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Notes Toward a History of American Justice

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NOTES TOWARD A HISTORY OF AMERICAN JUSTICE*

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In Kent County, Delaware, in 1703, Adam Latham, a laborer, and Joan Mills, wife of a laborer named Andrew Mills, were brought before the county court. The grand jury presented Joan Mills for adultery. She pleaded guilty to the charge. For punishment, the court ordered her to be publicly whipped—21 lashes on her bare back, well applied; and she was also sentenced to prison, at hard labor, for one year. Adam Latham was convicted of fornication. He was sentenced to receive 20 lashes on his bare back, well laid on, in full public view. He was also accused of stealing Isaac Freeland's dark brown gelding, worth 2 pounds 10 shillings. Adam pleaded guilty; for this crime he was sentenced to another four lashes, and was further required to pay for the gelding. Adam had been in trouble over Joan Mills before, charged with "the Sin of Incontinency and fornication." At that time, he was acquitted, but the court ordered him to post bond guaranteeing "good behavior." He had broken his word. Now he was ordered to "weare a Roman T on his left arme on the Outside of his uppermost garment . . . for the space of six months next."[1] These were typical crimes and punishments in colonial America. Published colonial records show hundreds of similar examples.[2]

We note the tremendous stress on visibility. The whipping post, pillory, and stocks stood in the public square. They did not gather dust. Countless men and women felt the whip, or stood in the stocks.

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1. COURT RECORDS OF KENT COUNTY, DELAWARE 1680-1705, at 234-35, 270-71 (L. de Valinger ed. 1959).

2. The trial of Joan Mills and Adam Latham did deviate somewhat from the norm in that a prison sentence was imposed. Colonial society did not, in general, make use of prisons in this way. Society needed workers; a man in jail was not a productive hand. The colonists used jails to detain people waiting for trial or for sentence, or to hold those who did not pay their debts. Whipping, branding, fines, and the stocks were far more common. D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 53 (1971).

When Christopher Lawson, of York County, Maine, came into court "unsevelly," with a "turbilent beheaviouer," in July, 1669, he was forthwith "comited to sitt on ower in the stockes."[3] In the same volume of records we read about Sarah Morgan, who struck her husband, horror of horrors, and was given the choice of paying a fine or standing for a half hour at Kittery, at a public town meeting, with a gag in her mouth and "the cause of her offence writt upon her forhead."[4] The law made common use of brands and badges of shame. A burglar, under the Laws and Liberties of Massachusetts (1648), was to be "branded on the forehead with the letter (B)." A second offender would be "branded as before," and whipped. The third offender would be "put to death, as being incorrigible."[5] Colonies made liberal use of devices such as the bilbo, the cucking stool, and, for military offenders, the wooden horse—all of which carried stigma and shame.

It is commonplace that social forces produce law, directly and indirectly. It follows that different cultures will make law in different ways. In every society there are the rulers and the ruled; some individuals, groups and strata have more power or influence than others; the law that any society makes will reflect the interests of those on top, to the extent of their superior might. But power and influence do not directly act on law. Law—statutes, doctrines, legal behavior in general—comes about only when individuals and groups make *demands* on the system. *Demands* then, rather than interests, are the proximate causes of law. The structure of demands is a cultural factor; no doubt its shape always reveals the powerful pull of long-term pressures, deriving from those with influence and power. But one cannot deduce the catalog of demands current in society directly from a knowledge of the real, objective needs of those with power, actual and potential. Every society rests on a set of implicit bargains about the legitimate limits of law; in every society a set of important attitudes support these bargains.

In every era, we want to ask: what forces had power, real and potential; what were their interests; and what were their demands? These demands need not be solely economic in nature. Power is not

3. 2 PROVINCE AND COURT RECORDS OF MAINE 174 (C. Libby ed. 1931).
4. *Id.* at 224.
5. LAWS AND LIBERTIES OF MASSACHUSETTS 4 (1929).

solely economic. Distinct and important are the demands for the maintenance of *moral* hegemony—demands for a monopoly of respectability, in short, for legitimacy.

We will analyze, in a much oversimplified scheme, three periods of American history in terms of these simple propositions. The three periods are: colonial America, the first two-thirds of the 19th century, and the period from about 1870 to the present. There is nothing neat about these "periods." They do seem, however, to reflect differences in prevailing frames of mind.

We began with colonial America. We cannot sum this period up, of course, in a single glib formula. There were more than a dozen separate "colonies," and the colonial "era" spanned a century and a half. But for much of this period the rulers, particularly in New England, had a clear idea of what crime meant. Crime was a kind of sin. Society's leaders did not easily abandon hope for the sinner. These were, in the main, small societies; they believed, rightly or wrongly, in repentence and rehabilitation. Except for the most hardened and abandoned cases, it was thought that men could respond to pressure and improve their way of life if they were instructed in proper behavior, punished for wrong conduct, subjected to shame and derision from their neighbors, and stigmatized when they strayed from the straight and narrow path. This is the reason why punishment was so open, so public. The man who was whipped in view of everyone was receiving physical punishment; but far more important, perhaps he felt on his back the invisible whip of public opinion. Colonial society hoped to reform the sinner by invoking the mockery and scorn of his neighbors. Of course, everyone knew that a certain hard core would not respond. These people were, first, clearly labeled as the damned; and then, in the most aggravated cases, banished or put to death. Kai Erickson has pointed out that branding marked a person "with the permanent emblem of his station in life." Branding thus made it difficult to restore the offender to a normal social role.[6] Only serious offenders then, or repeaters, suffered this penalty. The death penalty was infrequently used, but it also was an instrument of education. Hanging was as public as whipping. The world could observe the wages of sin.

