den Staaten Mitteleuropas hin.

Herr Frank Spengler, Leiter des Auslandsbüros der Konrad-Adenauer-Stiftung Budapest, begrüßte zunächst die Konferenzteilnehmer und betonte sowohl den wichtigen Beitrag der Konrad-Adenauer-Stiftung zur Entwicklung der grenzüberschreitenden wissenschaftlichen Kooperation als auch die Unterstützung der Andrássy Universität Budapest seitens der Konrad-Adenauer-Stiftung.

Panel 1

Zu Beginn des ersten Panels hielt Herr Dr. Gábor Hamza, ordentliches Mitglied der Ungarischen Akademie der Wissenschaften, Professor der „Eötvös Loránd" Universität Budapest einen Vortrag mit dem Titel „Einleitende Bemerkungen zum Einfluss des deutschen Rechtsdenkens in Mitteleuropa". Prof. Gábor Hamza bot in seinem Vortrag eine generelle Übersicht über den Einfluss des deutschen Rechtsdenkens in Mitteleuropa. Er befasste sich zunächst mit dem Begriff von Mitteleuropa bzw. Zentraleuropa, wobei die drei Staaten im Baltikum auch als mitteleuropäische Länder bezeichnet wurden. Dann wies er auf den großen Einfluss des deutschen Rechtsdenkens auf die ungarischen Kodifikationsentwürfe im 19. und im 20. Jahrhundert hin.

Der zweite Referent, Herr Dr. Lajos Vékás, ordentliches Mitglied der Ungarischen Akademie der Wissenschaften, Professor der „Eötvös Loránd" Universität Budapest, sprach über den Einfluss des deutschen Privatrechts auf die ungarische privatrechtliche Kodifikation. Er hob den Einfluss des deutschen Bürgerlichen Gesetzbuches (BGB) sowie des deutschen Handelsgesetzbuches (HGB) auf die ungarischen Gesetzesentwürfe im 19. und im 20. Jahrhundert hervor. Nachher sprach er über das neue ungarische Zivilgesetzbuch, wobei er anhand einiger Beispiele betonte, dass bei der Erstellung dieses Gesetzbuches deutsche Lösungen teilweise mitberücksichtigt, teilweise abgelehnt und teilweise völlig übernommen wurden.

Nach den Vorträgen der Referenten fand eine Diskussion statt.

Panel 2

Dieses Panel eröffnete Herr Dr. Rudolf Welser, Professor der Universität Wien und Leiter der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform derselben Universität. In seinem Vortrag thematisierte er den Einfluss des deutschen Rechtsdenkens auf das österreichische Privatrecht. Er wies mehrmals auf die Verwandtschaft des deutschen und österreichischen Privatrechts hin. Weiterhin betonte er, dass sich das österreichische Privatrecht im Allgemeinen vom deutschen Recht emanzipiert hat. Er betonte die Ähnlichkeiten in der historischen Entwicklung der beiden Rechtssysteme. Zusammenfassend formulierte er die These, dass das deutsche und das österreichische Recht zusammengehören.

Den Vortrag über den Einfluss des deutschen Rechts auf die Rechtsprechung des EuGH hielt Frau Dr. Verica Trstenjak, Professor der Universität Wien. Sie wies zunächst auf die überragende Bedeutung der deutschen Sprache in Europa hin. Dann wurde die Struktur des EuGH analysiert. Sie betonte den bedeutenden Einfluss der Entscheidungen des EuGH auf die Entwicklung des europäischen Rechts.

Dieses Panel wurde ebenfalls mit einer Diskussion abgeschlossen.

Panel 3

Frau Dr. Tatjana Josipovic, Professor der Universität Zagreb hielt einen Vortrag über der Einfluss des deutschen Rechts und Rechtsdenkens im kroatischen Privatrecht. Bekanntermassen wurde die Republik Kroatien 1991 souverän und ist seit Juli 2013 Mitgliedstaat der Europäischen Union. Diese Ereignisse führten zu der bis heute immer noch andauernden Rekodifizierung des Privatrechts. In Kroatien wird die Reform des Privatrechts sowohl durch Änderung früher verabschiedeter Gesetze als auch durch neue Sondergesetze durchgeführt. Die Modelle hierfür sind Österreich, Deutschland und die Schweiz. Da kroatische Juristen häufig deutsche Autoren zitieren, ist ein indirekter Einfluss des deutschen Rechtsdenkens festzustellen. Im Bereich des Privatrechts ist dieser Einfluss besonders stark spürbar.

Frau Dr. Meliha Povlakic, Professor der Universität Sarajevo hielt ihren Vortrag über den Einfluss des deutschen Rechtsdenkens im Privatrecht von Bosnien und Herzegowina. Sie betonte, dass es eigentlich schwer sei, über das Rechtsdenken in Bosnien und Herzegowina zu sprechen. „Wir haben das bekommen." Damit meinte sie, dass in

einigen Rechtsgebieten deutsche Regelungen übernommen wurden. Auch der Einfluss von Österreich ist nicht zu vernachlässigen. Während des Umwandlungsprozesses in den 1990er Jahren begannen der Rechtstransfer und die Rezeption. Bei der Einführung des Notariats wurde die Bundesnotarordnung als Muster benutzt. Auch in Bosnien und Herzegowina wurde das deutsche Konzept der Vormerkung zugrunde gelegt. Im Allgemeinen kann man sagen, dass der Umwandlungsprozess immer noch andauert und der Synergieeffekt und die Angleichung positive Wirkungen haben.

Herr Dr. Christian Alunaru, Universitätsdozent der Westlichen Universität zu Arad sprach über den Einfluss des deutschen Rechtsdenkens im rumänischen Privatrecht. Er begann seinen Vortrag mit der Verdeutlichung der bedeutenden Unterschiede, welche das Kontinentalrecht und das englische Common Law insbesondere im Bereich der Rechtsbegriffe hätten. Ursprünglich wurde Rumänien im 19. Jahrhundert stark vom französischen Recht beeinflusst, da durch Veranlassung Napoleons III. die entsprechenden Donaufürstentümer 1859 im Gebiet Rumänien entstanden. Andererseits hatten auch das österreichische Recht und das ABGB einen maßgeblichen Einfluss, da in Siebenbürgen das Grundbuch nach ABGB eingeführt wurde und in Moldau das österreichische Recht durch eine Kopie des ABGB verbreitet wurde. Das deutsche Rechtsdenken zeigt erkennbare Wirkungen in dem neuen Zivilgesetzbuch, besonders beim Kaufrecht, das 2011 in Kraft getreten ist.

Panel 4

Dieses Panel begann mit dem Vortrag von Dr. Andrzej Maczynski, Professor der Jagiellonen-Universität Krakau über den Einfluss des deutschen Rechtsdenkens auf das polnische Privatrecht. Er wies auf die historische Entwicklung der beiden Rechtssysteme hin. Des Weiteren teilte er die Geschichte des polnischen Rechtes in unterschiedliche Perioden. Er wies auf den großen Einfluss des deutschen Rechts in den von Preußen beherrschten Teilen des heutigen Polens hin. Er betonte, dass viele namhafte polnische Rechtswissenschaftler an verschiedenen Universitäten Deutschlands ausgebildet wurden. Im letzten Teil seines Vortrages verwies er auf den Einfluss des deutschen Rechtsdenkens auf die Entwicklung des internationalen Privatrechts.

