

THE BENEFITS OF MERCY: TEACHING LAW AND EXCEPTION IN THE INQUIRY-BASED CLASSROOM

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Abstract:

The law and related trial records convey moments of history involving people who otherwise left few records behind. Court records provide students with compelling stories that convey unique elements of historical life. This article explores theories of punishment and mercy while introducing readers to a variety of legal databases and lesson plans in the inquiry-based model of teaching. By focusing on the anatomy of law and punishments in early modern England, the article presents a formula for teaching crime, law, and mercy that may be applied for any historical subject in the college classroom.

Keywords: legal history, mercy, punishment, crime, statutes of the realm, inquiry based learning, benefit of clergy, assize records

Introduction

Legal codes that record the tensions and concerns of a given moment may be found throughout history. Introductory courses that cover large periods of time tend to evaluate history through the lenses of politics and religion, but the law as a lens of historical inquiry provides students with a wonderful opportunity to view social traditions and expressions of power that connect time periods and civilizations. The language of legislation itself may reveal the pressing issues affecting ruling classes; the preserved trial records and commentary may allow scholars to understand how legislation affected real lives of individuals in far-spread communities who often leave little written record of their lives. In order to study the law, one must also study crime and litigation.

The stories of trials, from prosecution to litigation, open a fascinating world of jealousy, tension, petty theft, egregious assault, and other conflicts. Students may be forgiven for reducing most of criminal justice throughout history to a battle between good and evil. After all, such stories surround us, from the fairy tales that allow heroes to triumph to the latest detective show that

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brings criminals to justice every week.² What occurs within a court system may differ wildly from its prescribed response at the legislative level. And often what historians assume to be a new policy might actually be a lawmaker bringing the legal code into line with what is already happening in the courts - indeed, with what may have been happening for years, decades, or centuries.³ The dismissal of the law as mere rules that must be followed disguises complex cultural interactions of exceptions and harsh penalties. Studying laws, criminal offences, and the judicious application of mercy throughout history allows these myths to be examined more closely while enhancing the development of crucial skills for analysis, written expression, and cross-cultural comparison.

This article will demonstrate how Inquiry Based Learning (IBL) focusing on the law as an historical lens encourages students to develop the skills needed to become leaders after graduation. In this paper, sources of legal codes, trials, and their influences are taken together to focus on the skills associated with IBL: the design, management, and execution of projects designed to answer a single question. Inquiry education incorporates four main stages to its goals, and these stages can be applied within a single semester to a course on crime and the law.⁴ The first step is a form of traditional rote learning that incorporates lecture, reading, and discussion. Rather than assess the material through examinations, students complete a creative project that engages with the presented material. The next step would be to allow students to seek their own information through a structured project with extensive design guidance from the instructor. In the third phase, instructors provide a research question and allow students to make their own mistakes and own their successes by designing and executing a unique and creative project to answer the question. Finally, students are able to ask whatever question they wish of the material, having already practised the skills necessary to design an original research project.⁵ Through this process, students complete the course having developed core project management skills applicable to future careers in any discipline.

² Terry K Aledjem, *The Culture of Vengeance and the Fate of American Justice* (Cambridge University Press, 2008), especially pp.xiv-xvii and pp.145-176.

³ Paul Brand, *Kings, Barons, and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge University Press, 2003), especially pp.2-5

⁴ C. Hmelo-Silver, 'Problem Based Learning: What and how do students learn', *Educational Psychology Review*, 16(3) (2004), pp.235-266.

⁵ H. Yoon, Y.J. Joung, M. Kim, 'The challenges of science inquiry teaching for pre-service teachers in elementary classrooms: Difficulties on and under the scene', *Research in Science & Technological Education*, 42(3) (2012), pp.589-608.

