

2016

# Editorial

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Rowbotham, J., Stevenson, K. and Pegg, S. (eds.) (2016) 'Editorial', Law, Crime and History, 6(1). Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/8927>  
<http://hdl.handle.net/10026.1/8927>

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## EDITORIAL

Change and continuity is a key theme for this issue, and the challenges that each bring in their wake. This editorial is being written at a time of considerable debate about the law in operation, in the context of the recent Queen's Speech and the looming referendum on membership of the EU, with all the debates that has sparked about the impact (or not) on legislation throughout the UK that 'Brexit' would have. How much of change and how much of continuity would there be, and where would the balance lie, with any continuities? With pre-EU entry traditions, or with those that represent more of the EU legacy? There is also the issue of how far the EU's own constitution and legislation is working in the face of the refugee crisis. Rumblings about whether or not a 'British Bill of Rights' to replace the Human Rights Act 1998 continue – but the wording of the reference in the Queen's Speech to such an eventuality was pretty much the same as in the 2015 speech. What this suggests is that either there is, with considerable secrecy, a draft being drawn up which the Government intends to 'spring' on the populace, or there is still little or nothing more to say about its details because of a lack of developed thinking about how a new Bill of Rights could first remedy, practically and not just rhetorically, the perceived shortcomings of the current legislation and secondly, how it could be achieved in a way that permitted continued membership of the European Court of Human Rights. So – how much change, and how much continuity?

A student once wrote in an essay submitted to one of the editors that 'the Renaissance bolted in from the blue' and was duly critiqued for this mistaken perspective. Historically, new legislation aiming to change a *status quo* – if it arrives – can take a very long time to emerge in any coherent form and the continuities tend to be very visible. The need for, and talking about, what became the Offences Against the Person Act 1861 started seriously in 1833, and arose out of debates dating back into the 1820s. After 1834, draft bill after draft bill reached the Committee Stage, only to be rejected. A strong case can be made that the version that reached the statute book in 1861 was only passed in that parliamentary session in an attempt to dampen down the panic that was beginning to appear in the metropolitan press about the practice of 'garrotting' spreading to London and the ineffectuality of the courts in dealing with it in places like Liverpool, Manchester and Birmingham in the previous five years.<sup>1</sup> The suspicion must be that even the first draft of any new Bill of Rights is unlikely

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<sup>1</sup> The 'panic' reached its height in 1862, and resulted in further legislation in the shape of the Security Against Violence Act 1863, which enabled a substantial number of arrests to be made, especially in London. The irony is that garrotting was never, in fact, a particularly widespread mugging technique – just a high profile one. For a full discussion of the panic, see Jennifer Davis, 'The London Garrotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in Mid-Victorian London', in V.

to appear for some time, and that when it does, it could take a sustained period of time to stand any chance of becoming more than a rhetorical ambition. It must also be open to doubt whether any new Bill of Rights that did emerge and make it onto the statute books would (or could), in substance, differ much from the existing legislation given what Michael Gove has described as 'complex legal issues'. More, the Offences Against the Person Act 1861 was a codification bill – there were changes, especially in the definitions within the Act, but there was a high degree of continuity, certainly with legal practices.

However, the Queen's Speech on 18 May does suggest that some constitutional reform amounting to a degree of change is being looked for by the government and may stand a better chance of materialising somewhat sooner: that relating to her announcement that her ministers 'will uphold the sovereignty of Parliament and the primacy of the House of Commons'. Though the accompanying briefing notes are ambiguous, it is plain that this refers substantially not to the EU but to Lord Strathclyde's recommendation that legislation be passed to limit the power of the House of Lords to refuse its approval to Government secondary legislation in the wake of the action of the Lords over tax credits in October 2015. However, again, the issue is complex and will be difficult to resolve in the short term, given that any such legislation would reinforce the power of the government, and so opposition is likely from within Parliament as well as outside it.

Equally, in terms of achieving change, most pundits agree that any decision to leave the EU could not, practically speaking, be achieved within the proposed two year time frame simply because of the extent to which EU law has become intertwined and entangled with existing law within the United Kingdom: English and Welsh, Scottish and Northern Irish. It certainly has implications for the durability of the United Kingdom in its present form. For one thing, any changes to legislation within the present structure would require the agreement of the Scottish and Welsh assemblies. There could well be substantial challenges there. Indeed, it is a real possibility that the whole 'Brexit' process could reinvigorate the Scottish independence arguments and lead to a further referendum and with a different outcome. Much has been made of the fact that support for continuing EU membership by the UK is strong in Scotland and that a vote to leave could trigger renewed demands in Scotland for independence and turn the popular tide there in favour of that outcome.

