

EDITORIAL, September 2013

In this, the second issue of 2013, we have what constitutes a ‘bumper’ issue (thank heavens for the elasticity of e-journals!). Consequently, we have decided to present the article content in two halves in order to highlight the complementary articles on war crimes, rather than going for a simple alphabetical order. We are also delighted to have several book reviews, as well as two conference reports and a current issues commentary. This issue presents to you a change to the editorial team also: Kim Stevenson and Judith Rowbotham remain editors, but Cassie Watson – that key interface for anyone submitting articles and other material to us – has decided to hang her editorial hat up. We are so very grateful (as, we know, are the authors of the various articles we have published over the life of the journal) to Cassie for her sterling efforts, both in helping to shape the intellectual framework of the journal and in laying down the practical guidelines for article processing etc! However, she is replaced by Samantha Pegg, another SOLON Director. Sam has previously published in the journal and so knows the refereeing process from that side and has, from 1 September, started to work on the other aspect. We are very happy to be working with Sam and are sure that authors will also appreciate the interaction with her! Also, it should be noted that Judith Rowbotham will no longer be located at Nottingham Trent University, and that her contact details are therefore changed.¹ She has decided to take the gamble of becoming an independent scholar as no opportunity at another HE institution has offered itself as an alternative to Nottingham Trent. This means that she remains affiliated to SOLON, but not directly within the formal academic system (something she regrets, but she sees this move as the only way to continue her own work and work with SOLON which she wants to be her priority).

In terms of contextualising this issue’s contents, we publish at a time when the law in action and proposals for new legislation which could materially affect the current legality of citizen actions are much in the news. There is, for example, a genuinely heated debate involving substantial public contributions about various aspects of government policy (past and present) which showcases an official will to control, via the law, access to information. One aspect relates to the so-called ‘gagging law’, or more formally the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill. Howls of outrage have gone up from expected parties such as the Unions but also from more unexpected groups like charities. While there may be a will to see an appropriate register of lobbying groups, an examination of a range of websites, on-line blogs and campaigning groups, and the mainstream media shows a widespread public unease which is not just confined to the

¹ Find her, instead, at Judith.Rowbotham@gmail.com or on her forthcoming webpage.

organisations which would be directly affected about plans which could significantly enhance government control over information placed legally in the public sphere. We do not touch on the likelihood of success of such a Bill were it to go through in its current form, but rather note the level of public engagement it has aroused. Then, after a campaign sustained through the media and electronic sources also, the situation which has existed for the last quarter century of what amounts to a blanket ban on publicity relating to proceedings in the Family Division is being modified, not by government (despite regular lobbying) but by the President of the Family Division himself, in the shape of Lord Justice Munby. Back in 2010, in the context of the passing into law of the Children, Schools and Family Act 2010, Lord Munby delivered the Hershman Levy Memorial Lecture, taking as his theme 'Lost Opportunities: Law Reform and Transparency in the Family Courts' He had warned of the dangers of ignoring calls for greater transparency of proceedings in those courts, advocating a move to a more judicious sharing of information via the media. On 5 September, in the wake of the passage of the Crime and Courts Act 2013, Lord Munby took action to remedy that missed opportunity. In delivering his judgment in *Re J (a child)* [2013] EWHC 2694 (Fam) he commented that there is 'a pressing need for more transparency, indeed for much more transparency, in the family justice system'. This amounts to what has been widely described as a 'landmark judgment', viz: that in future, there should be a presumption in favour of publication of proceedings unless there were 'compelling' reasons to abstain! It does provide a nice irony that both government and a member of the judiciary are discussing the need for transparency in such diametrically opposed ways. But both relate interestingly to the two general articles we publish, on extortion in its politico-legal dimensions and on the point and purpose of publicity given to executions at a time when capital punishment itself was the target for debates on legal reform, during 60 years leading up to 1867 and the abolition of public executions.