The value of studying the history of crime across cultures comes in its inter-connectedness to a wide variety of disciplines and the sheer breadth of materials that we may use in the classroom. These sources are not collected in a singular place; teachers must use the power of the internet as a sieve for catching ancient references to a minor legal element that may influence modern society. In appreciation of the wide variety of legal sources available, I have concentrated here on the popularity of the English legal system throughout the world and the lens of mercy in my proposed lessons. By studying the exchange of mercies in the evolution of a legal system used in a quarter of the world - the system of English common law - we can address the history of crime in the classroom for students of law, criminal justice, history, and culture.

1 Theoretical Frameworks of Punishment and Mercy

As this article will explore the study of law, crime, and mercy in the classroom, it would be helpful to introduce a framework for discussing theories of punishment. Primarily, there are two justifications for punishing a member of society: theories known as consequentialism and retributivism. Consequentialism subjects an offender to a negative consequence as both a personal understanding of their violation and as an example to other members of the community.⁶ Retributivism, on the other hand, describes a system in which an authority figure or system exacts vengeance on an offender.⁷ With retributivism, restoring stolen property or making peace after an assault is not the sole goal. In this theory, offenders must feel the pain of what they did, even if the punishment does nothing to prevent future acts of similar misbehaviour. Systems that instill measured public consequences or a series of fines would be considered consequentialist, but the ancient idea of an 'eye for an eye' would fall in line more with retribution. It should be noted that these theories overlap, and many prescribed punishments may fall under both categories.

Complicating matters within these two frameworks and their many related variations is the consideration that a justification of punishment might differ from moral theory.⁸ Hybrid systems of punishment might draw from the most efficient elements of both consequentialism and

⁶ John Bronsteen, Christopher Buccafusco, and Jonathan Masur, 'Happiness and Punishment', *University of Chicago Law Review*, 76 (2009), pp.1037-1057.

⁷ Michael T Cahill, 'Punishment Pluralism' in Mark D White (ed.), *Retributivism: Essays on Theory and Policy* (Oxford University Press, 2005), ch.2; Marc O DeGirolami, 'Against Theories of Punishment: The Thought of Sir James Fitzjames Stephens', *The Ohio State Journal of Criminal Law*, 9 (2012), pp.699-748, especially pp.701-711.

⁸ Although we might divide many punishments into these two broad ideas, most criminal justice systems have a form of hybrid penalties. See DeGirolami on 'hybrid theories' in 'Against Theories of Punishment', pp.705-706.

retributivism, but they do not always lead to a verdict that feels just by contemporary moral standards.⁹ Students must be disabused of the notion that seeking justice at court will somehow correspond with a sense of justice in their personal moral codes. Once students separate their personal feelings from the historical interpretation of justice, the law becomes an invaluable measurement of social history: by creating a series of commentaries of what authority figures considered to be acceptable steps against those who violated social mores.

Finally, not all violations must lead to the fullest punishment available by law. Often, human behaviour does not match the law's description perfectly. Interpreting the law and ideal punishments require local officials to engage with legal recommendations and the impact on the local community. Such interpretations construct complex variations at the local level. A lifelong thief may receive a different punishment than a citizen in good standing who faces charges for a first offence. Furthermore, a deeply significant expression of power can be found in rescinding the punishment entirely for an appropriate and deserving criminal. Throughout history, mercy has played a complex role in strengthening the power of legislative authority. Superficially, the repeated forgiveness of those who violate the law might appear to be weakening the entire legal system. However, a deeper analysis of rigid legal codes reveals the power of forgiveness, accommodation, and mercy within a code of law. The local baron who extends mercy to a poor farmer may enjoy subsequent popularity among all the farmers. A king who offers pardons is often rewarded with extreme loyalty by the community.¹⁰ Criminals whose lives are thus spared may be later compelled by feelings of debt and extreme loyalty toward the office that saved their lives. The application of forgiveness must be tempered, however, lest a populace begin to expect mercy rather than seek to earn it. Those who study legal history, especially across civilizations, ought to consider mercy as a significant relationship between law and prosecution, which functions less as a monologue of commands and more as a dialogue of negotiation.