The records of Kent County identified Andrew Mills and Adam

6. K. ERIKSON, WAYWARD PURITANS 197 (1966).

Latham as laborers. Colonial society was nowhere democratic; indeed, no colonial society even pretended to such an ideal. Society was stratified and hierarchical. To be sure, compared to England, great numbers of people owned property and, therefore, made use of common law institutions and the political process. James A. Henretta, in a study of colonial Boston, found 1,036 individuals in 1687 who paid taxes on real estate or on their income from trade.[7] The population of Boston was then roughly 6,000. Since children could hardly be expected to own property and most wives were effectively outside the economic system, landowners and tradesmen clearly constituted a sizeable percentage of the people of colonial Boston and, therefore, were customers for the tools and techniques of formal law.

At the bottom of the social pyramid were the landless laborers, indentured servants, and, in the South, the mass of blacks held in slavery. What the records make clear is that the weight of colonial social control bore down most heavily upon this underclass. It was not the merchant, landowner, or minister who was whipped in public, branded and set in the stocks. These were punishments for servants, laborers, and apprentices. The people who owned property, the leaders and their willing followers defined what was the correct morality. The criminal law enforced this code, upholding a moral regime that the upper classes no doubt considered universal, but which strained the human nature of their servants. Whatever its ethical base, the code had a cold-blooded function. It aimed to maintain control over a work force on whose labor and obedience the community depended.

From the standpoint of the 20th century, crime and punishment in the American colonies is remarkable because of its emphasis on crimes against morality—particularly what we would now call victimless crimes. But to the colonists every crime had a victim: society. In colonial Massachusetts, the man who blasphemed God, who was idle, who failed to attend church, or who slept with a servant girl was a criminal—and a sinner. He had to be punished in order to preserve the moral order. The argument that these acts hurt nobody would have puzzled and annoyed the good citizens of Massachusetts Bay. The moral order *was* society; injury to one was injury to both.

7. Henretta, *Economic Development and Social Structure in Colonial Boston,* in 1 NEW PERSPECTIVES ON THE AMERICAN PAST 83, 96 table 1 (S. Katz & S. Kutler eds. 1969).

Colonial social control was by no means unique in this regard. Law and order take a similar form in small, face-to-face communities which have clear lines of authority—explicit notions of who is on top and who is on the bottom. Discipline in Massachusetts Bay was not unlike discipline among schoolchildren. We note, for example, Wylie's study of a village in France, where the usual way to punish a schoolchild was through shame—isolating him, and pitting the rest of society against him. Teachers in the village consistently used "mocking criticism" to bring children into line. Sometimes they made a child kneel at the wall, pressing his forehead against it, his hands folded on top of his head. Or they made a child spend recess walking in a circle in the schoolground, hands folded on his head, while other childern mocked.[8] Derision, of course, is a common form of punishment; and, in stateless societies an almost inevitable one.[9] The criminal law of colonial society used a common technique, then, when it invoked public opinion to enforce the rules of moral order. These rules were a paramount concern of that small closely knit community.

The civil side of the law in colonial society also fit the needs and demands of that particular social order. Colonial justice was open and cheap. People did not hesitate to bring disputes to court, even for rather petty claims. In 1639-40, in the Pynchon Court Record of Western Massachusetts, we read of an "action of the Case for 3 boards;"[10] and an action of debt for 2s 6d.[11] In these small communities everyone knew who the judges were and where they could be found. In colonial records we find thousands of small wills processed, thousands of petty complaints, and thousands of local disputes. These show how low the threshold of access to court was, at least in some colonies and in some periods of time. In this regard, too, colonial courts were like the courts of preliterate societies or, in some ways, like the neighborhood courts of Cuba and other socialist countries.[12] In colonial society courts were inexpensive and at

8. L. WYLIE & A. BÉGUÉ, VILLAGE IN THE VAUCLUSE 84, 86 (rev. ed. 1969).

9. *See, e.g.*, J. REID, A LAW OF BLOOD 242-45 (1970); G. VAN DEN STEENHOVEN, LEADERSHIP AND LAW AMONG THE ESKIMOS OF THE KEEWATIN DISTRICT 91 (1919).

10. COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 204 (J. Smith ed. 1961).

11. *Id.* at 209.

12. For a discussion of communist law as "parental" and "educational," see H. BERMAN, JUSTICE IN THE U.S.S.R. 277-84 (1963); Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969).

everybody's door step. No affair was too petty for scrutiny. It was a gossipy, ingrown society. People regularly brought disputes before the courts. The courts settled them—admonishing, governing and teaching. These traits differed, of course, from colony to colony. They were probably most pronounced in the early period and in the Puritan theocratic colonies. In these, law was bossy, parental, and moralistic; but (on the civil side) it was cheap and open of access as well.

In the 19th century the legal system changed dramatically. To be sure, much of the *formal* criminal law was carried over from colonial days. The statute books kept the old moral laws. Fornication, adultery, and blasphemy were still crimes after the Revolution, as they had been before. But this is only the surface; in reality, these laws soon fell out of use. William E. Nelson studied criminal prosecutions in seven Massachusetts counties, between 1760 and 1774, at the very end of the colonial period. He counted 2,784 prosecutions; no less than 38 percent of these (an astonishing percentage) charged sexual offenses, mostly fornication. Another 13 percent, 359 in all, were for religious offenses—blasphemy, profanity and nonattendance at church.[13] These figures confirm that the statutes were part of the living law of the colony. But in the early 19th century, without major change in the statutory base, the rate of prosecution for these crimes declined almost to nothing. Criminal justice turned its attention to crimes against property: crimes such as burglary and theft.

There is evidence that this lack of interest in crimes against morality was generally felt. Francis Laurent carefully sifted the court records of Chippewa County, Wisconsin. Between 1855 and 1894 he found a total of five cases of incest, nine of adultery, four of fornication, and one of lewd and lascivious behavior—not much of a harvest of sin.[14] Jack Williams studied crime and punishment in pre-Civil War South Carolina, hardly a society without sinners; he found few prosecutions for crimes against morality. Indictments for bastardy ran

13. W. Nelson, The Americanization of the Common Law During the Revolutionary Era 126-27, 1971 (unpublished thesis), *as cited in* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 63 (1973). In every fornication case except one (and 95 percent of the sex cases were for fornication), the defendant was the mother of an illegitimate child. Yet Nelson rejects the argument that fornication was punished merely because it burdened towns with support of illegitimate children. He points out that prosecutions were brought even against mothers who had married their partners, and in cases where there was no economic motive at all.