Den letzten Vortrag der Tagung hielt Herr Dr. József Szalma, Professor der Universität Novi Sad (Újvidék, auf Deutsch: Neusatz) über den Einfluss der Willens- und Erklärungstheorie auf das serbische Privatrecht. Das serbische Privatrecht wurde durch deutsches, schweizerisches und österreichisches Rechtsdenken beeinflusst. Er betonte, dass der größte Einfluss des deutschen Rechtsdenkens in der Wojwodina (auf Ungarisch: Vajdaság), einem Teil Serbiens, welcher zu Österreich-Ungarn bzw. zu Ungarn gehörte, zu erkennen ist.

Die Tagung wurde mit einer Diskussion des vierten Panels abgeschlossen.

Zweiter Teil – Zusammenfassung der Vorträge der Referenten

Dr. Christian Alunaru
Universitätsdozent
Universität „Vasile Goldiș“, Arad

Der Einfluss des deutschen Rechtdenkens auf das rumänische Privatrecht

Die Bedeutung und Aktualität dieses Themas in einer Zeit in welcher der Einfluss des anglo-amerikanischen Rechtsdenkens im kontinental-europäischen Recht deutlich zu spüren ist, wurde während des von der Nationalen Rechtsanwaltskammer Rumäniens zusammen mit dem Deutschen Anwaltsverein in Bukarest veranstalteten Symposiums „Law made in Germany“ (am 9. September 2014) hervorgehoben.

Traditionsgemäß ist das rumänische Privatrecht vom französischen Rechtsdenken beeinflusst, weil das erste rumänische Zivilgesetzbuch (in Kraft zwischen dem 1 Dezember 1865 und dem 1. Oktober 2011) trotz anderer Quellen die verwendet wurden, eine fast getreue Nachahmung des *Code Napoléon* war. Die Grundsätze dieses Systems, wie zB der *Konsensualgrundsatz* (Übertragung des Eigentumsrechts durch einfache formfreie Willensübereinstimung) widersprachen den Grundsätzen des deutschen Rechts, wie zB dem *Trennungsprinzip* (der systematischen Trennung zwischen dem Verpflichtungsgeschäft und der dinglichen Rechtsänderung), wie auch dem Grundsatz der *Abstraktheit* der dinglichen Rechtsgeschäfte (Abstraktionsprinzip). Unter diesen Umständen scheint die Erforschung des Einflusses des deutschen Rechtsdenkens als eine unmögliche Aufgabe.

Trotzdem findet man schon zur Zeit des alten ZGB deutliche Einflüsse des deutschen Rechtsdenkens. In den einstigen österreichischen Provinzen wurde selbst nach der Vereinigung mit dem Königreich Rumänien das Grundbuchsystem mit seinem *Intabulationsprinzip*, dem französischen Grundsatz des *Konsensualismus* zuwider behalten, da die rumänische Regierung die Überlegenheit dieses Publizitätssystems dem französischen System mit seinen Registern zur Eintragung und Bekanntmachung der Grundstücksgeschäfte (*registre d´inscription et de transcription*) gegenüber, zugeben musste. Das bedeutete ein System des Grundstückserwerbs das näher dem deutschen als dem französischen System war, wie auch die Einführung von Sondervorschriften zB im Bereich der Ersitzung die den Grundsätzen des deutschen Rechtsdenkens entsprechen sollen. In diesen Provinzen wurde sogar das österreichische materielle Recht, das ABGB, noch 25 Jahre nach der Vereinigung mit dem Königreich Rumänien, weiter in Kraft behalten.

In der Moldau, die nie unter österreichischer Oberhoheit gewesen ist, war ein halbes Jahrhundert lang (zwischen 1817 und 1865) ein Gesetzbuch in Kraft, der *Codex Callimachi*, der als ein getreues Abbild des österreichischen ABGB galt *(„une*

copie fidèle du code autrichien") wie der griechische Professor *Triantaphyllopoulos* in seinem Aufsatz *„Sur les sources du code Callimaque"* behauptet hat). Die Erklärung dazu ist, dass der wahre Verfasser dieses Gesetzbuches der wichtigste und gebildeteste Mitarbeiter des Fürsten, der Rechtsprofessor *Christian Flechtenmacher* war, ein Siebenbürger Sachse aus Kronstadt (Brasov) der seinen Doktortitel in Wien – als Student Franz von Zeillers – erworben hatte und so den Kommentar seines Meisters, dem Verfasser des ABGB, verwendet hat.

Das neue rumänische ZGB (in Kraft getreten am 1. Oktober 2011) ist keine Kopie des französischen Zivilgesetzbuchs mehr. Zwischen den von den Verfassern des Gesetzbuchs verwendeten zahlreichen Quellen wird auch das deutsche BGB zitiert. Die Autoren erklären nicht, worin der Einfluss des deutschen Rechtsdenkens besteht. Es erscheinen aber neue Begriffe, die bisher im französisch beeinflussten rumänischen Recht unbekannt waren. Zum ersten Mal erscheinen die Begriffe „Grundbuch" und „Intabulationsprinzip" im ZGB. Dann wurden die Risikoübertragung zum Zeitpunkt der Übergabe der Sache, der Eigentumsvorbehalt, der Kaufvertrag als Verpflichtungsgeschäft, und andere Begriffe die aus dem deutschen Recht stammen, geregelt. Diese neuen Vorschriften bedeuten eine Abweichung vom französischen Recht und bringen das neue rumänische Zivilrecht dem deutschen Recht näher.

Dr. Gábor Hamza
Universitätsprofessor
ordentliches Mitglied der Ungarischen Akademie
der Wissenschaften
„Eötvös Loránd" Tudományegyetem Budapest

Einleitende Bemerkungen zum Einfluss des deutschen Rechtsdenkens in Mitteleuropa

Die Schaffung eines gemeinsamen europäischen Privatrechts, des *ius commune (privatum) Europaeum*, stellt für die nächsten Jahrzehnte eine der wichtigsten Herausforderungen für das zusammenwachsende Europa dar. Voraussetzung dafür ist die gründliche Aufarbeitung und Darstellung der gemeinsamen historischen Wurzeln der Privatrechtsordnungen der Reformstaaten Europas, wobei die deutsche Privatrechtswissenschaft eine zentrale Rolle spielt. Während dieser Tagung wird das Fortleben und die breitgefächerte Wirkungsgeschichte der Tradition des deutschen Pandektenrechts untersucht. Der Grund hierfür liegt einerseits darin, dass diese Tradition einer der Grundpfeiler der europäischen juristischen Identität ist. Andererseits hat die Pandektistik bei der Darstellung der universalen Privatrechtsgeschichte den wohl größten Einfluß.

Die Tradition des Pandektenrechts ermöglicht es, auch die Privatrechtsordnungen der Reformstaaten Europas aus einem gemeinsamen Blickwinkel heraus zu betrachten. Mit der Verwendung des römischen Rechts als ständigem Bezugspunkt ist auch dem Erfordernis nach Kontinuität Genüge getan, die ein wesentliches Element einer jeden Rechtsordnung sein sollte. Selbstverständlich lässt sich kein vollständiges Bild über die verschiedenen Privatrechtsordnungen ohne die Kenntnis der gemeinsamen europäischen juristischen Traditionen gewinnen. Das Außerachtlassen der im römischen Recht wurzelnden Tradition des Pandektenrechts hat unter anderem zur Anerkennung der eigenständigen Familie des „sozialistischen" Rechts geführt. Im Zuge der Beseitigung der politischen Polarisierung Europas im Laufe der letzten Jahrzehnte erwies sich diese Ansicht eindeutig als überholt.