But it is worth turning this on its head: what would be the implications for English support for continuing the union with Scotland if a clear majority in England voted for exit but the

'Remain' side won because of Scottish votes! Whatever the outcome, another issue for consideration is the impact of the whole process on the legal frameworks operating within the UK and – given the continuing crisis over the operation of the Dublin Protocol – of the EU itself. Any imperial historians amongst the readers of this editorial may (like one of the editors) start reflecting on the durability of the whole EU project. While it may not be labelled an empire, it certainly has many (if not most) of the most salient characteristics of empires, including the impulsion to expanding borders and the tensions subsequently resulting from such expansion. Whether the EU survives for another decade or another century and more, the legal complications will be likely to be as transformative in the long run as another major European expansion which fundamentally and enduringly changed the legal landscape of Europe – that accomplished under Napoleon. So how much things would actually change if Brexit was achieved, in terms of the present legislative landscape, is open to question. It is much easier to talk about turning clocks back and restoring status quo ante's than it is to achieve it, as the peacemakers found in 1814-1815 (Vienna) and again in 1918-1921 (Versailles and its associated treaties, including Sykes-Picot).

All of this has relevance to the articles within this issue, because one thing that is apparent in them is the length of time that changes to existing legal frameworks take to manifest themselves, and also the reality that the extent to which outcomes of change to the legal process and subsequent directions in legal practices are often not those predicted or envisioned by the promoters of change. The fact that apparently small changes can mask significant shifts in attitudes or practices is also visible in these articles, as Devereaux points out most effectively in his article. Equally, that there is a high degree of continuity underlying many of the changes – including those considered to be the most radical. Devereaux casts a refreshing light on what he rightly identifies as being one of the most significant developments in resources of the last 12 years: the resource of the Old Bailey Proceedings Online (OBPO).

The magisterial scope and the depth of analysis offered via that resource, and various scholarly publications deriving from it by figures like Bob Shoemaker, Tim Hitchcock and others like Peter King, has undoubtedly transformed our understanding of the operation of the criminal justice process particularly from 1674 to the 1820s. But what was not always fully appreciated by users who were less acquainted with either the period or the background to the resource (the original Old Bailey Proceedings) was that the OBPO did not represent a holistic picture of the criminal justice proceedings of London in the years 1674-1913. What Devereaux's article does is highlight a new database which pays compliment to and extends

the usefulness of the OBPO, by looking – for the period 1730-1837 – at the actual outcomes after sentencing.

The wider value of Devereaux's discussion of the OBPO and its background printed resource is that it reminds us that official documentation is never devoid of inaccuracy – for a variety of reasons that only careful and imaginative investigation can uncover. Certain trials were omitted from the original printed Proceedings, because of their 'delicate' nature (rape, sodomy, bestiality). Others, however, are missing because of omissions on the part of those compiling the resource. It seems that at least one day was entirely excluded through (probably) some kind of printer error: further, that the recorders of the trials may not always have accurately noted down details such as sentence length etc. As the article cogently points out, apparently insignificant aspects of the ways in which things were (and were not) recorded by the various available official sources, including parliamentary data, could materially affect our wider understanding of a number of important dimensions to the considerations of the issues of continuity and change. Huge amounts of scholarly time have been spent debating the extent to which gender considerations may, or may not, have affected the criminal justice process, especially the harshness of any outcomes. But it seems, for instance, that more work was needed on the evidential detail here in that official resources do not distinguish the gender of those convicted where the capital sentence was actually carried out, and those where it was not. The wealth of detail in this article, and the attention it draws to this new database resource, make this a particularly valuable contribution to the scholarship on this period and this aspect of legal history – partly because it thereby challenges so many existing assumptions about continuity and change over an extended period of time.

It is a particularly useful article to publish in this issue, given that in the last issue we published Cusack's piece relating to a complementary time period dealing with 'due process' as part of tracing the emergence of the adversarial trial. This piece is worth referring back to, because it contextualises important aspects of Devereaux's article, in the way that it highlights the broader debate over penalty and the 'bloodiness' of the state amongst the jurists and politicians of the day. Together, they are also particularly relevant to current debates, reminding us that they have a popular and political as well as a legal dimension to them – and that legal processes require a high level of popular and political support if they are to operate effectively. Such considerations need to be included in the various jurisprudential debates about the powers that the EU should have over aspects of laws throughout the United Kingdom, with the implications that has for parliamentary sovereignty as well as to the powers of the metropolitan executive over not just the secondary chamber

but also over devolved government. The impact of the Enlightenment and its philosophical thought on the legal epistemology of the late seventeenth and eighteenth centuries continues to resonate today. The State's colonisation of the ownership of criminal wrongdoing was something which has seemed to have made sense. However, the completion of that process from the post-1918 period, when even summary proceedings were overwhelmingly now in the hands of the local or national state and its institutions, could be argued to have worked against the necessary levels of public and popular support for the State's management of the processes of the criminal justice system after a century of such full ownership.