14. F. LAURENT, THE BUSINESS OF A TRIAL COURT 122 (1959).

to about two percent of the total, but many of them were really cases of nonsupport. Incest, bigamy, sodomy, and adultery hardly appeared in court records.[15]

One is welcome to believe, of course, that actual rates of fornication and blasphemy declined in this country in the 19th century. This may be; but such dramatic declines are unlikely. What changed, then, must have been a social factor, which affected the *demand* for prosecution of victimless crimes, and which altered the system of criminal justice. The secular, instrumental men of the 19th century were less interested in the moral code as such, so long as infractions wore a low profile. Colonial magistrates had wanted to build an ideal, godly society. But in the 19th century wealth and opportunity were recurrent themes in the writings (and presumably the thoughts) of the elite and articulate. The task of law was to foster what J. Willard Hurst has called "the release of individual creative energy."[16] People had "sighted the promise of a steeply rising curve of material productivity as the dynamic of a new kind of society";[17] they had a "deep faith in the social benefits to flow from a rapid increase in productivity."[18] Consequently, the main emphasis of the law shifted to the encouragement of economic activity, rather than enforcement of the ideal moral code.

In any event the cozy colonial system of social control was no longer possible. Society was larger, more mobile and transient; it was busy with commercial affairs; rapid technological growth brought constant novelty and complexity. Society was less able to entrust its safety to stigma, shame, and the opinion of neighbors, particularly in the industrial North. Hence, reformers of the 19th century no longer saw society as cleansing and educating, as a hammer of reform and retribution, or as the teacher and parent of men. Rather, as David Rothman has argued, they saw society in a much more questionable role. The peer group was, if anything, corrupting. Bad company, idleness and vice were ever present in society. A rotten environment was ruinous to man. Everyone was "under siege . . . . Once, observers be-

15. J. WILLIAMS, VOGUES IN VILLAINY 55-58 (1959).

16. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 6 (1956).

17. *Id.*

18. *Id.* at 7.

lieved, neighbors had disciplined neighbors. Now, it seemed that rowdies corrupted rowdies."[19]

This was the age in which a new institution, the penitentiary, was devised. In it, the deviant would be *removed* from society, to be reshaped in a monastic, protected environment. Of course, the whipping post did not vanish overnight. It continued to be used, particularly in the South. Many states, such as South Carolina, still hung incorrigibles in public; and people flocked on foot, on horseback, sometimes even on special trains, to see the spectacle.[20] But more and more, imprisonment became the standard punishment for serious crimes.

The old style jails had been dirty, insecure and loosely run. The new prison was radically different. To work reform, prisons had to be redesigned. The two most famous of the early penitentiaries, Auburn in New York and Cherry Hill in Pennsylvania, were both based on the principles of solitude and silence. In Auburn (1821), the prisoners slept alone at night in their cells. During the daytime they worked together in a workshop, but were not allowed to talk to each other, or even to look at their fellow inmates. Cherry Hill (1829) tried to achieve even more radical isolation. Prisoners ate, worked and slept in individual cells. Sometimes they wore masks. They listened to religious services through peepholes. They were utterly silent, utterly alone.

The new penology burst like a bombshell in the world of social thought. Foreign visitors, such as Beaumont and de Tocqueville, came to study the penitentiary in its native habitat. On the whole, the two Frenchmen were impressed by its rigor, its efficiency.[21] Charles Dickens, who came a bit later, visited Cherry Hill and found it horrible: the prisoners seemed to him like men who were buried alive. Isolation, he felt, was a mental torture worse than any "torture of the body."[22] Apparently, few of his peers saw things his way. Certainly contemporaries endlessly argued the merits of the two systems,

19. D. ROTHMAN, *supra* note 2, at 71.
20. J. WILLIAMS, *supra* note 15, at 101.
21. *See* G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1833).
22. C. DICKENS, AMERICAN NOTES 109 (1900); *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 259-60 (1973).

which to us today are as alike as Tweedledum and Tweedledee. But all over the country, legislatures eagerly copied the one or the other.[23]

In its pure state, the silent system could not and did not last. To keep one man to a cell, in solitude, cost a good deal of money; and the money was simply not forthcoming. Penitentiaries gradually became mere prisons; the solitude and silence were surrendered except as a special punishment for troublemakers. By the time of the Civil War even the famous penitentiaries, which had led the way, often slept more than one man to a cell; and only a handful of wardens still made a serious effort to enforce the regulation of silence.[24]

But the basic idea of the penitentiary flourished. Reformers believed that strict regimens, sermons, piety, loneliness and quiet would regenerate a shattered soul. The average man probably rejected the advanced views of the reformers, while agreeing that hard work, regimentation, a spartan life and long sentences were appropriate punishment for crime. Criminals were dangerous to society. They could not be cured through stigma and shame. They, therefore, had to be removed from normal life. Those who were not to be hung or imprisoned forever would hopefully be cured of their tendencies. If not, the prisoner was at least out of harm's way.

Victorian society has a reputation for prudery and sexual intolerance. American society was as prudish in language and official behavior as the corresponding circles in England. Yet, as we saw, apparently nowhere did the law take seriously the job of enforcing the sexual code. The law of divorce also illustrates the complex interaction between official morals and unofficial behavior. Divorce had always been difficult to get, rare and expensive. Absolute divorce was not available at all in England, except through act of Parliament;[25] and in some Southern states before the Civil War divorce was equally difficult and uncommon.[26] Yet in the North, a group of states dramatically relaxed their divorce laws. In Maine, by a law of 1849, any justice of the supreme judicial court could grant a divorce if he felt it was "reasonable and proper, conducive to domestic harmony and

23. C. DICKENS, *supra* note 22, at 108.
24. D. ROTHMAN, *supra* note 2, at 242.
25. *See* Mueller, *Inquiry into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957).
26. *See generally* N. BLAKE, THE ROAD TO RENO (1962).

peace, and consistent with the peace and morality of society." Connecticut, too, had an easy divorce law.[27] The divorce rate was very low by modern standards, but some contemporaries still found it alarming that there should be divorce at all or that divorce rates should rise.