Die mitteleuropäischen Privatrechtsordnungen sind entscheidend von den deutschen privatrechtlichen Traditionen geprägt. Durch die Jahrhunderte dauernde Einflussnahme des deutschen Privatrechts und der Privatrechtswissenschaft existieren auch heute starke Beziehungen zwischen Deutschland und den mittel- und osteuropäischen Reformstaaten. Die Kodifikation bzw. Neukodifikation des Privatrechts (Zivilrechts), die in den meisten Reformstaaten von Zentral- und Osteuropa im Gange ist, spiegelt eindeutig den massgebenden Einfluss der deutschen Privatrechtswissenschaft wider. Dieser Einfluss sollte aber in Anbetracht der Ergebnisse der neueren Forschungen mit Nachdruck betont werden. Dies wäre auch vom Standpunkt der Rechtsvereinheitlichung von nicht zu unterschätzender Bedeutung.

In den meisten Ländern von Mitteleuropa vermochten die tiefgreifenden politischen, sozialen und ökonomischen Umwandlungen nach dem Zweiten Weltkrieg die jahrhundertelangen rechtlichen Traditionen, die sich bewährten, nicht vollkommen in den Hintergrund zu drängen. Die Gesetzeswerke (vor allem der französische *Code civil*, das deutsche *Bürgerliche Gesetzbuch,* das österreichische *Allgemeine Bürgerliche Gesetzbuch,* das Bürgerliche Gesetzbuch für das Königreich Sachsen vom Jahre 1863, der italienische *Codice civile* vom Jahre 1865, das *Schweizerische Obligationenrecht* vom Jahre 1881 und das *Schweizerische Zivilgesetzbuch* vom Jahre 1907) haben entscheidend die zivilrechtliche Kodifikation der zentral- und osteuropäischen Länder beeinflußt. Das österreichische ABGB, in der Form des (West-)Galizischen Gesetzbuches (Bürgerliches Gesetzbuch für Westgalizien) vom Jahre 1797, wurde schlechthin auf polnischem Gebiet zwei Jahre nach der im Jahre 1795 erfolgten dritten Teilung Polens, das als jüngstes Kronland an Österreich gefallen war, im Jahre 1797 in Kraft gesetzt. Das Westgalizische Gesetzbuch erlangte auch in Ostgalizien und in der Bukowina, die im Jahre 1775 an Österreich angegliedert wurde, noch in demselben Jahre – erst aber einige Monate später – Geltung. Das Galizische Gesetzbuch war das *erste moderne* vollständige privatrechtliche Gesetzgebungswerk (sieben Jahre *vor* dem französischen *Code civil*). Gleichermaßen verhielt es sich mit dem französischen *Code de commerce* (1807), dem *Allgemeinen Deutschen Handelsgesetzbuch* (1861), dem deutschen *Handelsgesetzbuch* (1897) und dem italienischem *Codice di commercio* (1882). Am Anfang des 19. Jahrhunderts wollte selbst Rußland den *Code civil des Français* (ab 1807 *Code Napoléon*) und den französischen *Code de commerce* als Grundlage seiner geplanten zivil- bzw. handelsrechtlichen Kodifikation einfüh-

ren. Dies blieb jedoch auch mehrfachen – teilweise politischen – Gründen aus.

Selbst in Ungarn, wo erst im Jahre 1959 das Zivilgesetzbuch sozialistischer Prägung verabschiedet wurde – das Zivilgesetzbuch wurde am 1. Mai 1960 in Kraft gesetzt und stellte das *erste* Zivilgesetzbuch in Ungarn dar –, haben die westeuropäischen Gesetzbücher großen Einfluss auf die Zivilgesetzbuchentwürfe ausgeübt, wobei das revidierte schweizerische Obligationenrecht – im Falle des ungarischen Zivilgesetzbuchentwurfes vom Jahre 1928 (*Magánjogi Törvénykönyvjavaslat*, abgekürzt: *Mtj*) – besonders große Rolle spielte.

Mit dem Fortleben bzw. Fortwirken der westeuropäischen rechtlichen Traditionen erklärt sich die relativ leichte Rückkehr zu den gemeineuropäischen juristischen Traditionen in der Mehrheit der zentral- und osteuropäischen Länder. In letzter Zeit kann man im Wesentlichen *zwei* Haupttendenzen wahrnehmen: Einerseits hält man an Gesetzen, die nach der kommunistischen („sozialistischen") Periode formell oder stillschweigend außer Kraft gesetzt wurden, fest. Gutes Beispiel hierfür ist Polen, wo man das Gesetz über die Schuldverhältnisse vom Jahre 1933 und das Handelsgesetzbuch vom Jahre 1934 wieder, wenigstens teilweise, mit Änderungen – wobei das Zivilgesetzbuch vom Jahre 1964 größtenteils in Kraft blieb – in Kraft gesetzt hat. Erwähnung verdient auch Rumänien, wo man das Zivilgesetzbuch vom Jahre 1864, das übrigens nicht einmal in der kommunistischen Periode formell abgeschafft wurde, mit vielen Abänderungen ihre Geltung behielt. Andererseits tragen die ab Anfang der 90-er Jahre verabschiedeten Gesetze – mit Rücksicht darauf, dass die meisten Länder dieser Region der Europäischen Union beitreten möchten – dem in vielen Bereichen noch in Entstehungsphase befindlichen EG-Recht (Gemeinschaftsrecht) Rechnung.

Dr. Tatjana Josipović
Universitätsprofessor
Universität Zagreb

Der Einfluss des deutschen Rechts und Rechtsdenkens im kroatischen Privatrecht

Die Rekodifizierung des kroatischen Privatrechts, die nach der Verselbstständigung der Republik Kroatien im Jahre 1991 begonnen hat, hatte einige wichtige Ziele: die Reintegration des Privatrechts in den (mittel-) kontinentaleuropäischen Rechtskreis, die Anpassung an die Marktwirtschaft, die Stärkung des Privateigentums, der unternehmerischen Freiheit, der Marktfreiheit und letztendlich die Angleichung an das acquis communautaire. Das bedeutendste Merkmal dieser Rekodifizierung war die schrittweise Reform des Privatrechts. Im Zuge der Reform des Privatrechts wurde weder ein neues Bürgerliches Gesetzbuch noch ein neues Handelsgesetzbuch verabschiedet. Einzelne privatrechtliche Bereiche wurden schrittweise durch besondere Gesetze geregelt. Dabei hatten in der Reform jene Privatrechtsgebiete Vorrang, die für die Entwicklung der Marktwirtschaft als das größte Hindernis galten (Sachenrecht, Arbeitsrecht, Handels- und Gesellschaftsrecht). Kennzeichnend für die Reform waren einerseits die autonome Entwicklung einzelner privatrechtlichen Bereiche, andererseits auch die Übernahme von Modellen sowie die *„legal transplants"* aus den entwickelten europäischen Rechtssystemen. Sämtliche Bereiche wurden auch mit dem EU-Recht harmonisiert, wobei in den einzelnen Segmenten eine überschießende Angleichung an das EU-Recht zur Erhaltung der Konsistenz des Privatrechtssystems durchgeführt wurde.

