

Punishing the offender

From Block 4: Crime, police and penal policy by Clive Emsley (pp. 17-20)

In the mid-eighteenth century, the main punishment for felony (the more serious form of indictable crime) was presumed to be death. This was the period of what is commonly described, principally with reference to England and Wales, as 'the Bloody Code'. In reality, of course, not everyone convicted of felony was hanged; the punishment of transportation (initially to the Americas and then, at the end of the eighteenth century, to Australia) was introduced in the seventeenth century and given a formal basis by the Transportation Act of 1718. The idea of small children being sentenced to death for stealing a handkerchief is common in the more sensational popular histories but, in reality, such a sentence was most unlikely. Juries were inclined to make an assessment of the accused's age, his or her circumstances, demeanour and reputation and they might downgrade an offence if they thought that he or she was the victim of circumstances or deserved another chance. Judges condoned such behaviour and sometimes acted similarly. Did changes occur because of a shifting perception of offenders, because of the development of new forms of punishment, because of a new humanitarianism that rejected the idea of the death penalty for felony or for other reasons? There remains considerable debate about this. Nevertheless, historians have noted a significant growth of the idea of the prison as a means of both punishment and reformation from the late eighteenth century.

Across the period of this course, from the mid-eighteenth to the mid-twentieth centuries, a series of major developments have been identified in the history of criminal justice, principally:

1. the development of new systems of police
2. the development of the prison as the principal form of punishment
3. a greater formality within the courts: the petty sessions began to be held in buildings designed specifically for the purpose (rather than in inns or the parlours of the magistrates); in the higher courts the trial ceased to be a confrontation between victim and accused as lawyers began to argue cases, judges became impartial arbiters and jurors became an audience invited to adjudicate on the case presented by adversarial professionals.

There are debates about all of these changes: were the new police primarily the result of the need to confront new levels of crime and disorder or of demands for the better regulation of the new urban industrial society? How far were they different from the old systems? Were the traditional parish constables and watchmen as inefficient, old and decrepit as police reformers and some historians have maintained? There has been research on eighteenth- and early-nineteenth-century London particularly that suggests that the division between 'old' and 'new' has been overemphasised. The limited work that has recently been done on what was going on in the provinces also suggests that some provincial constables, and possibly some watchmen too, were becoming much more professional before the creation of any 'new' police. This is prompting questions about the extent to which the two systems continued side by side in the same counties.

There are similar issues about punishment. Many of the old punishment practices were brutal (hanging, flogging, branding, the pillory) and, to modern eyes, degrading – not least because they were in public. But were these punishments reformed during the eighteenth and

nineteenth centuries simply because they upset changing sensibilities? Recent research has shown that, in the relative informality of the old courts, laws were bent and shaped to suit circumstances and the court's perception of the offender and victim.⁴ Moreover, in the courts of the new stipendiary magistrates in early nineteenth-century London these magistrates bent the law in ways that enabled the development of a system for dealing with juvenile offenders which kept them out of prison but subjected them to a period of training (and hence, it was hoped, reformation) in a refuge for the destitute. Well into the nineteenth century the ways in which the offence, the offender and the victim were perceived occasionally led to confrontations between judges and jurors in the higher courts – often with the judges taking the more liberal and progressive line. All of these issues have prompted research and often very heated debate over the last few decades, but there is still a lot of ground to be worked over and many of the controversies are far from resolved.

It is also important to situate criminal justice developments in the broader context of the changing relationship between central and local government over the period studied on the course. No situation is entirely static but, in the eighteenth century, policing and punishment were largely in the hands of different organs of local government. There was no Home Office as such until the end of the century, and it was a very small instrument in its early years. Gradually, however, as the nineteenth century wore on, the Home Office acquired more and more responsibility for the supervision of these matters in England and Wales; in Scotland such acquisition was mediated through those government departments responsible for Scotland; in Ireland there was much more of a centralised system run from Dublin Castle. An inspectorate of prisons was established for the Home Office in the 1830s which reported on prison provision across the country; prisons were only nationalised in 1877. An inspectorate for police was established in the 1850s, but throughout the period of this course local government in England, Wales and Scotland held on to their policing powers (except in metropolitan London). There were well over 200 police forces in the three countries at the end of the nineteenth century, and well over 100 at the end of the Second World War. Local government took pride in running their own institutions without interference from Westminster; this also meant that, for much of the period, individual local government districts could make decisions on how much to spend on *their* police and on *their* prison.