Divorce, however, unlike adultery or blasphemy, could not be allowed to exist in a kind of moral underworld. There was a genuine demand for it for social and economic reasons. For the sake of the legitimacy of children, for security of property rights, for the right to live *legally* with a second consort, divorce was an absolute necessity. Hence, the attack on easy divorce ultimately failed. But the easy *laws* were repealed. They were replaced with tougher, more "moral" laws—laws with a strong, healthy ethical surface—but the collusive divorce and the Nevada divorce mills made the situation one of extreme and blatant hypocrisy.[28]

Yet the 19th century seemed to prefer, even to welcome, this hypocrisy. By all accounts, throughout the century, particularly after the first quarter of the century, there was a great deal of crime, brawling, drunkenness, gambling, and general hell-raising, just as one would expect of normal human flesh. But a rather sharp line was drawn between that which was officially allowed and that which was unofficially tolerated. This is the key, perhaps, to the strange fact already noted: that the state stopped punishing fornication and other crimes against morality, but never repealed the laws against these acts. This may be the very heart of Victorian attitudes toward moral behavior. What had to be preserved at all costs was the *official* code of strict morality. What went on underneath was deplorable, but inevitable, and in a curious way almost acceptable.

Evidence of the dark underbelly of Victorian life[29] throws this hypocrisy into high relief. Victorians on both sides of the Atlantic published and read dirty books, cavorted with prostitutes, engaged in buggery and every form of vice. They drank and gambled to excess. But they seemed to take care not to sin in such a way as to threaten the moral norms publically. A society can tolerate a great deal of deviance, so long as the deviants do not attack the norms themselves, but remain hidden in the woodwork. When deviants become what

27. *Id.* at 60-61.
28. *Id.* at 130-51.
29. *See* S. MARCUS, THE OTHER VICTORIANS (1966); R. PEARSALL, THE WORM IN THE BUD (1969).

Joseph Gusfield has called "enemy deviants,"[30] that is, when they attack the norms themselves and try to overthrow them, they represent a greater (or at any rate a different) danger; and those who benefit from the normative status quo, economically or spiritually, will react repressively.

One such group of enemy deviants was the body of the Mormon faithful, who insisted on practicing polygamy. Many people all over the country were polygamists in fact if not in law. Yet, the Mormons were open, defiant polygamists. A crusade against polygamy followed whose savagery and shrillness can barely be imagined today.[31]

A kind of Victorian hypocrisy also characterized the whole of the criminal law. On paper, every man was entitled to elaborate procedural safeguards. He came to trial wearing the armor of the Bill of Rights; he had a claim to a fair and speedy trial before a jury of his peers, and scrupulous observance of the rules of the game. But during the century, the sheer volume of trials overwhelmed these rights. Society became more serious about catching and trying thieves and murderers. Instead of amateur, haphazard methods of patrolling cities, after 1830 many cities turned to full-time professional police.[32] The police themselves often ignored formal law and fought violence with its own weapons. Masses of people were arrested and treated routinely, almost cavalierly, in court. Rights were never *formally* relaxed. Upper courts zealously combed the records of lower courts looking for errors. The state renounced terror and torture as means to control the lower classes. But, as far as we can tell, the lower courts and the enforcers, particularly in the cities, ignored many of the formal rights. The population never accepted as an absolute good the official legal code. The vigilantes in the West, lynch mobs in the South, and police brutality in the cities all demonstrate over and over that, when the chips were down and the situation serious enough, men inside and outside the system were willing to take the law into their hands.

There was a similar hypocrisy in the civil part of law. American law affected the work and welfare of great masses of people. In the United States, land law was not a remote, aristocratic concern; mil-

30. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOCIAL PROB. 175 (1968).

31. *See* T. O'DEA, THE MORMONS 41-75 (1957).

32. For an account of the origins and early years of two municipal police forces, see R. LANE, POLICING THE CITY, BOSTON 1822-1885 (1967); J. RICHARDSON, THE NEW YORK POLICE 23-51 (1970).

lions dealt in the market, buying and selling land, moving about, getting and giving deeds, using mortgages, drawing up wills. Many borrowed money, or lent it out at interest; it was common to make, endorse, or accept bills and notes. Perhaps, compared to old Massachusetts, a rather lower percentage of the people directly confronted the law. But, if commercial and land law did not touch the life and interest of everyone, they did affect the life and interest of the vast middle class.

To accommodate this mob of "consumers," to release latent economic energy, to maximize opportunity, society developed its law in such a way as to make transactions both safe and efficient, that is, routine. The documents in use were redesigned to become simple, streamlined, and standard. Deeds shrank in size. Businessmen developed form contracts to sell goods on the installment plan. These forms depended, in a way, on the courts. The courts ratified the devices that businessmen developed—devices such as conditional sales, garnishments, and chattel mortgages—and began to process them swiftly and efficiently. At the same time, society seemed to feel that in a market economy the legal system could not both promote efficiency and do strict, careful justice between individual parties. Courts turned their back on what in most societies is their primary and ordinary function—the settlement of disputes. They abandoned people to their own institutions and devices. The law of a mass economy avoids individualization. It reduces transactions to the typical, to the routine; it slices up some small segment of reality and handles it in a standardized way. Behaviors are converted to legally relevant forms. A person pays his debts by check—a piece of paper fixed in form and in legal meaning. Routinization makes a good deal of sense. The work of society could not proceed if judges had to stop to examine each little dispute in a compulsive thoroughgoing way.