Complementing this, it is often suggested that the absence of the voice of defendants, except through the records of what they may or may not say in the courtroom, is a weakness in the consideration of the justice process at work, certainly in the past. The realities of the adversarial trial structure have increasingly shaped the presentation of narratives of both victimology and defence which are presented in the courtroom. As the two previous articles have at least implicitly shown us, the official and public documents recording the criminal justice process at work do not locate trial narratives in a wider social context, revealing the individuals involved in prosecution and defence in a more holistic fashion. While there are doubts, highlighted by Ailwood, about the full validity of the story told by Mrs Anne Bailey, the importance is that the story is there. It reminds us that the story that a defendant or victim of crime may choose to tell in courtroom proceedings is likely to be a very partial one, because of the nature of the platform on which that narrative is unveiled.

Mrs Bailey's Memoir was clearly intended to generate public sympathy for her claims – which also underlines the point made earlier in this editorial about the significance of popular support for the law in action. It points up that opportunity to generate this support needs to be visible for both accusers and defendants in court proceedings, helping to explain also why – into the present day – so many involved in criminal proceedings are willing to find opportunities to tell, publicly, their side of a crime story. There is a sustained public interest in crime narratives, and the media historically and now remain both a willing collaborator and an enthusiastic generator of such narratives. But to be able to glean an insight into the more or less contemporaneous communities and community networks contextualising the formal judicial proceedings as highlighted in the previous two articles makes this an apposite as well as a valuable complementary piece.

The final article is also apposite and complementary – on a couple of fronts. First, we have highlighted previously that the Journal is eager to receive pieces that deal explicitly with the

Scottish legal system and experience, and the contribution from Kelly certainly represents that. In addition, in the previous issue, we published an interesting piece on juvenile justice in Nigeria and Kelly's discussion reveals similar issues of continuity and change. This is a wide-ranging and, particularly in terms of references to the existing scholarly literature across the fields of law, criminology and history, relating to key events such as the Children's Act 1908, a well-informed piece. As Kelly points out, a very substantial case has been made that argues for a real transformation in attitudes and practices in the later years of the nineteenth century – a special issue published under the Journal's earlier title (*Crimes and Misdemeanours*) edited by Kate Bradley rehearsed exactly this point. What Kelly has done, very effectively, is challenge scholars to perceive and assess this change through the lens of a longer term perspective highlighting the degrees of continuity to be traced, certainly in Scotland, to the earlier philanthropic enterprises so powerfully associated with the mid-Victorian era. Kelly's depiction of the last half of the nineteenth century, and the early part of the twentieth, is one that displays a very significant amount of continuity in terms of thought and understanding especially of the ways in which institutions like industrial schools and reformatories worked. What is interesting is how this echoes parts of the article on child justice in Nigeria which also adopted a long term perspective in assessing the relative degrees of change and continuity in practices there. Scholarship for both England and Wales has a great deal to do on similar records to those utilised by Kelly before we can say that things were different – or not – in these parts of the United Kingdom... This article thus has very wide ramifications here, but also – as the Nigerian experience suggests – for understanding aspects of justice delivery and practices (and not just for juveniles) in a post-imperial world. From Canada to Zambia, similar work is crying out to be done.

We are also happy to include a discussion piece from Robert Shiels, who has previously published in this journal. Not only is it another welcome contribution from him but also a reinforcing of our delight in being able to publish more on Scottish legal landscapes, past and present. We can only hope to attract more from Ireland, as well as Wales – and indeed from Europe and elsewhere in the world. We particularly hope that Shiels' contribution on the Scottish criminal trial process and the issue of judicial interventions in public controversy may spark further contributions and reflections around this broad topic. In a way that echoes and complements our first two articles, the antecedent history and consequences of the introduction of the Criminal Procedure (Scotland) Act 1887 are traced, with reflections on modern retrospects on this perceived change. This is very much in line with the change and continuity theme running through this issue. The impact and significance of Lord Kingsburgh, a major Victorian jurist but less well known South of the Border than counterparts and contemporaries like James Fitzjames Stephen, challenges us to consider how far legal

reforms and changes are the result of either an individual or a small group deciding what is needed (individual men historically, though fortunately, we could now include women, when reflecting on twentieth century history) rather than being the result of popular pressures and expectations. One of the other great values of this piece is to shed illumination on a jurist whose ideas have been unjustly neglected – again, how many more figures of similar stature have we unfairly forgotten about? To what extent might their ideas and impulses bear revisiting from a present-minded perspective when facing similar demands for both continuities and change?

As well as some fascinating book reviews again, keeping the Scottish dimension well to the fore, the issue contains a conference report on last December's Experiencing the Law conference, held in collaboration with King's College London and its Institute for Contemporary British History. The focus was on the refugee experience and its challenges, as ever with these collaborative, and inter-institutional as well as interdisciplinary events, we at SOLON owe a huge debt to colleagues especially Dr Virginia Preston and Dr Michael Kandiah. We are also happy to say that we are collaborating with the ICBH again on a series of witness seminars relating to the police, as institution and as individuals, and focusing particularly on the provincial experience.