The main theme of **Joseph Bonica's** article relates to terror in historical context, and how fear of consequences leads to consent to extortion. As the author points out, this is something which has politico-legal implications as well as the (to the modern mind) more obvious ones rooted in criminal law. The article highlights early American sensitivities to the issue of extortion by the state and its agents, and linking it to the resistance to despotism that was core to the coalescence of a national identity. Thus early American comprehension of extortion was rooted in the relationship between citizen and government (local and national); and it is argued that that was how American law consequently perceived extortion. Bonica then uses this to reconceptualise the issue of sexually-based extortion (or blackmail) as an essentially political matter, rather than one of cultural identity. This provides not only a fascinating perspective on an under-studied area of criminality in the shape of extortion but

also, opens up a very interesting area of speculation relating to another legal history area: that of honour crimes and shaming mechanisms and the political dimensions to these. One early footnote suggests that the reason why this reaction to sexually-based extortion seems, in nineteenth century America, to represent a new development could link to the lack of an aristocratic class where women had the power which enabled them to challenge male control over consent. But reading the article leads to a consideration also of whether this might link as much, if not more, to the relative absence of long-established honour systems, certainly in the Northern states; systems with an inexorable political force because created by settled values and identities and bolstered by kinship or 'blood' links and so necessarily recognised in law. It seems to suggest that another confirmation of the arguments put forward by David Nash and others in *Shame, Blame and Culpability* (eds Rowbotham, Muravyeva and Nash, Routledge SOLON, 2012 reviewed in this issue): shame cannot be considered something characteristic only of pre-modern societies. Because of the political dimension which is inherent, if not often expressed, the power of a public shaming process is discernible in modern societies, as a punishment for wrongdoing whether that wrongdoing is purely moral or actually criminal. Implicit also in this article is the message that an American honour system was (like more traditional European honour systems) profoundly gendered. The core to one of the early American 'cowboy' novels, *The Virginian* (Owen Wister, 1902) is a conceptualisation of what constitutes male honour (what a man must do to be a man; including taking the law into his own hands to preserve his personal honour). But that novel was also deeply political; explaining and justifying the development of the West and how it fitted itself for incorporation into the federal unity of the USA; including, interestingly enough, a couple of episodes featuring extortion. This is a thought-provoking piece which we are very happy to publish.

John Wallis's article focuses on the reportage in the provincial press of executions at Norwich Castle between 1805 and 1867 – which includes that mid-century period when crime reportage emerged as a distinctive and professional enterprise in the national press, with real implications for the provincial press.² The article confirms that the Norfolk experience was similar to that elsewhere, and in emphasising the low percentage (6% overall) of those actually executed after being found guilty, it is in line with the work of other scholarship in this area, by Vic Gatrell, Howard Taylor et al. In the discussion of the differences in reportage styles pursued by both papers, the political orientation of both is nicely explored. There is little focus on the actual trials, as this is not the author's purpose

² This is something which will be discussed in greater depth in the forthcoming publication, *Crime News in Modern Britain, Press Reporting and Responsibility 1820-2010* (Judith Rowbotham, Kim Stevenson and Samantha Pegg, Palgrave Macmillan, 2013).

(as he says, there has been too little written on the reportage of the provincial execution ritual). His focus is on the discussion of the perception of how execution worked as an appropriate punishment via its presentation in the press. In a sense, the emphasis that he demonstrates the Tory-supporting *Norfolk Chronicle* as manifesting in favour of the processes of the scaffold serve to underline a perceived need on the part of the conservative element in society to respond to criticism that executions were no longer performing their proper function. They were supposed, as scholars like Paul Friedland have underlined, to terrify witnesses into a sense of the authority of the law (and so acting as a deterrent force). But, as commentators like Vic Gatrell have pointed out, by the eighteenth century execution crowds were not necessarily behaving appropriately. There is much that is written on the arguments for abolition: this is an interesting contribution that recognises the existence of support for capital punishment. It is worth remembering that there is a Private Member's Bill for the restoration of capital punishment due for a second reading in February 2014. While it will not succeed, the media will undoubtedly reveal the high levels of popular support for the option to return. At least in theory....(it is also worth remembering that every post-1850 execution was accompanied by at least one petition for clemency).

These two articles comprise our general section: but we also address the issue of war crimes in a separate section – a timely and powerful collection of articles given the high profile being given to war in the media on a daily basis and to the clear legal dimension to perspectives on that war and the possibilities of intervention by international powers (essentially, now, the USA and France). It is plain that at some point in the future, there is an expectation – indeed there will almost certainly (as after Bosnia) be a demand that war crimes prosecutions be launched in relation to Syria. Both the public morally-based outrage and pity generated world-wide by media coverage (from Al Jazeera to the Australian press, via the BBC and CBC and their ilk) will fuel such demands, as they did after the Bosnian conflict; and political expediencies on an international scale will require this. The legal profession and debate in the academic sphere are already preparing themselves for this in anticipation.