Als wichtigste Vorbilder für die Rekodifizierung des kroatischen Privatrechts dienten das österreichische Recht, das deutsche Recht und das Schweizer Recht. Für die Wahl der ausländischen Modelle waren verschiedene Kriterien entscheidend, wie z.B. die Tradition (Wahrung der Kontinuität des bestehenden Privatrechts), die Ziele der Reform, die Bedürfnisse des kroatischen Privatrechts im Wandel, tatsächlich vorhandene Fähigkeit des nationalen Rechtssystem zur Übernahme ausländischer Modelle, der jeweilige Entwicklungsstand der nationalen Rechtsinfrastruktur, der Entwicklungsstand des jeweiligen ausländischen Rechtsmodells, dessen Wirksamkeit in der Praxis und Anpassung an das EU-Recht, der jeweilige Entwicklungsstand der ausländischen Rechtsprechung und Rechtsliteratur und deren Zugänglichkeit. Aus all diesen Gründen hatten die Rechtsordnungen des mitteleuropäischen/germanischen Rechtskreises unterschiedlichen Einfluss auf die einzelnen privatrechtlichen Segmente, die Struktur der Gesetze, die Rechtsgrundsätze, den Inhalt der Gesetze, die Nomotechnik sowie auch auf das Konzept der Harmonisierung mit dem EU-Recht. Einerseits wurden in die kroatische Gesetzgebung Rechtsinstitute unmittelbar übernommen, die in der ausländischen Gesetzgebung geregelt wurden. Andererseits wurde unter dem Einfluss des ausländischen Rechtsdenkens sowohl die kroatische Rechtsliteratur als auch die kroatische Rechtswissenschaft schrittweise entwickelt, so dass das ausländische Rechtsdenken letztlich auch einen indirekten Einfluss auf die kroatische Gesetzgebung ausgeübt hatte. In das kroatische Privatrechtssystem übernommen wurden Rechtsnormen aus ausländischen Vorschriften, die im Zuge der Entwicklung des Rechtsdenkens in der jeweiligen ausländischen Rechtsordnung entstanden sind/geändert wurden.

Allerdings haben die einzelnen Rechtsordnungen des mitteleuropäischen/germanischen Rechtskreises die Entwicklung des kroatischen Privatrechts nicht in allen Segmenten gleich stark beeinflusst. In einigen privatrechtlichen Bereichen (z.B. Sachenrecht, Zwangsvollstreckungsrecht) übte das österreichische Recht den entscheidenden Einfluss aus, in anderen wiederum das Schweizer Recht (z.B. Schuldrecht, Erbrecht). Interessant ist, dass das deutsche Recht und Rechtsdenken jene privatrechtlichen Bereiche am stärksten beeinflusste, die für die Marktwirtschaft von besonderer Bedeutung sind, wie z.B. die Handelsgesellschaften, der Konkurs, das Eigentum, das Insolvenzrecht. Deutsches Recht der Handelsgesellschaften war das wichtigste

Vorbild für das erste kroatische Gesetz über Handelsgesellschaften aus dem Jahre 1993, sowie für alle seine späteren Änderungen und Ergänzungen. Das deutsche Recht diente als Vorbild, wurde jedoch nicht zur Gänze übernommen. Für die Übernahme des deutschen Modells der Regelung der Handelsgesellschaften sprachen u.a. folgende zahlreiche Gründe: umfangreiche und hochentwickelte Regelung der Handelsgesellschaften im deutschen Recht, moderne Lösungen, entwickelte Rechtsprechung und Rechtsliteratur, umfassende Erfahrungen mit der Harmonisierung der nationalen Rechtsvorschriften mit dem EU-Recht. Das Ergebnis dieser Herangehensweise ist, dass Kroatien heute eine moderne Regelung der Handelsgesellschaften, unter Zugrundelegung der an die EU-Rechtsstandards angepassten deutschen Gesetze, der deutschen Rechtsprechung und Rechtsliteratur hat. Gerade deswegen übte auch das deutsche Konkursrecht (Insolvenzordnung/1994) einen entscheidenden Einfluss auf die Entwicklung des kroatischen Konkursrechts aus. Zahlreiche Institute (z.B. das Insolvenzverfahren, die Verwaltung und Verwertung der Insolvenzmasse, die Befriedigung der Insolvenzgläubiger, die Insolvenzanfechtung, das Insolvenzplanverfahren) im kroatischen Konkursgesetz aus dem Jahre 1996 sowie alle seine späteren Änderungen und Ergänzungen wurden nach dem Vorbild des deutschen Konkursrechts geregelt. Im Gesetz über das Eigentum und andere dingliche Rechte aus dem Jahre 1996 wurden nach dem Vorbild des deutschen Rechts auch zahlreiche moderne Lösungen des deutschen Sachenrechts übernommen. Aus dem deutschen BGB wurde das objektive Besitzkonzept einschließlich sämtlicher Klassifizierungen des Besitzes und der Regeln über den Besitzerwerb übernommen (unmittelbarer – mittelbarer Besitz – mehrstufiger mittelbarer Besitz, Eigenbesitz, Besitzdiener, Übertragung des mittelbaren Besitzes durch Abtretung des Anspruchs). Nach dem Vorbild des deutschen Rechts wurde auch der Schutz des Vertrauens im Rechtsverkehr mit Fahrnissen, d.h. der gutgläubige Erwerb dinglicher Rechte (Eigentum, Pfandrecht) an Fahrnissen durch einen Nichtberechtigten geregelt. Übernommen wurden auch einige deutsche Regeln über den Bau auf fremdem Grundstück, d.h. über die Überbau-Errichtung eines Gebäudes über die Grenze. Interessant ist wiederum, dass die deutsche Rechtsdoktrin einen sehr bedeutenden Einfluss auch auf die Auslegung der autonom geregelten sachenrechtlichen Institute in der kroatischen Rechtsliteratur ausübte. So entwickelte sich unter dem Einfluss der deutschen Rechtsdoktrin in der kroatischen Literatur die Interpretation, wonach die im Zwangsvollstreckungsgesetz autonom und sehr spezifisch geregelte Sicherungsübereinung ein nicht akzessorisches sachenrechtliches Sicherungsmittel ist, wobei sämtliche Normen des kroatischen Sachenrechts nach dem Vorbild des österreichischen Rechts lediglich akzessorische sachenrechtliche Sicherheiten regeln.

Die verschiedenen Einflüsse einzelner Rechtsordnungen des mitteleuropäischen/germanischen Rechtskreises auf die spezifischen privatrechtlichen Bereiche führten dazu, dass heute eine Art Koexistenz und Kombination verschiedener Rechtsinstitute aus unterschiedlichen Rechtssystemen des germanischen Rechtskreises besteht. Diese Situation führt zu einer Reihe neuer Fragen über die künftigen Entwicklungsrichtungen des Privatrechts. In der Praxis kommt es immer öfter zu Problemen aufgrund der Inkonsistenz des kroatischen Privatrechts, der Unterschiede in der Terminologie sowie aufgrund der Unterschiede in der Herangehensweise bei der Auslegung der Rechtsnormen. Wenn es sich um Normen handelt, die „deutsche Quellen" haben, sind diese Probleme noch stärker ausgeprägt. Vor allem besteht das Problem in der Unkenntnis der Rezeption deutscher Rechtsinstitute, der deutschen Versionen der rezipierten Rechtsinstitute, der Änderungen deutscher Vorschriften, der deutschen Rechtsprechung und Rechtsdoktrin. Letztendlich ist eines der sehr großen Probleme auch die praktische Anwendung dieser hoch entwickelten Rechtsinstitute, die im deutschen Recht eine lange Tradition haben. Wie diese komplexen Rechtsinstitute aus dem deutschen Recht anzuwenden und an die vollkommen unterschiedliche kroatische Rechtsinfrastruktur anzupassen sind, ist in der Praxis häufig problematisch. Es ist deshalb künftig vermehrt Augenmerk zu legen auf die bessere Kenntnis und systematische Weiterbildung der kroatischen Juristen im Bereich der ausländischen Rechtsordnungen, die als Vorbild für die Regelung der einzelnen privatrechtlichen Institute gedient haben. Positive Tendenzen in diesem Sinne sind bereits zu beobachten und zwar insbesondere in der Fachliteratur, in der bei der Auslegung der kroatischen Vorschriften immer häufiger auf die deutschen Kommentare der Rechtsvorschriften und der Rechtsprechung verwiesen wird. Außerdem ist zu erwarten, dass auch in der Zukunft das deutsche Recht und Rechtsdenken die Modernisierung einzelner privatrechtlicher Institute (wie z.B. Verbraucherinsolvenz, Vertrauensschutz im Immobilienverkehr, nicht akzessorische sachenrechtliche Sicherheiten) beeinflussen wird.