It is dangerous, of course, to attempt to read the minds of past generations and generalize about what "society" thought. Yet one senses in the 19th century a widely-held belief that it would be best if people stayed out of court, tending their own affairs. Through law, society established a basic framework, ensuring security to property and contract. Inside this framework people were to do their jobs, getting and spending, making the wealth of the country grow. In American law and, so far as we can tell, in Western law in general, courts gradually withdrew from the basic task of settling everyday disputes.

One bit of evidence is the startling fact, suggested by data from a number of countries, that formal litigation tends not to keep pace with population growth in the industrial nations. During an initial period of expansion (perhaps because of the removal of restrictions left over from the medieval past), the caseload rises; but with mature industrialization, the number of cases per 1,000 population turns static or even declines. In England, where judicial statistics after 1850 are relatively good, the number of cases filed in court rose throughout the 19th century—perhaps less, however, than one might expect. In the 20th century, the trend reversed itself.[33]

In the long run, cost was an important monitor of the case loads of courts. Litigation seems to have become more and more expensive. High costs raise the threshold at which it makes sense for a person to funnel disputes into court. Colonials litigated over pennies. Many matters got to court or were appealed that could appear today, if at all, only in a small claims court.

Costs of litigation defy precise measurement, especially in the past. The largest element, for example, is the lawyer's fee; but this does not show on the face of the record. This fact itself is an interesting historical footnote. American courts do not award attorney's fees to the winner of a lawsuit, as do the English. The American rule seems to date from around 1850.[34] Supposedly, this rule was an historical accident, but if so, it was a suspiciously convenient one. What the rule does, of course, is raise the threshold of suit. Even a winning party loses, unless damages cover the attorney's fee and then some. The natural result of the American rule is to discourage small claims and noneconomic causes of action.

Delays and overcrowding also raise the price of a lawsuit. Colonial courts did their business quickly. They had no backlogs. Of course, these were not mass societies. Great delays occur when judges and staffs are inundated by the volume of cases. This happens in a society with a huge population. But when one considers how economical it is to run a system of justice, compared to schools, hospitals, highways, or armies, one wonders why society was never willing to spend a few

33. *See* CIVIL JUDICIAL STATISTICS 19 (1972) (Comparative Table: Courts of First Instance—Proceedings). An unpublished study of litigation rates in Spain by Jose Juan Toharia shows similar results for recent decades, a period of rapid economic growth in that country.

34. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 72 (1966).

dollars more in order to expand the system and meet growing needs. One senses a feeling, implicit no doubt, that a logjam in court is not all to the bad. It discourages litigation. Then too, the country has allowed its lawyers to unionize (as it were), raising standards and fees; it has refused to subsidize litigation, and it has made, until recently, only feeble attempts to provide cheap justice for the poor.[35]

Most important of all, perhaps, is the nature of law itself. Legal rules and procedures are impersonal and remote, dryly technical, forbidding. Law in the urban, industrial countries is very different from law in small societies. Legal and social norms are much the same in small societies; everybody knows a lot of law since it is nothing special to know.[36] Colonial law had some smattering of this aspect. The law was technical in detail, but in broad outline it spoke an everyday language.[37] A high degree of technicality will inevitably discourage litigation. If justice is mysterious, if law resembles a lottery, people will be unwilling to take a chance even if they feel morally secure in their cause. An unpredictable outcome is a high cost, high risk result.

All these factors create a zone of behavior which one might call a "zone of reciprocal immunity."[38] Landlord and tenant sign a lease agreement. The tenant promises not to play his radio loud or late at night. The landlord promises to keep the outside stairway in repair. Each violates a little. Because litigation is costly, because there is no neighborhood court, because justice is risky, far-off, and expensive, each is in a way immune from legal attack, at least for these minor infractions. They must settle the matter themselves.

On the whole, a system of reciprocal immunities may be quite functional in a society of our type. We do not want people running to court at the drop of a hat. But this sort of system produces severe and dangerous side effects. Compared with other societies and other periods, Western legal systems have removed the bulk of the population from any voluntary contact with the courts. The system of immunities on the whole favored business over private citizens; it was,

35. *See, e.g.*, J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR (1967).

36. *See, e.g.*, S. SCHLEGEL, TIRURAY JUSTICE 163 (1970).

37. On this point, see W. Nelson, *supra* note 13.

38. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 806 (1967); *see* M. Galanter, Why the Haves Come Out Ahead 17 n.29, August, 1973 (unpublished paper on file at the *Buffalo Law Review* office).

therefore, itself a device of allocation. The 19th century, practically speaking, denied justice to the poor and the powerless. Redress of grievances through law was distinctly abnormal. There may have been, in absolute terms, a tremendous volume of litigation. But the man in the street did not use courts to adjust his problems or settle his disputes. The average man was left alone, separated from whatever wisdom, understanding, and justice may inhere in the formal principles of law.

Nor was the situation of the lower middle class much better. The courts did not and could not reach out for the business of the common man even if he were an entrepreneur of sorts. It may be that courts in urban, market societies simply cannot play the role that a tribal or village court plays. American courts, however, never tried, though a certain number of schemes helped patch the system up, helped mitigate some of the most severe defects of justice.

Many scholars, looking at the legal system in the first part of the 19th century, have come away impressed with a sense of economic optimism. Obviously, many things were palpably wrong with the country. A gigantic failure to solve problems of region and race brought on the great Civil War. Cycles of boom and bust destroyed thousands of homes, businesses, farms, and fortunes. Yet overall, people believed that America was a land of opportunity, that in the long run economic horizons would constantly expand, that the stock of national wealth would grow larger and larger. Here, then, was a second period of American justice—a period of rapid growth in society and rapid change in law. Criminal justice and civil justice alike ceased to be concerned with the individual as such. Rather, they became responsive to the socioeconomic needs of the society (as courts and legislatures interpreted these) through routinization of transactions on the civil side, and through routinization and professionalization of law enforcement, the penitentiary system, and the stressing of the protection of property rather than morality on the criminal side.