In this section, our first article (by Charlesworth) could have been placed in the general section, as it is in many ways a jurisprudential piece and one which takes issue with and so deconstructs an article which relates not to war crimes *per se* but rather, to British family law. We have chosen to locate it in this section, because it provides a linkage with the General Section but also, it underpins and contextualises the other three articles in the War Crimes Section with its explication of the minor war crimes trials and the role of figures like Lieutenant Colonels Champion and Genn in evolving appropriate legal strategies for those

trials. It is a powerful piece which constitutes a passionately felt and argued polemic (and is so, like any good polemic, inherently provocative and controversial). It is one which also strikes to the heart of the interdisciplinary project on which SOLON rests. We have argued, from the start, that there needs to be a level of respect between disciplines which requires a full acknowledgement, methodologically and practically, of the intellectual expectations and priorities of any other discipline drawn on. It is not enough, for example, for lawyers and criminologists to invoke a historical perspective and provide a chronology. A proper understanding of the expectations of historiography (the core of historical methodologies) is required – or at the very least an apology for any failings in that respect, indicating a consciousness of the validity of the other discipline. The same holds true for historians engaging with law – historians have a reputation with other disciplines of being intellectual sluts; readily, for instance, adapting social theory to their own ends without considering the intellectual context which has generated that theoretical model. Equally, when dealing with law, there is a tendency to use the label ‘law’ as having a purely cultural meaning and not a precise, and empirically as well as intellectually, framework to how the law in action needs to be understood. Historians, we always argue, need at the very least to be ‘law-minded’ when encountering law, as they do more frequently than they actually acknowledge. **Lorie Charlesworth’s** challenging piece is interdisciplinary in the best way, in that the core of her disquiet with the main chosen piece of legal writing she critiques lies as much in its failure to engage with historiography in an appropriate way as with what she identifies also as its dubious conclusions. Her piece is also timely, given that it addresses so many issues that confront those responsible for the practicalities as well as the theories involved in war crimes prosecutions. She highlights the issue of a silence that is at times wilful and deliberate; as well as being for others more indirect and even simply convenient. Implicitly, it suggests also that it is conveniently easy to ‘forget’ the uncomfortable. It is a wide-ranging piece which draws on a significant amount of scholarship to justify and explain the stance taken in relation to both Carl Schmitt and current users of his legal philosophies. Some may feel it a harsh stance, but we feel that it warrants being placed within the same open-access online type of forum as the piece she targets.

Charlesworth’s piece recognises the horror of the Holocaust as an enduring issue; **Gregory Kent’s** article recognises that the conflict in Bosnia in the 1990s represented the worst conflict, in terms of the outrages committed as accompaniments to that war, within the European continent since WWII. The irony is that the dilemmas over interpretation and the tension between academic understanding and practical application of law must also be understood in the context that the Bosnian conflict was the first major European outbreak of war, but it was not the first conflict that involved atrocities committed against civilian

populations, including accusations of genocide etc. One has to think only of Cambodia, the Biafran war, the war that resulted in the establishment of Bangladesh as an independent state and more broadly, of Vietnam and the Korean War. What characterises these conflicts and that in Bosnia is that they were essentially internal conflicts or civil wars with the two latter attracting international intervention. None of them, though, raised the expectation amongst observers of international war crimes proceedings. In that sense, Bosnia marked a real departure, almost certainly because Western expectations of the former Yugoslavia was that any conflict there would be conducted in a 'civilised' way, according to the established rules of war based on the Geneva Conventions, UN resolutions etc. We are still in the process of comprehending the modern developments in war crimes jurisprudence let alone war crimes law in action. This article thus provides a valuable contribution (we also look forward here to the edited volume in the Routledge SOLON series which will contain work from other authors who presented at the SOLON War Crimes conferences in 2009 and 2011: we are already planning for the next conference in summer 2014).

The remaining articles in this section provide a focus on what still remains the historical core to modern war crimes jurisprudential thought: that relating to WWII and the war crimes proceedings in its aftermath (remembering, as Charlesworth points out, that this remains an ongoing and so very relevant concern and not just a matter of historical curiosity). **McKay Smith** explicitly draws upon Charlesworth's previous work in his consideration of silence as a disturbing factor in war crimes prosecutions. It is also something which, implicitly, Kent considers in relation to both Bosnia and the ICTR in Rwanda. Smith's article provides a significant contribution to an understanding of WWII both from a historical and a legal perspective, and highlights that here is another neglected area of study into that conflict from these perspectives. It encompasses a personal account of prisoner of war treatment, but also from that perspective of witness to atrocities on a civilian (French) population. It reminds us that in the past, as in the present, one of the key dilemmas for war crimes tribunals is deciding which cases to proceed with and which – for a variety of reasons not always visible in retrospect – are not pursued through the courts. The awful reality is that there always have been and probably always will be atrocities which remain either undiscovered or relegated to the dusty archive of legal history as a testament to law's inevitable failure in this respect. For instance, Toby Cadman, in talking of his experiences at the ICTY, identified the problem of accumulating evidence which was sufficiently robust to enable prosecution in a Tribunal which was determined to demonstrate its legal credentials to the widest gaze, ensuring that defendants as well as victims got a fair trial. It remains a question why an individual case such as that highlighted in Smith's article remained 'hidden from history'. A question also remains therefore on how many other incidents like this will be discovered by

future scholars with an eye to both the historical and the legal importance of what they find. We are proud to publish this compelling piece.