Dr. Andrej Maczynski
Universitätsprofessor
Jagiellonen-Universität Krakow

Einfluss des deutschen Rechtsdenkens im polnischen Privatrecht

Zusammenfassend ist festzustellen, dass es trotz unbestrittener Einflüsse des deutschen Rechts auf das polnische Recht unbegründet wäre, wollte man das polnische Recht der germanischen Rechtsfamilie zurechnen, da die polnische Normierung vieler Institute des Zivilrechts durch französische Muster inspiriert ist. Ebenso unbegründet scheint meines Erachtens der Begriff einer separaten Familie der sog. postsozialistischen Rechte zu sein. Das Abgrenzungskriterium dieser Rechtsfamilie hat lediglich historischen Charakter – beruft sich auf die Tatsache, dass einige Länder des Mittel- und Osteuropas einige Jahrzehnte lang nach dem 2. Weltkrieg von der Sowjetunion abhängig waren, und nicht

auf gemeinsame, für das heute in diesen Ländern geltende Recht charakteristische Merkmale.

Was Polen anbelangt, verdient die Beständigkeit der noch vor dem Krieg angenommenen Regelungen eine besondere Hervorhebung. Die Arbeiten an der Vorbereitung der Neukodifizierung des polnischen Zivilrechts sind zwar im Gange, es ist aber schwer abzusehen, wann und mit welchem Resultat diese zum Abschluß gebracht werden. Mit Bedauern muss man feststellen, dass die Antwort auf diese Frage vielmehr von Ambitionen der Politiker und der an diesen Arbeiten beteiligten Juristen als von tatsächlichem Bedarf abhängt.

Dr. Meliha Povlakic
Universitätsprofessor
Universität Sarajevo

Einfluss des deutschen Rechtsdenkens im Privatrecht von Bosnien und Herzegowina

Das Privatrecht in Bosnien und Herzegowina (weiter auch: BuH) war seit dem Ende des neunzehnten Jahrhunderts am stärksten durch das österreichische Recht geprägt. Dies war die Folge der Tatsache, dass BuH seit dem Berliner Kongress von 1878 bis 1918 Teil der Österreichisch-Ungarischen Doppelmonarchie war. Der direkte und indirekte Einfluss des ABGB und anderer österreichischen Gesetze hielt auch zwischen den zwei Weltkriegen in BuH an. Sogar auch heute werden Rechtsregeln des ABGB angewendet (zB an Schenkungs-, Sozietät- und Leihvertrag). Darüber hinaus ist auch das neue Sachenrecht in BuH überwiegend unter dem österreichischen Einfluss. Trotz der Tatsache, dass manche angesehene Juristen deutsche Schüler waren und durchaus sich mit dem deutschen Recht befasst haben, wäre es schwierig zu behaupten, dass deutsches Rechtsdenken über die bosnisch-herzegowinische Doktrin, den bosnisch-herzegowinischen Gesetzgeber beeinflusst hat.

Seit dem Beginn des Transformationsprozesses prägte das deutsche Recht zunehmend das bosnisch-herzegowinische Privatrecht. Im Rahmen des Transformationsprozesses kam es auch in BuH zu einem Rechtstransfer, und zur Übernahme Lösungen aus den anderen Rechtssystemen, darunter auch deutscher. Ein wesentlicher Grund für das letztere ist ohne Zweifel die Unterstützung mancher Reformen durch deutsche Organisationen (bzw. Gesellschaft für technische Zusammenarbeit, heute Gesellschaft für internationale Zusammenarbeit – GIZ). Mit dieser Unterstützung wurden Grundbuch-, Notar-, Insolvenz-, Sachenrechtsgesetze in beiden Entitäten Bosniens und Herzegowinas (Föderation BuH und Republik Srpska) verabschiedet.

Der deutsche Einfluss ist im Grundbuch- bzw. an der Schnittstelle des Grundbuch- und Sachenrechtes festzustellen. Der Eintragungsprinzip sowie des Prinzip des öffentlichen Glaubens bekamen einen neuen Stellenwert im bosnisch-herzegowinischem Recht. In diesem Zusammenhang wurde die Vormerkung von einem unbedeutendem Institut nach dem Maße des früher österreichisch geprägten Grundbuchrechts zu einer dinglichen Sicherung des schuldenrechtlichen Anspruchs auf die Eigentumsübertragung nach dem Maße des deutschen Rechts umgestaltet. Zusammen mit der Einführung des Notariats nach dem deutschen Modell, wurden dadurch die Grundstückstransaktionen zunehmend sicherer.

Die Reform des Sachenrechts, wie vorher bereits in der Republik Kroatien, bedeutete die Übernahme sachenrechtlicher Bestimmungen aus dem ABGB. Trotzdem gibt es punktuelle sowie umfangreichere deutsch beeinflusste Lösungen in diesem Gesetz. Dazu können das Besitzkonzept, Erwerb durch den Nichteigentümer, Wohnungseigentum und die Grundschuld gezählt werden

Anstatt einer Konstante, die über Jahrzehnte andauerte, und das ist der Einfluss des österreichischen Rechtes, kam es in dem Transformationsprozess zum Einfluss verschiedener Rechtsordnungen und sogar verschiedener rechtlichen Kreisen. Das deutsche Recht war nur ein davon. Trotzdem ist gerade dieser Einfluss positiv zu beurteilen: verschiedene Rechtsgebiete wurden synchronisiert geändert, so dass die Lösungen aus einem Guss waren und synergische Effekte entwickelten.

Dr. Dr. h.c. József Szalma
Universitätsprofessor
Universität Novi Sad

Der Einfluss der Willens- und Erklärungstheorie im serbischen Privatrecht

Obwohl das geltende Gesetz über Obligationenverhältnisse Serbiens (GO) grundsätzlich unter dem Einfluss des schweizerischen Obligationengesetzes entstanden ist, zeigt es in mehreren Normen und Rechtsinstituten den Einfluss des österreichischen Allgemeinen Bürgerlichen Gesetzbuches, besonders auf dem Gebiet der Willensäusserung. Beim Vertragsabschluss sind die Einflüsse der deutschen zivilistischen Literatur zu erwähnen. Bemerkbar sind die Einflüsse der allgemeinen und der besonderen Theorie über die Willensgeschäfte, und auch der Regelung des BGB über Willensgeschäfte.