Writers throughout history have given support for providing forgiveness to those who violate social expectations. In the eyes of St Augustine, mercy was a profoundly Christian trait. Punishing a man for sin would only sentence him to hell with no chance for repentance or regret. Conversely, granting him reprieve showed grace while potentially saving a soul. 'For

⁹ Aladjem, *The Culture of Vengeance*.

¹⁰ Helen Lacey, *The Royal Pardon: Access to Mercy in Fourteenth Century England* (York Medieval Press, 2009).

otherwise punishment will end this life for them, and once it is ended, they will not be able to bring their punishment to an end'.¹¹ Shakespeare's Portia famously commented that:

The quality of mercy is not strain'd
It droppeth as the gentle rain from heaven
Upon the place beneath it is twice blest
It blesseth him that gives and him that takes...mercy is above this sceptred sway
It is enthroned in the hearts of kings
It is an attribute of God himself.¹²

Portia repeats St Augustine's sentiment connecting mercy to the divine. Her words signal the dual benefits of tempered mercy: the recipient, whose freedom is granted, and the authority figure, whose reputation is enhanced by the act. Legal historian Krista Kesselring wrote that elements of mercy, like the royal pardon, were 'useful in a number of immediately practical ways: as expressions of gratitude; as elements of festivity; and as bargaining tools with the political and religious elite for various forms of cooperation'.¹³ For these reasons, the study of mercy in a larger legal system can unearth complex relationships within a hierarchical society, particularly a society in transition, as we may say about Reformation-era England.

The examples in this article have been drawn from England from the early modern era, as the laws reacted and adapted to the changes instilled by agents of the Reformation. The goals and approaches within the lesson plans are applicable to other areas of study and even multiple regions for long-term comparison. Adjusting these sample lessons to focus on law, crime, and mercy could provide a common theme for world history survey courses. For instance, ancient law codes may be found readily online. The Code of Hammurabi from eighteenth century BCE emphasised the public penal nature of vengeance by sentencing an offender to lose a finger, hand, or eye for violations.¹⁴ Contrast that penal system of physical dismemberment and permanent markers of offence with the sixteenth-century BCE Code of Nesilim, which converted all offences to a series of monetary or labour-intensive fines.¹⁵ Those who could not afford to pay might offer a slave or even themselves as a labourer to pay off the debt for the offence they

¹¹ See E.M. Atkins and R.J. Dodaro (eds.), *Augustine: Political Writings* (Cambridge University Press, 2001), pp.70-87; Quote from Letter 153, p.73.

¹² William Shakespeare, *The Merchant of Venice* Scene One, Act Four.

¹³ Krista Kesselring, *Mercy and Authority in the Tudor State*, (Cambridge University Press, 2003), p.72.

¹⁴ 'Hammurabi's Code of Laws', translated by L W King. Paul Halsall, Fordham Internet Source Book <http://www.fordham.edu/halsall/ancient/hamcode.asp> [Accessed on 15 July 2013].

¹⁵ Oliver J. Thatcher (ed.), *The Library of Original Sources* (University Research Extension Co., 1901), Vol. III: *The Roman World*, pp.9-11. Digitally available at the Fordham Internet Source Book through the efforts of J.S. Arkenberg. Paul Halsall, 'Code of Nesilim' Fordham Internet Source Book <http://www.fordham.edu/halsall/ancient/1650nesilim.asp> [Accessed 15 July 2013]

had committed. For the Code of Hammurabi, the punishment illustrated the offender's criminal past. In the Code of Nesilim, the point was readjusting the offence so that the victim regained what was lost in some monetary or labour value. In Nesilim, guilt or blame was less important than simply trying to undo the harm. These codes reveal to students and scholars alike the values of a society by identifying unacceptable behaviour and prescribing an appropriate punishment. Law codes from radically different traditions tend to cover similar offences, from murder to treason. Therefore, studying the law, crime, and mercy allows for structured comparison of global civilizations in classrooms. The following lesson plans may draw from English sources, but their ideas and the focus on IBL reflect a larger pedagogical approach that could apply to all law codes throughout history.

