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Fixing the Sentence

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Kiran Mehta

Fixing the Sentence*

In *Judges and Convicts: The Principles and Patterns of Criminal Sentencing in Victorian England*, Victor Bailey looks to explain how sentencing policy was fixed in the 19th century. In the course of his study, he charts the shift away from capital punishment, the creation of the new punishment of penal servitude, and finally, a remarkable mitigation of sentencing severity in the second half of the century. In his account, judges take center stage. Bailey argues that in the century-long struggle for control over sentencing policy between the legislature, executive and judiciary, the judiciary came out on top. They secured »the maximum discretion in matters of sentencing«, developed a »reasonably coherent sentencing structure«, and drove the shift towards more lenient sentencing (4, 122). Bailey's book consciously responds to contemporary and historical critiques of the English judiciary, and to a large extent, his work should be read as a spirited defence of that body.

Rather than a study of sentencing policy of all criminal courts across Britain, Bailey restricts his focus to England and to the punishment of serious crime by three bodies: the Assize or high court judges who rode in circuit throughout the country twice a year; the judges of the Central Criminal Court; and the judges of the Middlesex session. The latter two courts, both in London, met more regularly than the Assize and were selected by Bailey because they were two busiest metropolitan courts in England.

The first two chapters provide background on the criminal justice system in Victorian England. Chapter one focuses on the high court judges themselves. Bailey provides detail on the judges' backgrounds, experiences, politics, religious affiliations and legal training. He uses such personal detail to argue that the judges were part of a »highly centralized and tightly knit« group of legal professionals with a »shared legal culture or *habitus*« (14, 22). This profiling of the judiciary is very welcome as most previous studies of criminal sentencing practice have paid rather less attention to the individual judges, their backgrounds and personalities.

The second chapter provides a brief introduction to the higher criminal courts in England. Not only does Bailey discuss the number and range of cases that judges handled (the business of the court, in short), but he also paints a picture of life as a judge and provides insight into how judges viewed the courts. The chapter concludes with a more general discussion of the study as a whole. It is here where Bailey explains how and why he chose particular years and courts on which to focus. He also touches on the weaknesses and limits of his sources. From this discussion, it is clear that Bailey mainly relied on records that he could access online or digitally.

Chapters three and four look to uncover the principles of judicial sentencing. These chapters are not concerned with change over time. Instead, they draw on cases and practices from across the period under study. He eschews a quantitative study in favour of taking »periodic soundings« of the judges' sentencing practice as preserved in press reports and digital transcripts of trials, which allow him insight into the considerations shaping judges' thinking (55). Bailey explicitly writes against the view that sentences in Victorian England were inconsistent and unequal, and that judges lacked rules or principles governing their sentencing decisions. Instead, he aims to show that between the mid- and late-Victorian period English, judges used the wide discretion afforded to them to develop »their own jurisprudence of sentencing« based on the *habitus* they shared with each other, sketched out in chapter one (55). For Bailey, Victorian judges believed that offenders deserved punishment and that the severity of the penalty should be determined by the gravity of offence and the offenders' culpability. Judges first fixed the fundamental gravity of the offence before looking to aggravating and mitigating factors associated with offender and the crime.

* Victor Bailey, Judges and Convicts. The Principles and Patterns of Criminal Sentencing in Victorian England, London: Routledge 2025, 360 p., ISBN 978-1-04104-037-8

The remainder of chapter three explores aggravating factors. We see that the courts considered not just the circumstances surrounding the offence but also the offender. The most important aggravating factors were an offender's previous convictions and evidence of the offender's professional or habitual status. In England today, it is viewed as wrong to »sentence on record«, but in the Victorian years, many judges used previous convictions and evidence of professionalism to increase a prison sentence beyond what the gravity of the offence merited (81). In chapter four, Bailey turns his attention to mitigating factors. Except for crimes of murder, judges had full discretion to decide if an individual case merited leniency. In making these determinations, they were assisted by the jury, and judges generally felt compelled to accept a jury's recommendations.

At times, these chapters could have benefitted from a more quantitative approach to sentencing practices and patterns. For example, it is hard to reconcile Bailey's view that an offender's »respectability« or class did not result in more lenient treatment with some of the evidence that he presents. Nevertheless, they clearly establish two of Bailey's main claims: first, that there was considerable continuity in the practice of judges between the 18th and 19th century, and second, that at mid-century, judges were »steering by the maximum« – that is, their sentences more often approached or realised the maximum penalty for the crime.

Chapters five to eight take a chronological approach to the development of sentencing practice. Chapter five considers sentencing up to 1853. This period saw the dramatic dismantling of Britain's »Bloody Code« whereby Britain went from having the most extensive capital jurisdiction in Europe to restricting the death penalty to a small handful of offences. This shift, Bailey argues, enhanced the role of judicial discretion, giving judges greater control over sentence length, which they used to push for more lenient sentencing. Here he forcefully contests Vic Gatrell's well-known depiction of early Victorian judges as eager executioners.

The other chapters are concerned with the period from 1853 onwards and specifically with the judges' engagement with the new system of penal servitude. Penal servitude was a sentence of long-term imprisonment, established in 1853, which came to replace convict transportation to colonies overseas. Through detailed qualitative and quantitative analyses of sentencing practice, Bailey shows the key role that judges played in shaping England's penal system, in particular by blunting legislative and executive policies that aimed at punishing convicts more severely. As chapter nine further shows, penal servitude was dramatically rolled back in the late 19th century, and a key consequence of the judges' practices was the shrinking of the prison population.

The final substantive chapter offers explanations for the swerve towards leniency in sentencing. Bailey insists that the most important reason was endogenous to the realm of sentencing. Specifically, as judges slowly started to establish »going rates« for offences, they increasingly steered by their own scale or standard of punishment (»steering by the tariff«) rather than »steering by the maximum« (289, 300). These practices tended towards sentencing leniency, and they helped to substantiate supreme judicial control over sentencing standards.

Bailey sees in his study of 19th-century judicial sentencing important lessons for the present, as his short conclusion makes clear. Bailey believes that since the late 20th century, »political interventions [have] distorted proportionality in sentencing« in Britain, driving up sentence lengths and creating severe overcrowding in prisons (316). He offers his work on the 19th century as evidence that, when judges had more discretion to determine sentencing policy amongst themselves, they reduced the tariff of sentencing for serious crime and delivered »60 years of unwavering moderation in sentencing practice« (317).

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