Diese Einflüsse sind in den Regelungen des GO bei *culpa in contrahendo* (vorvertragliche Willenserklärungen) erwähnt, beim Angebot und seinem Empfang, beim Willensmangel (wie Irrtum, Täuschung, Bedrohung, Scheingeschäfte usw.). Aber diese Theorie beeinflusste auch die Regelung des GO über die Auslegung des Rechtsgeschäftes, bzw. des Vertrags. Nach dem GO soll bei der Auslegung das Gericht den wahren gemeinsamen Willen der Vertragsparteien berücksichtigen, falls dieser nicht besteht, hat dann den Vorteil die Willensäußerung, möglicherweise mit dem objektiv bestimmbaren Inhalt der Geschäftsausdrücke.

Bei Handelsgeschäften sind die im Handel üblichen Ausdrücke maßgeblich für die Auslegung. Wie im deutschen Recht (im Bürgerlichen Gesetzbuch, BGB), dominieren bei

diesen Rechtsinstituten (*negotia juridica*) die Auffassungen der Erklärungstheorie, aber mit der Beachtung des wahren Willens der Vertragsparteien. Aber bei nicht entgeltlichen Rechtsgeschäften soll man auch den innerlichen Willen (Motive) als rechtsgestaltendes Element des Rechtsgeschäftes in Betracht ziehen, und dieser soll der Auslegung des Rechtsgeschäfts zugrunde liegen.

Dr. Verica Trstenjak
Universitätsprofessor
Universität Wien
Max Planck Institut Luxemburg

Der Einfluss des deutschen Rechtsdenkens in Mitteleuropa Der Einfluss des deutschen Rechts auf die Rechtsprechung des Gerichtshofs der EU (und die Bedeutung für Mitteleuropa)

1. Einführung

Das deutsche Rechtsdenken hatte schon immer einen großen Einfluss. Dies vor allem aufgrund zahlreicher – auch heute noch bekannter – deutscher Juristen, deren Werke bis in die Gegenwart Relevanz haben (z.B. Otto von Gierke, Friedrich Carl von Savigny). Darüber hinaus, hatten später indirekt auch die umfangreiche deutsche Rechtstheorie und die deutsche Gesetzgebung, z.B. das deutsche Bürgerliche Gesetzbuch (BGB)[1], einen außerordentlich großen Einfluss auf das Recht in Mitteleuropa. Dies gilt noch heute, besonders im Rahmen der Europäischen Union und hier vor allem in Bezug auf Staaten, die nach dem Jahr 1990 das sozialistische System sowie dessen utopisches und irreales Rechtssystem verlassen haben.

Dieser Einfluss äußert sich anhand mehrerer Instrumente: zu nennen wären an dieser Stelle die deutsche Sprache, deutsche Universitäten, das deutsche Verfassungsgericht (erinnern wir uns an das Urteile Solange[2] oder das Urteil hinsichtlich des Vertrags von Lissabon[3]), die Gesetzgebung und natürlich die Veröffentlichung juristischer Artikel in deutscher, aber vor allem auch die von deutschen Professoren in englischer Sprache veröffentlichten Artikel. Außerdem tragen die internationale Vernetzung sowie die richtige politische Strategie des Staates mit dem Ziel, den Einfluss des Staates, insbesondere auch jenen des deutschen Rechtssystems, zu stärken, zu dem hohen Stellenwert des deutschen Rechts bei. Dieser Einfluss ist auch auf Europäischer Ebene, nämlich in den einzelnen Institutionen, zu spüren. In weiterer Folge wird der Einfluss des deutschen Rechts auf die Arbeit des Gerichtshofs der EU (im weiteren EuGH), besonders unter Berücksichtigung der Statistiken des EuGH, dargestellt.

2. Der Einfluss des deutschen Rechts auf den EuGH

Das deutsche Rechtsdenken kann mittels verschiedener Faktoren Einfluss auf den EuGH nehmen. Zu nennen wären z.B. die Sprache, die deutsche Theorie, der persönliche Einfluss (vor allem den der deutschne Richter und des deutschen Generalanwalts) und deutsche Gerichte, indem sie Fragen zur Vorabentscheidung an den EuGH einbringen.

2.1 Im Besonderen über die deutsche Sprache am EuGH

Arbeitssprache am EuGH ist Französisch. Das bedeutet, dass Deutsch von den Mitgliedern des EuGH in der Regel nicht als Arbeitssprache verwendet wird und auch von den Angestellten nicht gebraucht wird. In der Europäischen Union gibt es jedoch 24 Amtssprachen, wie dies Art. 24 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) bestimmt[4]. Daher werden Fragen zur Vorabentscheidung von deutschen Gerichten in deutscher Sprache eingebracht, Vertragsverletzungsklagen nach Art. 258 oder 260 AEUV gegen Deutschland auf Deutsch erhoben; und Nichtigkeitsklagen, die von Deutschland oder einer deutschen natürlichen oder juristischen Person (wenn dies erlaubt ist) eingebracht werden, können in deutscher Sprache verfasst sein. Ähnliches gilt für die Rechtsmittel.

Deutsche Gerichte sind beim Einbringen von Fragen zur Vorabentscheidung sehr aktiv, sodass in den Jahren 2000-2014 gar 21,5 % aller Fragen zur Vorabentscheidung aus Deutschland kamen[5]. Aber auch sonst lässt sich aus inoffiziellen Statistiken herauslesen, dass die deutsche Sprache Amtssprache in 22 % der Verhandlungen ist[6], was unter allen Mitgliedstaaten den Spitzenwert darstellt. Die deutsche Sprache wird am häufigsten (neben der Arbeitssprache französisch) für das Verfassen von Schlussanträgen der Generalanwälte gebraucht[7]. Neben den deutschen Generalanwälten wurde die deutsche Sprache noch von der österreichischen Generalanwältin Christine Stix-Hackl (2000-2006) und der slowenischen Generalanwältin Verica Trstenjak (2006-2012) benutzt.

Der EuGH stellt noch immer die Übersetzung in alle 24 Amtssprachen der Europäischen Union sicher. Dies gilt für schriftliche Übersetzungen von Urteilen und Schlussanträgen, aber auch für das mündliche Dolmetschen während der

1 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2.01.2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 22.07.2014 (BGBl. I S. 1218) geändert worden ist.

2 Solange I Beschluss des deutschen Bundesverfassungsgerichts v 29.5.1974, BvL 52/71 (BVerfGE 37, 271); Solange II Beschluss des deutschen Bundesverfassungsgerichts v 22.10.1986, 2 BvR 197/83 (BVerfGE 73, 339).

3 Urteil des deutschen Bundesverfassungsgerichts v 30.6.2009, 2 BvE 2/08 (BVerfGE 123, 267).

4 Bulgarisch, Dänisch, Deutsch, Englisch, Estnisch, Finnisch, Französisch, Griechisch, Irisch, Italienisch, Kroatisch, Lettisch, Litauisch, Maltesisch, Niederländisch, Polnisch, Portugiesisch, Rumänisch, Schwedischer, Slowakisch, Slowenisch, Spanischer, Tschechisch und Ungarisch.

5 Siehe Jahresbericht des EuGH 2013, Seite 108.

6 Die erwähnte inoffizielle Statistik umfasste den Zeitraum 2013/2014. Ich bedanke mich hier auch bei Herrn Mathias Gläser, dem Leiter des Referats Deutsche Übersetzung am EuGH, der die Statistik erstellt hat.