2 Statutes of the Realm: A Study in Authority and Compromise

One of the most influential legal systems grew out of medieval England. Because of the expanse of the British Empire, the English common law tradition functions throughout the world, in former colonies such as the United States, India, Bermuda and Australia. By understanding the slow development of the English system, students can develop an appreciation for the legal systems and how their variations affect current events. Three sources provide excellent insight into centuries of legal development during England's Renaissance and early modern periods. These include laws that have received royal assent, somewhat imperfectly collected in *The Statutes of the Realm*, and two collections of court decisions: the Assize Records of the Home Circuit, and the Year Books.

The *Statutes of the Realm* contain almost 500 years of parliamentary legislation. Collected and published under George the Third, this collection reprints the majority of laws still in force in 1801.¹⁶ Because of the focus on Acts still in force, repealed laws are merely summarised rather than reprinted in full, but the majority of the text survives. The structure of statutes usually opens with a preamble explaining a problem within the kingdom and concludes with a proposal to correct the issue. The preambles alone provide a wonderful insight into the expectations and perceptions of England's ruling class. Taken together, they construct an official view of the unique challenges and problems facing England during any given session of Parliament.

¹⁶ John Raithby (ed.), *The Statutes of the Realm printed by command of his majesty King George the Third; in Pursuance of an Address of the House of Commons of Great Britain; from Original Records and Authentic Manuscripts* Vol.1-7 (Great Britain, 1801-1822)

The laws of an organization function as a demonstration of authority as much as practical solutions to specific problems. Not all laws correspond with real spikes in crime or threats of national security. Therefore, the *Statutes of the Realm* must be read in conjunction with court proceedings. For the late medieval period, the random collection of striking judicial opinions known as the *Year Books* convey matters in which the statutory guidance was insufficient to deal with the realities of offenders' lives. When the jurisdiction or mandate was unclear, Justices wrote opinions seeking clarification or expressing concern about the practicality of a specific measure. These commentaries can be used to understand the real consequences of an overzealous policy. Readily available through Boston University's website, this collection of opinions can be ideal as an assigned homework piece.¹⁷

JS Cockburn transcribed and published a collection of the early modern Assize Records spanning the Home Circuit of London - the counties surrounding the capital for which a single panel of Justices would visit for trials approximately four times per year.¹⁸ His multi-volume collection explores individual cases by including the name and occupation of each accused defendant, the description of the crime reported, and the outcome of the trial. Through these compelling yet brief story-driven records, students will be able to measure how people were punished and what role mercy might play in the outcome of applying new legislation in communities throughout England.

The examination of trials in light of specific laws highlights an immediate contrast between idealised behaviour and the complications of extenuating circumstances that offer an opportunity to develop student skills as historians. For instance, a lesson could begin by assigning students to read the new statutes concerning a specific offence. The late Tudor period witnessed a rise in controlling laws concerning marginalised groups: vagabonds and wanderers, 'Egyptians' or gypsies, Catholic recusants, women, those suspected of witchcraft, and what they considered to be sexual deviants. A close reading of those laws' preambles can help develop a student's ability to interpret early modern English and the complexity of legal language while also giving a sense of the fear and preoccupation of legislators. The counter-balance would come with an analysis of the Assize Records. Students could select a specific county – Essex or

¹⁷ For more information, see the About Page here: <http://www.bu.edu/law/seipp/> [Accessed on 1 August 2013].

¹⁸ For a summary of the findings, see J.S. Cockburn, *Introduction to the Calendar of Assize Records* (Her Majesty's Stationary Office, 1985). Volumes for Hertfordshire, Sussex, Essex, Kent, and Surrey were published from 1975 to 1985. He treated the material with great focus in his work *A History of the English Assizes, 1558-1714* (Cambridge University Press: 1972)

Kent - and mine such volumes for examples of people put to trial for these crimes. Based on the judicial opinion, students will begin to interpret the interaction of legislation and litigation. Most importantly, the contrasting primary sources will convey the importance of community support and mercy in determining an outcome of each trial.