While historians tend to focus on the specific, several broad overarching theories of social change have been taken up as a means of exploring (and even at times just explaining) these developments. The assumption used to be that there was a growth of humanitarian rationality emerging out of the eighteenth-century Enlightenment which prompted the creation of a modern, bureaucratic and effective system of police and the gradual replacement of brutal punishment with prisons that were designed, at least in part, to reform the offender. This assumption fits within what is commonly referred to as the Whig interpretation of history, described in the 1930s by Herbert Butterfield. Butterfield was principally concerned with explanations for political change during the eighteenth and early nineteenth centuries and he showed how political Whigs, and their descendents, wrote the history of politics from the reign of George III emphasising how the Whig Party identified with progressive movements and the general direction of change.⁵ The Whig interpretation has tended to fall from favour especially as a result of the way in which cultural and social historians look to broad movements and structures to explain change. Moreover there was a tendency among the old Whig histories to concentrate on individuals – far-sighted reformers on the one hand, ranged against myopic conservatives on the other – and to imply that the reformers even had a vision of the kind of ideal police or prison institution that existed in the Whig historians' present.

The Whig interpretation was constructed by a historian exploring the way in which history came to be written about a particular period and during a particular period. More recently, historians working on criminal justice history have often turned consciously to the theories of the German sociologist, Norbert Elias, or the French philosopher historian, Michel Foucault, to understand patterns of change. Elias was interested in exploring changes in human behaviour, particularly how the warlike society of the medieval period transformed itself into a courtly society and how, in the process, first elite groups and then others became more and more sensitised to certain aspects of life such as bodily functions, sex, suffering and death and, as a result, sought to banish these from public life. Elias's central book on the subject is called *Über den Prozess der Zivilisation*, which is readily translated as *The Process of Civilisation*. Unfortunately, the English translation misses the point that in German *Prozess* can mean 'trial' as well as 'process', and his ideas are often assumed to suggest a kind of Whig, linear movement from what might be called 'barbarism' to 'civilisation'. This was not, however, how Elias understood shifts in what he understood as civilisation; at times, he maintained, the psychological apparatus of self control that human beings exercise could become weaker rather than stronger.⁶ Elias was a Jew who lost many of his family in the Holocaust and who would never have argued that, in any positive linear sense, society had become, or was becoming, 'more civilised'. Foucault worked from a perspective that was in many ways the antithesis of the Whig interpretation. In place of the beneficial impact of the rational, humanitarian Enlightenment, he argued that while the period from the eighteenth century saw a decline in punishments inflicted on the body, there had been a significant rise in disciplinary power intent on regulating the body and the mind. According to Foucault, the Panopticon – the prison designed by the Utilitarian philosopher Jeremy Bentham – was the model that characterised this shift. From the centre of the prison, the all-seeing gaoler could supervise and, ultimately, exercise control over the inmates; and for Foucault, this was something that impacted not simply on the criminal justice system, but on society as a whole.⁷

Notes

4 See, for example, Peter King, *Crime, Justice and Discretion in England 1740–1820* (Oxford: Oxford University Press, 2000).

5 Herbert Butterfield, *The Whig Interpretation of History* (London: G. Bell and Sons, 1931).

6 Norbert Elias, *Über den Prozess der Zivilisation: Sozialgenetische und Psychogenetische Untersuchungen*, 2 vols (Bern: Haus zum Falcken, 1939); the most recent English translation is *The Process of Civilisation: Sociogenetic and Psychogenetic Investigation* (Oxford: Blackwell, 2000).

7 Michel Foucault, *Surveiller et Punir: Naissance de la Prison* (Paris: Gallimard, 1975); English translation: *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977).