7 Laut einer inoffiziellen Statistik von Herrn Mathias Gläser, dem Leiter des Referats Deutsche Übersetzung am EuGH wurden im Jahr 2013 von insgesamt 228 Schlussanträgen 38 in deutscher Sprache verfasst (im Jahr 2012 waren es 40 von insgesamt 202 und im Jahr 2011 waren es 54 von insgesamt 212 Schlussanträgen).

Verhandlungen. Für die Übersetzungsarbeit ergeben sich anhand der 24 Amtssprachen 552 mögliche Sprachkombinationen, aufgrund der Sonderstellung des Irischen reduziert sich die Zahl der Amtssprachen in der Praxis jedoch auf 23 und damit auf 506 Kombinationen[8].

2.2 Besonderheiten der Urteile und Schlussanträge

Wie bereits erwähnt werden alle Urteile, wie auch die Schlussanträge, in alle Amtssprachen übersetzt. Die Urteile des EuGH sind an das französische Rechtssystem angelehnt, sind also kurz, ohne rechtsvergleichende Analyse und ohne Theorieverweise. Anders sieht es bei den Schlussanträgen aus, in denen das Zitieren von Theorie und von rechtsvergleichender Analyse möglich ist. Das wiederum bedeutet, dass auch die deutsche Theorie oft zitiert wird. Dies gilt besonders für Generalanwälte aus Deutschland (Juliane Kokott) oder jene, die in Deutschland studiert haben oder anders mit Deutschland verbunden sind (z.B. Verica Trstenjak, Pedro Cruz Villalón).

2.3 Vorlagefragen aus Deutschland an den EuGH

Im Rahmen des Vorabentscheidungsverfahrens entscheidet der EuGH nach dem Artikel 267 AEUV über die Auslegung von europäischen Primär- und Sekundärrecht, sowie über die Geltung des Sekundärrechts. Die Urteile des EuGH in diesem Verfahren sind äußerst wichtig, da die Rechtsauslegung für alle Mitgliedstaaten rechtlich verbindlich ist. Wie bereits erwähnt, sind die deutschen Gerichte unter den Aktivsten, was das Einbringen von Vorlageersuchen betrifft. So wurden 97 der insgesamt 450 Fragen zur Vorabentscheidung im Jahr 2013 von deutschen Gerichten eingebracht.

Als Beispiel soll hier die Rechtssache *Messner*[9] genannt werden, in der der EuGH über die Auslegung der Richtlinie 97/7 über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz[10] entschieden hat. Die Frage bezog sich auf das Recht des Verkäufers Wertersatz für den Gebrauch einer Sache zu verlangen, wenn der Verbraucher den Kaufvertrag fristgerecht wiederrufen hat. In diesem Urteil entschied der EuGH erstens, dass die auszulegende Richtlinie dem nationalen (also deutschem) Recht, welches solchen Wertersatz generell vorsieht, widerspricht. Jedoch sprach der EuGH zweitens aus, dass diese Richtlinie nicht einer Verpflichtung des Verbrauchers entgegensteht, für die Benutzung der Ware Wertersatz zu leisten, wenn er diese Ware auf eine mit den Grundsätzen des bürgerlichen Rechts (zB Treu und Glauben, ungerechtfertigten Bereicherung) unvereinbare Art und Weise benutzt hat. Dieses Urteil hatte einen großen Einfluss auf die folgende Entwicklung des Fernabsatzrechts. So beinhaltet die neue Verbraucherrechterichtlinie 2011/83[11] in Art. 14 Abs. 2 die Bestimmung, dass *„Der Verbraucher [nur] für einen etwaigen Wertverlust der Waren [haftet], wenn dieser Wertverlust auf einen zur Prüfung der Beschaffenheit, Eigenschaften und Funktionsweise der Waren nicht notwendigen Umgang mit den Waren zurückzuführen ist."* Dies bedeutet, dass die deutsche Vorlagefrage mittelbar zur Klärung dieser Frage auf Unionsebene beigetragen hat.

Natürlich gibt es eine Fülle solcher Beispiele. Dies zeigt, dass Fragen zur Vorabentscheidung nicht nur bedeutend für die Mitgliedstaaten, in diesem Fall Deutschland, sind, sondern Auswirkungen für die gesamte EU haben.

3. Fazit

Ich möchte hervorheben, dass die deutsche Theorie, die in Europa als sehr genau und umfangreich bekannt ist, äußerst wichtig für die Entwicklung des Unionsrechts, aber auch für die Entwicklung des Rechts in den einzelnen Mitgliedstaaten, ist.

Zusammenfassend lässt sich sagen, dass das deutsche Rechtssystem auch am EuGH eine wichtige Rolle spielt, welche ich anhand mehrerer oben erörterter Faktoren aufgezeigt habe.

Abschließend möchte ich unterstreichen, dass die Rechtssysteme der Mitgliedstaaten – mögen sie noch so logisch und systematisch, wie das deutsche Recht aufgebaut sein – nie völlig gleich sein werden. Folglich können wir Juristen auch niemals einen solch großen, über die Staatsgrenzen hinausgehenden Einfluss haben, wie ihn zB Albert Einstein hatte; denn die Relativitätstheorie ist überall gleich.

Dr. Dr. h.c. mult. Lajos Vékás
Universitätsprofessor
Ordentliches Mitglied der Ungarischen Akademie
der Wissenschaften
„Eötvös Loránd" Universität Budapest

Über den Einfluss des deutschen Privatrechts auf die ungarische Kodifikation

I. Historische Einführung

Der früher überwiegende Einfluss des österreichischen ABGB auf die ungarische Privatrechtsentwicklung ist zunächst im Vertragsrecht erloschen. Der Grund dafür lag vor allem darin, dass Ungarn 1875 ein Handelsgesetz geschaffen hat, dessen Vorlage das deutsche ADHGB (1861) war. Das ungarische HGB diente auch dem nicht kodifizierten Privatrecht, insbesondere auf dem Gebiet des Vertragsrechts, lange Zeit als Hauptquelle. Im Zuge der Kodifikationsarbeiten im letzten Drittel des 19-ten Jahrhunderts war aber das damals nagelneue deutsche *BGB nur ein ausländisches Model* von vielen, welchem Beachtung geschenkt wurde. Wie es in den ausführlichen Protokollen dokumentiert ist, hatten die Kodifikationsausschüsse die Entwürfe auf eine beeindruckende rechtsvergleichende Basis aufgebaut. Neben den beiden großen, vom Naturrecht beeinflussten Gesetzbüchern des beginnenden 19. Jahrhunderts (dem Code civil und dem ABGB) sowie dem BGB wurden auch das sächsische ZGB,

[8] Vgl Sprachen und Dolmetschen beim Gerichtshof der Europäischen Union in Luxembourg (2013).

[9] EuGH 3.9.2009, C-489/07, *Messner*.

[10] Richtlinie v 20.5.1997 über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, Abl L 1997/144, 19.

[11] Richtlinie 2011/83/EU v 25.10.2011 über die Rechte der Verbraucher, zur Abänderung der Richtlinie 93/13/EWG und der Richtlinie 1999/44/EG sowie zur Aufhebung der Richtlinie 85/577/EWG und der Richtlinie 97/7/EG, ABl L 2011/304, 64.

das Zürcher ZGB, der Dresdner BGB-Entwurf, der bayerische BGB-Entwurf und schließlich auch das schweizerische OR aufgearbeitet.