Harry Bennett's piece completes consideration of this section and complements the other pieces, especially in its echo of the issue of German silence discussed by Charlesworth. In the exploration of the case of Gieseke, his work provides a practical explication, through the strategies employed by Gieseke to try to avoid prosecution, of how difficult it has been for any in post-war West Germany to deal with Nazi war crimes which do not relate to headline leadership responsibilities. Gieseke is described as middle management; and so not directly responsible for policy evolution. Nor, as a middle manager, was he involved in the direct encounters with individuals that resulted from his implementation of policy. As such, he was one likely to remain anonymous (like thousands of others in similar positions). Bennett picks up on the disappointment that a historian must inevitably feel on viewing the quantitative dimensions to Nazi war crimes: many thousands of individuals known to be responsible for appalling acts contrasting with the much lower number of trials and the resulting convictions: just over 5000 in total. This is an ongoing issue for war crimes practitioners and scholarship; something explored by figures like Jose-Pablo Baraybar in his attempts to remedy this lack of formal process through suggestions for more cultural memorialisation of individuals and their suffering in the work of EPAF Peru (their website is well worth a visit: <http://epafperu.org/?lang=en>). But what Bennett emphasises, so echoing Charlesworth and Smith and more implicitly Kent, is the will to silence practised by a West German legal system which wished to avoid dealing with Germany's murky past – which effectively saw little profit to itself as a state in so dealing with such embarrassments. The eventual decision not to prosecute Gieseke (and Bennett's conclusion that had a prosecution proceeded, the chances of conviction would have been slim) raise once again the importance of evidence as a legal dilemma (both procedural and jurisprudential) in war crimes proceedings. Again this is a sound interdisciplinary article, making a valuable contribution to this emerging interdisciplinary area of scholarship – something vitally needed to contextualise and frame ongoing legal proceedings.

We also publish a Current Issues contribution which focuses on media presentations of prisons as locales for appropriate punishment for crimes. The core tension revealed here addresses the basis of what constitutes crime and criminality: it is an act, process or individual which offends the community and so, conviction requires a community response which indicates the level of offense taken by that community. W.S. Gilbert (a barrister by training, let it not be forgotten) put in the mouth of the Mikado that his 'object, all sublime' was to 'make the punishment fit the crime'. What **Ian Marsh** explores is not the

jurisprudential debates over prison as reform or revenge but rather, the reaction of the wider public to prison as an end outcome of the criminal trial process. Does prison work? That is the implicit question being asked by those concerned about the prison experience – does it, in other words, ‘fit the crime’ in terms of being a suitable riposte. The Mikado envisaged that, for instance, the ‘billiard sharp’ should be condemned to eternal matches with, amongst other accoutrements to his play, elliptical billiard balls – are the metaphorical balls provided for today’s prisoners sufficiently elliptical to satisfy the community and provide that ‘innocent merriment’ that that ‘true philanthropist’ saw as the community’s due? The piece provides a summary consideration of Foucault and, from this perspective, goes on to consider how Foucault’s arguments about the nature of modern punishments can be used to illuminate an understanding of the prison experience as provided by a range of extracts from the media. Like all good current issues pieces, it leaves the conclusion largely open – so where do our readers stand? We would welcome any further contributions to debate on this point, or others addressing how the media informs, for good or ill, the general public on issues relating to law and crime. The issue is also enriched by several book reviews and, as is our wont, conference reports. These, of course, speak for themselves – the mention here is to remind readers how we welcome both notices of books to review and conference reports!

Our next issue should be in January 2014, in the shape of a special issue on the History of Activism (which relates to the SOLON conference held at Liverpool John Moores in the summer of 2012). Our next general issue will be in March/April and we look forward to contributions for that, including ideas for Current Issues and Debate Forum pieces – a response to Lorie Charlesworth’s piece for the latter, perhaps?

Judith Rowbotham, Kim Stevenson and Samantha Pegg