A lesson plan to draw from both the *Statutes of the Realm* and the trial records that followed could focus on the student-engaging topic of witchcraft. An Elizabethan witchcraft law in 1563 can reveal to students the social importance of seeking out and destroying witches in early modern England. Its text can be found online or in the official collection of *The Statutes of the Realm*.¹⁹ The Act is entitled, 'An Act against Conjurations, Enchantments, and Witchcraft.' An excerpt of the law states:

Where at this present, there is no ordinary Punishment provided against the Practitioners of ... Conjurations and Invocations of evil Spirits..., the which Offences were made to be Felony, and so continued until the said Statute was repealed by the Statute of Repeal made in the first year of the Reign of the late King Edward VI; since the Repeal whereof many fantastic and devilish persons have devised and practiced Invocations and Conjurations of evil and wicked Spirits... For Reformation whereof be it enacted by the Queen's Majesty with the assent of the Lords and the Commons in this present Parliament assembled, ... That if any person or persons exercise any Invocations or Conjurations of evil and wicked Spirits, or else if any person or persons shall use any Witchcraft, Enchantment, Charm, or Sorcery, shall suffer pains of Death as a Felon or Felons, and shall lose the Benefit of Sanctuary & Clergy.²⁰

Superficially, this law justifies its enhanced penalties through a fear that the recent Reformation-era challenges to the legal code. The preamble claims that a sudden shift in the law had broken all legal barriers against embracing the dark arts. In order to guard against such unfettered use of witchcraft, any suspect found guilty of such practices would suffer one of threefold consequences: physical abuse, loss of property and liberty, or even death without possibility of pleading the traditional mercies of sanctuary or benefit of clergy. Teachers can draw students into the complexities of witchcraft persecution by giving them access to the Assize Records and helping students craft unique research questions about the motivations behind the prosecution of supernatural crimes. Data collection with trial records allows a body of students to chart the

¹⁹ *Statutes of the Realm* Vol. IV, Part One (1819), pp.446-47. One online source claiming to transcribe this law (with some elementary errors) can be found here: <http://www.witchtrials.co.uk/act1563.html> [Accessed on 12 October 2013] or through the Internet Archive: <http://www.archive.org/stream/statutesrealm00etcgoog#page/n8/mode/2up> [Accessed on 18 July 2013].

²⁰ I have shortened this law from its original text in order to make it brief enough for students to process without sorting through the repetitive nature of English statutes. I have also modernised the language to account for undergraduate unfamiliarity with early modern English spellings.

prosecution of individuals in the decades following the passage of this legislation. A class can then interpret the peaks and lows of prosecution.

From the Hertfordshire collection of Assize Records, I have collected a series of examples, recreated here for use in the classroom. I drew these examples from only one slim volume. Instructors could expand a project by including the volumes on Kent, Sussex, Essex, and other counties.²¹

9. Thomas Heather, of Hoddesdon, yeoman, indicted for witchcraft. On 1 Jan 1573 in a wood at Hoddesdon he conjured spirits to help him discover large sums of money. Guilty; afterwards pardoned.

59. Alice Sparke, wife of Stephen Sparke of Buntingford, indicted for witchcraft. On 16 Sept 1575 at Buntingford she bewitched 2 cows belonging to John Harvy at Buntingford. Not Guilty.

172. Alice Cowle, of Therfield, spinster, indicted for witchcraft. On [incomplete] at Therfield she bewitched a brewing vat full of water at which 2 cows belonging to Henry Gynne were drinking. Guilty; to be pilloried 4 times for the space of 6 hours and to confess her offence

244. Margaret Bonner, wife of James Bonner of Flamstead, labourer, indicted for murder by witchcraft. On 8 April 1582 at Flamestead she bewitched John Skelton of Flamstead so that he languished until 10 April and then died at Watford. Not guilty.