II. Drei Beispiele für das Verhältnis des 2014 in Kraft getretenen ungarischen Gesetzbuches zum BGB und dem deutschen Privatrecht

1. Das neue ungarische Gesetzbuch enthält *keinen Allgemeinen Teil* im Sinne des deutschen BGB. Die imponierende Abstraktheit dieser Lösung ist für den Gesetzgeber in Ungarn immer fremd geblieben. Bereits im allerersten umfangreichen Entwurf von 1900, der sonst unter dem starken Einfluss des BGB stand, hat man einen Allgemeinen Teil mit der Begründung abgelehnt, dieser mache die Struktur des Gesetzbuches unnötig kompliziert. Es wurde schon damals betont, dass diejenigen einseitigen Rechtsgeschäfte, die in der Praxis eine wichtige Rolle spielen, wie etwa die letztwilligen Verfügungen, ohnehin mit eigenständigen Normen geregelt werden sollten.

2. Die *Verletzung von Persönlichkeitsrechten* kann mitunter als Quelle für vermögensrechtliche Vorteile dienen, so dass die durch die Rechtsverletzung entstandene Verschiebung der Vermögensverhältnisse rückgängig gemacht werden muss. In den Fällen, in denen dem Schädiger ein Vermögensvorteil zu Lasten der verletzten Person entstanden ist, ist der *Entzug der Bereicherung* zu Gunsten der geschädigten Person recht und billig. Im neuen ungarischen Gesetzbuch wird dazu eine objektiv konzipierte neue Sanktion eingeführt. Demnach kann die verletzte Person die Überlassung des durch die Persönlichkeitsverletzung entstandenen Vermögensvorteils verlangen. Diese Lösung wurde zuerst im deutschen Schrifttum vorgeschlagen.

3. Bekanntlich überlassen die *Richtlinien* der EU den Mitgliedstaaten die Art und Weise der Umsetzung in das jeweilige Rechtssystem. Im Rahmen und mit Hilfe dieser Freiheit soll die Kohärenz des jeweiligen mitgliedstaatlichen Rechtssystems bewahrt werden. Die Frage des Umsetzungsmodus hat einen inhaltlichen und einen eher redaktionellen Gesichtspunkt. Was den zweiten Aspekt betrifft, ist die bisherige Umsetzungspraxis der verbrauchervertragsrechtlichen Richtlinien praktisch *drei Modellen* gefolgt. Die Richtlinien wurden entweder in Einzelgesetzen oder in einem speziellen Verbraucherschutzgesetz oder aber durch Integration in das bürgerliche Gesetzbuch umgesetzt. Deutschland hat als bisher einziger Mitgliedstaat mit dem Schuldrechtsmodernisierungsgesetz von 2001 den letzten, anspruchsvollen aber schwierigen Weg eingeschlagen. Diese Methode hat aber m. E. den Kodex strukturell sehr belastet und das klassische Gesetzbuch den teils willkürlichen Änderungen in Brüssel ausgeliefert. Deshalb hat der ungarische Kodex eine Mischlösung gewählt. Demensprechend sind aus dem europäischen Verbraucherrichtlinienrecht nur die *„kodifikationsreifen" Kernelemente* – und zwar thematisch – in das Zivilgesetzbuch integriert, das übrige Material für das Verbraucherschutzgesetz gelassen worden. Der ungarische Gesetzgeber hat damit in dem neuen Zivilgesetzbuch die Bewahrung der Kodifikationsidee vor dem Transparenzgebot bevorzugt.

Dr. Dr. h.c. mult. Rudolf Welser
em. ord. Universitätsprofessor
Leiter der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform der Universität Wien

Der Einfluss des deutschen Rechtsdenkens auf das österreichische Privatrecht

Die deutsche und die österreichische Rechtswissenschaft sind in Theorie und Praxis eng miteinander **verknüpft**, was auf der gemeinsamen **Vergangenheit**, vom römischen Recht über die mittelalterlichen Rechte hin zum gemeinen Recht beruht. Die wissenschaftliche Bearbeitung des römischen und gemeinen Rechts, wie es durch die Glossatoren, die Postglossatoren, die Kommentatoren, die Konziliatoren, den *usus modernus pandectarum* und die Pandektistik erfolgte, sorgte für weitere Gemeinsamkeiten.

Der geistesgeschichtliche Zusammenhang war also stets gegeben. Die beiden maßgebenden Privatrechtskodifikationen, nämlich das **ABGB** und das **BGB**, liegen nicht nur 100 Jahre auseinander, sondern folgen auch recht verschiedenen **Geisteshaltungen**. Dennoch war eine Wechselwirkung immer gegeben, bei welcher die deutsche Dogmatik und Methode zweifellos dominierte und die in der **Pandektistik**, wie sie von *Windscheid*, *Dernburg* und *Glück* betrieben worden ist, einen Höhepunkt fand. Das deutsche BGB, das durch Logik und wissenschaftliche Durchdringung gekennzeichnet war, hat das österreichische Privatrecht wesentlich **beeinflusst** und zu interpretativen und gesetzlichen Änderungen unserer Kodifikation geführt.

Dabei spielte auch eine Rolle, dass die Vorschriften des **ABGB** einen solchen Einfluss leicht zuließen, weil sie im Gegensatz zum BGB **großzügig** und **nicht kasuistisch** gestaltet sind. Man sprach vom „weiten Haus des ABGB", das viel mehr Platz für die Auslegung böten als die engeren Räume des BGB. Und schließlich wurden, besonders begünstigt durch den „Anschluss" Österreichs an das Deutsche Reich, gewisse **Gesetze** oder Einzelbestimmungen direkt in das österreichische Recht **übernommen**, wo sie vielfach auch nach dem Krieg weitergalten. Deutsches und österreichisches Recht gehören also zusammen.

Gábor Hamza*

* Prof. Dr. Gábor Hamza; Juristische Fakultät, Loránd-Eötvös-Universität Budapest, Ungarn.

Guidelines for authors

The **Journal on European History of Law** publishes posts from the field of history of law, History of legal thought and Roman law. The length of a post cannot exceed 50.000 characters. It must be written in English or in German languages.

All the works are reviewed. The executive editor decides on whether to publish the materials and in which order. After the review, the decision will be sent to the author by email.

The authors are responsible for the lingual and formal level of submitted papers. These levels are checked by the editorial office and some small necessary changes can be done by the editor. Corrections are possible only upon prior request.

Corrections done by the author must be returned within 4 days and no significant changes are permitted.

Supplements must be sent to the email address of editor's office: info@historyoflaw.eu

The supplements must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

If your text contains pictures or tables (only black and white), mention their meaning in the text. If the pictures are sent by electronic mail, they must be in JPG, TIFF or EPS format. All the tables, pictures and graphs must be placed somewhere in the text and also sent separately.

Since The European Society for History of Law is a non-profitable organization, there would be no payment for manuscripts published in the Journal on European History of Law.

Each work must contain:

1. **Title**. It contains (in this order, always in a new row):
Short and understandable title;
The full name and last-name of the author/s including academic titles and working-place;
Address of the author/s, including the code of the country before the postal code (for example CZ). Afterwards write down your email address.
2. **Abstract.** Summarizes the content of the work. Usually up to 10 rows. It should describe clearly the main question of the research, solution, sources and methodology (according to the type of research).
3. **Key words.** Several terms (not more than 20 words) that characterize the work. Words from the title can be repeated.
4. **Division of the proper text.** For better orientation in the text, it should contain headings. The headings should be numbered.

Quotation from publications in German language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, S. 151–152.
Quotation from publications in English language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, p. 151–152.