The age of optimism did not last forever. By the end of the 19th century it seemed to have come to an end, and a new, third period can be said to have begun. A sense of crisis, a kind of darkening of mood, seemed to seize the country. Concrete social change underlay this shift in the climate of opinion. Much of the population lived in big cities, which seemed more and more rotten, filthy, crime-ridden, ugly, crowded, and corrupt. People deserted the wholesome life of

farms and small towns for the dreary life of factories and slums. New inventions and techniques made life healthier, but somehow complicated it beyond the grasp of the average man. The frontier passed away. There was no more free land at the end of the rainbow. Never mind the question of how real the frontier had been, how much of an outlet it was for American energies. It was the symbol of unlimited opportunity, and by 1890 or 1900 it was gone. By this time many in the middle class felt that something vital had disappeared from American life. There was no longer room in the economy for everyone; social life was a struggle for survival. What one gained, another lost. The economy could not expand forever. The spectre of class struggle hung over the nation. Interest groups jockeyed for power and position, more blatantly than before.[39]

A certain paranoia set in on the subject of race. This was the period of lynch law and the furor over the so-called yellow peril. At one time the country had welcomed immigrants. The country wanted settlers and workers. Immigrants would create a demand for land and commodities; land values would rise and the economy would gain. Of course, people had in mind only a certain kind of immigrant. When others took the welcome sign too literally, nativist reaction developed. The debates over the Chinese at the California Convention of 1878-79 make hair-raising reading: one speaker denounced the Chinese as "moon-eyed lepers"; speaker after speaker expressed fear of cheap coolie labor. The Chinese would destroy white civilization and pauperize the people of California: "If clover and hay be planted upon the same soil, the clover will ruin the hay, because clover lives upon less than the hay; and so it is in this struggle between the races. The Mongolian race will live and run the Caucasian race out."[40] John R. Commons felt that immigrants from northwestern Europe—Germans and Scandinavians—were from the start the model farmers of America; they had qualities of thrift and self-reliance and pursued intensive agriculture.[41] The Jewish immigrant on the other hand was "unfitted for the life of a pioneer."[42] Commons drew a line between the "thrifty, hard-working and intelligent American or Teutonic

39. L. FRIEDMAN, *supra* note 22, at 295-99.

40. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 700, 704 (1881).

41. J. COMMONS, RACES AND IMMIGRANTS IN AMERICA 133 (1913).

42. *Id.*

farmer," and the "backward, thriftless and unintelligent races," who worked best "in gangs in large estates."[43] "Races wholly incompetent as pioneers and independent proprietors are able to find a place when once manufactures, mines and railroads have sprung into being, with their captains of industry to guide and supervise their semi-intelligent work."[44] Attitudes such as these helped mold a body of immigration law that became more and more restrictive and complex. The first step was to exclude the Chinese. Ultimately, the federal government put sharp limits on entry and adopted a quota system in 1924. The quotas discriminated, of course, against the "incompetent races."[45]

It is particularly interesting to note in the history of immigration law how fear of the effect of immigrants on the economy is mingled with moral or cultural horror. Both motives were behind the movement to exclude the less-favored immigrants. Perhaps the economic mood caused the moral mood; perhaps the lines of causality ran the other way around. At any rate, by the turn of the century millions were displeased with the national prospects. Industrialism was a monster that had run amuck. The mobs of "incompetent races" who flooded the country only stimulated the growth of this monster and, in the process, drove down the wage rate. Tremendous industrial combines were forming. Small businessmen, farmers and merchants trembled in fear of their power. Today, fear of the "trusts" seems as overwrought as fear of Chinese workers. But in the days of the Sherman Act, passed in 1890,[46] the fears were certainly real and in deadly earnest.[47]

Naturally, each major concern bred a mass of new law. In the struggle for existence, the power of the state was one of the most useful of weapons. In the late 19th century, economic interest groups multiplied in number. The urge to organize stemmed, at least in part, from the natural feeling that in union there was additional strength; and strength was sorely needed in difficult times. The interest groups fought each other in the marketplace and occasionally on the streets, but primarily in the halls of the legislatures. Unions, for example,

43. *Id.* at 132.
44. *Id.* at 133-34.
45. *See* G. STEPHENSON, A HISTORY OF AMERICAN IMMIGRATION 1820-1924, at 170-92 (1926).
46. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1973)).
47. *See* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54-71 (1965).

wanted legitimacy for their tactics; and when those tactics failed, they wanted to win through law what they could not gain through bargaining and fighting with management.

This was only one instance of the use of law to achieve organizational aims. Occupational licensing was another. Doctors, lawyers, barbers, plumbers, nurses and accountants lobbied for licensing laws. Licensing was a way to give control of a trade group to itself, along with the power to keep out the marginals and support the prices and prestige of the members. A whole array of occupations, ministering human wants from cradle to grave (from midwives to morticians and embalmers), asked for and got the right to be licensed. Even coal miners were briefly licensed in Illinois.[48] The form was novel, the concept was not. In general, workers joined unions, farmers joined farm organizations, businesses belonged to trade associations and formed combines. The middle class trades licensed themselves.[49]

Along with the economic struggle raged a fight for normative domination. The Victorian solution slowly broke down. Deviant minorities burst into public view, bringing uneasiness and pain to the moral majorities. The process was, and is, slow and complex. Frequently, the moral majorities fought back. When deviants openly defied them, they had no choice but to repress—or else surrender their claims to moral superiority. Consequently, after a long period of relative quiet, a number of dead moral laws seemed to spring into life, and new laws on similar subjects were passed. Sometimes the motives seemed mainly economic. Toward the end of the century, the Sunday laws were the focus of enforcement campaigns in many cities. Labor strongly supported these laws. They wanted to win a shorter work week for their members, and Sunday laws were a useful means to that end.[50] But ministers and preachers were their willing accomplices; labor and religion formed an odd but understandable coalition. Arguably, Sunday laws were all show and hypocrisy—economic laws masquerading as moral legislation. But probably the moral disguise which the economic motives wore was not wholly lacking in meaning. If the

48. Act of June 1, 1908, [1908] Laws of Ill. 90.

49. Friedman, *Freedom of Contract and Occupational Licensing 1890-1900*, 53 CALIF. L. REV. 487 (1965).

50. L. FRIEDMAN, *supra* note 22, at 511-12; *see, e.g.*, Act of May 25, 1897, ch. 188, [1897] Laws of Conn. 883. Of course, Sunday laws had been enforced off and on throughout the century. For some glimpses of this complex history, see W. JOHNS, DATELINE SUNDAY, U.S.A. (1967).

concept of a Sunday full of harmony and rest had had no power of persuasion, the unions could not have put together a coalition with the religious.