421. Agnes Morris, of Stevenage, spinster, indicted for murder by witchcraft. On 1 July 1582 at Steenage she bewitched Richard Jenkinson so that he languished until 1 May 1583 and then died. On 24 June 1586 at Stevenage she bewitched a cow (30s) belonging to John Clark. Guilty; to hang. Remanded after sentence because the evidence was weak.

598. Mary Hammond, of Walkern, spinster, indicted for witchcraft. On 20 March 1592 at Walkern she killed a horse (£4) belonging to William Walby by witchcraft. On 3 May 1592 at Walkern she killed 2 pigs (30s) belonging to William Bramfeild by witchcraft. On 2 June 1592 at Walkern she killed a bay horse (£7 10s) and a red cow (50s) belonging to William Bramfeild by witchcraft. Guilty; sentenced according to statute and to be pilloried four times during her year's imprisonment.

²¹ The following quotes come from pages throughout the Hertfordshire records. No 9, p.2; No 59, p.11; No 172, p.28; No 244, p.40; No 421, p.67; Nos 598-99, p.95; No 620, p.98; No 750 p.118; No 780, p.123; and No 872, p.137. These wonderful resources can be used to investigate early modern English society for any number of crimes, as the index is quite comprehensive for crimes, objects stolen, places and names. This is intended to give just a short example of how we could use the Assizes and *Statutes of the Realm* within the classroom.

599. John Sely of Stanstead Abbots, yeoman, indicted for witchcraft. On 31 March 1592 at Stanstead Abbots he bewitched 40 pigs belonging to John Spencer. Not guilty.

620. Helen Browne, of Buntingford, spinster, indicted for witchcraft. On 20 November 1592 at Buntingford she bewitched Margaret Dellow so that she languished until 1 March 1593. On 21 September 1592 at Buntingford she bewitched John Gates so that he languished until 28 February 1593. Not guilty

750. Catherine Dewsburie, wife of Nicholas Dewsburie of War, labourer, indicted for murder by witchcraft. On 6 September 1595 at Ware she bewitched Agness Watts, wife of Roger Watts of Ware, butcher, so that she languished until 20 October 1595. On 20 March 1591 at Ware she bewitched Thomas Bomley, son of Richard Bromley, so that he languished until 10 June 1591. On 27 August 1595 at Ware she bewitched Robert Cock so that he languished until 20 Jan 1596 and then died. Guilty on the second count only; imprisoned for one year.

780. Alice Crutch, wife of Thomas Crowtch of Tring, labourer, indicted for murder by witchcraft. On 28 September 1592 at Tring she bewitched Hugh Balden so that he languished until 1 April 1593 and then died. On 4 July 1596 at Tring she killed by witchcraft a horse (50s) belonging to Thomas Grace. On 26 December 1595 at Tring she killed by witchcraft a horse (£4) belonging to Barnard Michael alias Search. Guilty; to hang

872. Mary Taylor, of Hertford, spinster, indicted for murder by witchcraft. On 9 May 1596 at Hertford she bewitched Simon Grubb so that he died on 9 October 1596. On 20 August 1596 at Hertford she bewitched 7 pigs (20s) belonging to Ralph Willowbye so that they died. Guilty; to hang.

Such examples demonstrate the contrast between the idealised law and the reality of accusation in the courts. The charges brought against these men and women show a variety of offences, some against property and others against human beings, and the subsequent variety of outcomes. The severity of punishment often referred to the statutes only as a guideline, providing more intense or more lenient sentences based on family situation, reputation, and judicial mood. Indeed, some judges wove a path of merciful judgments through the English countryside only to be replaced with men who viewed violations much more harshly. Those found not guilty or only guilty on a single count bring a complexity to the courtroom that the framers of a law might never have intended. Indeed, this presents the chicken-and-egg question at court: whether laws are put in place in order to change the procedure at court, or if procedure at court has improved the rules to such an extent that new laws have to be passed in order to support what is already happening in real life. As a result, students can take a specific offence and trace its evolution through the law and trials throughout the realm in order to determine the strength, effectiveness, and practical consequences of the 1563 Act Against Witchcraft.

3 Benefit of Clergy: Nuances of Society through Mercy and the Law

The English legal system is among the most widespread in the world. Its spread can be attributed to many factors, most prominently the success of the British Empire to cover approximately one-fifth of the globe, and the judicious application of mercy through a medieval mechanism known as ‘benefit of clergy’. This benefit originated as a protection for the medieval church during a period when strife between the pope and king left priests and their associates at risk of secular punishments. A tradition of granting clemency for ordained men accused of felonies like theft and assault allowed such servants of God to be protected from secular punishment.²² This system and its regional variations would undergo drastic transformation in England during the century just before and after the Reformation.²³ Immediately following the sixteenth century religious reforms, England would begin to sow the seeds of the British Empire and export the English legal system to most of its colonies. Surprisingly, benefit of clergy survived the Reformation-era attacks on the Church and can be found across those colonies that adopted the English legal code. Benefit of clergy was maintained and even became a major cornerstone of English statutory law in the centuries that followed.

The history of benefit of clergy spans much of England and deserves more study elsewhere. For the purposes of this article, its history highlights the many intersecting social concerns that might be captured by a study of the law and trials in the classroom. In this legal traditions, students see tangible changes at a local level put into effect by a long-standing conflict between church and state. The religious change of the sixteenth century amounted to a revolution felt far beyond religious conversion. For instance, a 1489 law acknowledged what had already been happening in courts across England by formally offering benefit of clergy to literate laymen and expanding the potential for mercy in felonious charges. The law changed little in the courts, as judges had been granting clergy to laymen for decades, but it created a new precedent that would have a significant impact on the Reformation Parliament of the 1530s as Members of Parliament used this past law as a justification for a flurry of new legislation.

²² The classic work on benefit of clergy’s medieval tradition is over 80 years old: Leona Gabel, *Benefit of Clergy in England in the Later Middle Ages* (Department of History of Smith College, 1929). More recent treatment comes from: John G Bellamy, ‘Benefit of Clergy in the Fifteenth and Sixteenth Centuries’ in *Criminal Law and Society in Late Medieval and Tudor England* (St Martin’s Press, 1984), pp.115-164; Lesley Skousen, ‘Have Mercy upon Me O Lord: A History of Benefit of Clergy in Early Modern England’, Unpublished Dissertation, (University of Wisconsin, Madison: 2013).

²³ Krista Kesselring explored these ideas further in her classic publication *Mercy and Authority in the Tudor State* (Cambridge University Press: 2003) and J.H. Baker explained the adoption of this clerical privilege by the King during the Reformation in his chapter ‘The Secularization of Benefit of Clergy, 1450-1550’ in Mario Ascheri (ed.), *Ins Wasser geworfen und Ozeane durchquert’ Festschrift für Knut Wolfgang Nörr* (Köln, 2003), pp.27-37.

During the Reformation Parliament, benefit of clergy began to portray an English government that chose to grant mercy to priests and Englishmen. This interpretation would enhance the standing of King rather than Pope as the most supreme power in England. Following the Break with Rome, benefit of clergy began to expand rapidly. Between 1530 and 1604, almost every single session of Parliament issued new legislation changing the definition and scope of this privilege. Some sessions included as many as four new statutes covering the legal defence. In 1536, a law maintained that anyone who claimed the benefit would be allowed to do so only once and would suffer a brand to show their criminal past.²⁴ This measure placed priests, monks, bishops, and other clergy on the same footing as laymen and expanded the application of merciful exemption to a larger portion of the populace.