Many other signs of a resurgent moral militancy appeared at the end of the 19th century. The federal government crushed interstate traffic in lotteries in 1895.[51] The temperance movement became stronger and ultimately achieved a disastrous success. Joseph Gusfield, for one, interprets the temperance struggle as a struggle for normative dominance, a struggle to show the "superior power and prestige of the old middle class in American society."[52] In the early 20th century, some states even tried to ban the cigarette. One of these states was Arkansas, which, in 1907, made it a crime to make, sell or give away cigarettes or cigarette papers to anyone, child or adult.[53] In the same year, Arkansas prohibited betting on horse races[54] and passed a law against malicious disturbance of church congregations by "profanely swearing, or using indecent gestures," violence, or any "language" or act which would "disquiet, insult or interrupt said congregation."[55] This period too had the honor of ushering in a crusade against drugs and addiction. Arthur Conan Doyle described how Sherlock Holmes, as one author has put it, "relaxed at the Baker Street flat after his bouts with Professor Moriarity by summoning Dr. Watson to prepare him a needle."[56] There was little or no opprobrium attached. Troy Duster has written that in 1900, "[a]nyone could go to his corner druggist and buy grams of morphine or heroin for just a few pennies. There was no need to have a prescription . . . no moral stigma attached to such narcotics use."[57] Within 20 years, the law savagely proscribed the addict, who was now labeled a dope fiend; severe federal and state sanctions were imposed, and the country embarked on the dubious adventure of trying to stamp out drug use through repressive measures. Finally, in 1910, another nightmare or fantasy of a beleagured moral

51. Act of March 2, 1895, ch. 191, 28 Stat. 963 (codified, *as amended,* at 18 U.S.C. § 1301 (1970)). Lotteries, common in the early part of the century, were outlawed in many states. *See* J. EZELL, FORTUNE'S MERRY WHEEL (1960).

52. J. GUSFIELD, THE SYMBOLIC CRUSADE 122 (1963). *See generally* D. PIVAR, PURITY CRUSADE (1973).

53. Act of May 8, 1907, No. 280, [1907] Acts of Ark. 653.

54. Act of February 27, 1907, No. 55, [1907] Acts of Ark. 134.

55. Act of May 9, 1907, No. 287, [1907] Acts of Ark. 682.

56. R. KING, THE DRUG HANG-UP 17 (1972).

57. T. DUSTER, THE LEGISLATION OF MORALITY 3 (1969).

majority gave rise to the Mann Act, which outlawed "white slavery."[58]

We are paying a heavy price for some of these nightmares. Arguably, prohibition created a generation of lawbreakers, unwittingly vested immense power in gangsters, corrupted officials, and distorted the administration of justice.[59] Similar charges are leveled at the modern enforcement of drug laws.

More hopeful and productive was another breach of the Victorian compromise. This was the revolt of the underdogs themselves—the refusal of the downtrodden to accept their labels. It included the insistence of moral minorities on the right to their own view of life, not secretly, but *de jure,* right up front. This revolution is quite recent. It has been influenced strongly by the example of the civil rights movement, which is in one sense as old as slavery, but in another sense distinctly a product of the 20th century. Some might think that to put under one roof the civil rights movement and the revolt against moral taboos (obscenity, blasphemy, and non-Biblical behavior in bed) trivializes the struggle for racial equality. But this much is held in common: unwillingness to abide by Victorian arrangements. These were arrangements made with the expectation that the lower orders —"lower" in the social, economic, and also the moral sense—would more or less stay in their place.

Numerous devices fastened down the Victorian arrangements, and convenient ideologies and myths buttressed them. It is not the purpose of this paper to examine this subject in detail. However, some of the myths and ideologies might be mentioned. One was equality before the law. Obviously inequality was rife, not to mention corruption, but a system of beliefs justified or excused inequalities. Among these was the belief that the United States was a country of great social mobility. Most influential was the notion that nothing much could be done to redistribute power and wealth without ruining the country—that is, nothing which was radical or required active state action. Economists and their popular spokesmen told the country that only disaster could result from interference with natural laws. No one believed this entirely, but enough people believed it enough to keep the country politically calm—at least for a while. But faith in the invisible hand lasted only as long as the optimism of the formative

58. Act of June 25, 1910, ch. 395, 36 Stat. 825 (codified, *as amended,* at 18 U.S.C. § 2421 (1966)).

59. A. SINCLAIR, ERA OF EXCESS 178-219 (1964).

period. When the hand dealt bad cards, the players began to cheat. This ushered in the age of the pressure groups.

Whatever the causes, 20th-century man seems less inclined to accept the social order as a given and his place within it as fixed. He demands for himself, his interests, and his aspirations, recognition and legitimacy, as well as practical achievement. There is, consequently, a massive demand to close the gap between the official surface of the law and the reality. Already in the late 19th century, devices to improve the administration of justice and access to the law had developed; the pace of these changes quickened in the 20th century.

The law of obscenity provides us an excellent example. Pornography itself was centuries old.The first amendment to the Constitution —and a rather strong national tradition—protects freedom of speech. Yet no one in the 19th century imagined for a moment that "free speech" included hard core pornography. Pictures and descriptions of sex were taboo, except for medical and scientific purposes, or behind a screen of euphemism. Nudity on the stage or in live sex shows was out of the question. There was no demand for these entertainments, no test cases; the idea was simply unthinkable. The United States Supreme Court did not decide an obscenity case until after the Second World War.[60] This first case dealt with Edmund Wilson's novel, *Memoirs of Hecate County.* The Court divided equally. Not even a Bible-belt schoolmarm would blink at the book today, with the *Kama Sutra* and *Lady Chatterly* in every drug store, to mention only the mildest examples. Since 1948, the law has amazingly expanded the public zone of sexual expression—what can be said, seen, touched, felt, and done in the open. Whether there is a similar explosion of sexual behavior is much less clear. No doubt behavior has changed and will change further, but the initial and more dramatic change is in the balance between licit and illicit, between what is flaunted and what is hidden. Indeed, one of the best examples of the new permissiveness is John Cleland's book, *Memoirs of a Lady of Pleasure,* commonly called *Fanny Hill,* written in the late 18th century but safely underground until about 10 years ago. The question whether *Fanny Hill* is obscene

60. Doubleday & Co. v. New York, 335 U.S. 848 (1948) (per curiam), *aff'g* 297 N.Y. 687, 77 N.E.2d 6 (1947). The next obscenity case did not come before the Court until almost 10 years later. Roth v. United States, 354 U.S. 476 (1957).

has been adjudicated by the United States Supreme Court itself;[61] it goes without saying that never before in its two hundred years would this book have dared show its face in public. Yet a market for pornography existed in 1800, 1850, and 1900. There were people who wanted to read *Fanny Hill,* and who were willing to pay for a copy. What was lacking was an appreciable demand on the law to legitimate that market. People were content to remain underground in their lechery, or resigned to this fate. There were deviants, but not enemy deviants.

What does this history suggest? Law, we have said, is a kind of map of interests and demands. Its structure and substance betray current conceptions of law and current concepts of the legitimate limits of law. Law reflects the agenda of controversy—the things that are in actual dispute. It also gives strong negative evidence about which issues are *not* in dispute, the things that nobody questions. The issues in dispute are demands and counterdemands. When we speak of a crisis in law, civil or criminal, we mean a crisis in demands. Clearly, in the third and present period, which began roughly a century ago, two distinct pressures on law have produced such a "crisis." First, the oppressed and the deviant have demanded legitimization; second, counterpressure has developed from the old majorities, whose moral and economic dominance has been threatened.

The current agitation about law and order—crime in the streets—is a meeting ground or battlefield of these two armies, pushing against the legal structure from opposite sides. Most people assume that crime is rampant in the cities; a walk in the streets after dark is perilous. Also widespread is the idea that life in the cities is rotten and corrupt, and getting worse. This, of course, is not a new idea. The bad reputation of the cities is centuries old. But there seems to be an increase now, a stridency in the fears and demands of broad masses of people.

Yet in the face of this clamor, some scholars flatly proclaim that the crime wave is a myth. Over the long haul, they say, violent crime has, if anything, declined in the cities.[62] Urban crime may have jumped, but only in the last few years, and even that is disputed. New

61. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

62. *See* D. BELL, THE END OF IDEOLOGY 151 (1962); Lane, *Urbanization and Criminal Violence in the 19th Century,* in VIOLENCE IN AMERICA 468, 469 (H. Graham & T. Gurr eds. 1969).

York and other big cities, it is argued, were hot beds of crime in 1870 to a much greater extent than today.

If so, then what is the crisis in crime? First of all, it is possible that something real *has* happened to the crime rate. People care less about raw numbers of crimes than about the kinds of crime, who commits what acts, in what places, how, and to whom. It is one thing for crime to run rampant where the middle class never penetrates, in places it cares nothing about; but it is quite another thing for those same crimes to be committed in a city in which everyone is interdependent and within striking distance of one another. This is the condition of cities in a mass society, with mass mobility, and in which slums gird the core of the city. The "dangerous classes"[63] once lived in tight districts, out of sight and almost out of mind. Now no place is safe. The paths of those who live in the slums cross the paths of the rich on their way to work, theaters, restaurants, and banks.[64]

Much violence in the past took place outside the cities. In a raw frontier community, a Dodge City let us say, grown men committed violent crimes—many of them on other grown men. What horrifies people today is violence committed on the helpless and the innocent. When an addict murders an 80-year-old widow, the statistic is the same as when one gunfighter shoots down another. Socially, however, the two crimes are quite different. In one case victim and killer stand on an equal footing. Both entered a violent world, more or less of their own free will. In the other case, the relationship is involuntary—a relationship of predator and prey.

Even so, the crisis in law is a crisis of demand. Whether or not conditions have gotten worse in the outside world, the tolerance level has certainly declined, and correlatively, the level of demand that something be done has risen. The demand for an attack on crime is a demand for sterner police measures, tougher prisons, less "permissiveness." It is tied—not logically but emotionally—to fear and hatred of the moral minorities and of the unruly and political factions of the underprivileged. The demands of *these* people have brought about great improvements in access to law and in the administration of justice. Demand now meets counterdemand of equal or almost equal

63. *See* C. BRACE, THE DANGEROUS CLASSES OF NEW YORK, AND TWENTY YEARS WORK AMONG THEM (3d ed. 1880).

64. *See generally* Silver, *The Demand for Order in Civil Society*, in THE POLICE: SIX SOCIOLOGICAL ESSAYS 1-24 (D. Bordua ed. 1967).

strength. There is no obvious short-run solution to the clash of these sets of demands.

The third period, then—our period—is a period of conflict and struggle in the two specific areas we have stressed. There has always been conflict and struggle, but the current forms seem particularly nasty and sharp. This is because the moral world appears to have lost some of its classical shock absorbers. The unshakeable faith of the colonial elites is gone. The 19th century was fortified by faith in economic growth and a basic stock of moral principles. Now old compromises and accommodations have lost much of their strength. Opposing forces are struggling, not only for power, but also for legitimacy; and legitimacy is not easy to share. No doubt there will be new accommodations and new compromises; but their shapes and sizes, at least for now, are not visible to the naked eye.