The long-term consequence of this rapid change was that benefit of clergy became a cornerstone of the English legal system. Rather than offer a special privilege to the rare accused priest, any literate lay criminal could learn to read and escape execution for the first offence of a felony. As time wore on, more people became eligible to claim clergy. During the medieval period, less than 1% of trials resulted in a benefit-of-clergy plea. By the seventeenth century, approximately 24% of all Assize trials ended in the benefit, and 47% of all felony trials resulted in an attempt to plead clergy.²⁵

These statistics can be borne out in class by assuming a similar lesson plan as stated above, wherein students study some of the laws pertaining to benefit of clergy and then use the Assize Records or Year Books in order to witness how the lofty goals of each statute were implemented in real communities throughout England.²⁶ This intersection affords teachers a wonderful way to analyse crime in light of specific sub-categories of subjects. Poor people, immigrants, students, vagabonds, religious dissidents, and women all experienced unique relationships with the ability to claim benefit of clergy. Some had to learn to read by rote as they waited for trial; others had learned to read in Protestant Sunday schools. Examining how these

²⁴ Branding first began for a small group of literate laymen under Henry VII in 1489. Since the Courts were already granting some laymen their clergy, a 1489 law entitled 'An Act to take away the benefit of clergy from certain persons' was ratified by Parliament 4 Henry VII c.13. This was later made permanent and applicable to all persons claiming, regardless of clerical status, by law in 1536 entitled 'An Act that felons abjuring for Petty Treason, murder, or felony shall not be admitted to the Benefit of their Clergy' 28 Henry VIII c.1.

²⁵ The statistics were compiled by J.S. Cockburn, *Introduction* (Calendar of the Assize Records HMSO, 1979), p.119 and p.141 respectively; see also J.S. Sharpe for context, *Crime in Early Modern England* (Longman, 1999), pp.93-94.

²⁶ 'An Index and Paraphrase of Printed Year Book Reports', 1268 - 1535 compiled by David J. Seipp (Seipp's Abridgement) <http://www.bu.edu/law/seipp/> [Accessed 8 August 2013].

people fared in the Assize record collections allows us to see how evenly authoritative judgments were passed on specific groups of people.

An excellent example of this focus on sub-groups can be found in the way women pleaded benefit of clergy. For most of history, benefit of clergy was a man's plea, tied to ordination.²⁷ Even after the Reformation, women were barred from the traditional priestly privilege.²⁸ Some may say that men had benefit of clergy and women had benefit of belly, but this is not an apt analogy. For one, the plea of clergy was the end of the trial. Benefit of belly, on the other hand, meant a mere delay for the duration of pregnancy and possibly during weaning. After the birth of their children, they were to be arrested again and sentenced to death.²⁹ But in 1624 Parliament passed a curious bill to grant women the right to plead clergy 'for small felonies.' The preamble of this statute states 'many women do suffer death for small causes.'³⁰ The law creates a narrative in which Parliament must save women from an uncaring court.

Conversely, an analysis of the Assize records at the same time period shows that women were not really being convicted in large numbers just prior to this law's passage. In fact, it was notoriously difficult to convict women.³¹ Jurors wanted to avoid sentencing a poor woman to her death, and so they often found women not guilty or 'ignoramus' for not enough evidence. Persistent sympathy for women at trial allowed women to become undocumented repeat offenders, always relying on the kindness of sympathetic jurors to keep their records clean. However, with the allowance of clergy after 1624, women's convictions spiked in the counties around London. The effect was the same - a felony led to a trial after which a woman was allowed to go home - but this time, the woman went home having been found guilty and branded. A second offence would lead to execution. Therefore, a law that pretended to care

²⁷ There were some exceptions to this. Henry Charles Lea cites the case of a priest whose concubine was able to claim clergy as being part of the household of an ordained man. Reports of this protection were inconsistent. Henry Charles Lea considered to be common courtesy, but records lack detailed evidence of affiliation to support this claim and his own citations are insufficient to prove anecdote or representative example. There may have also been a nun in the fourteenth century who successfully claimed that her ordination allowed her access to the liberty. See Lea's *History of Sacerdotal Celibacy in the Christian Church* (Watts, 1932), p.288.

²⁸ In fact, some jurors were surprised to learn that the wife of a peer would not be allowed her clergy for manslaughter after her correction of a servant led to the servant's demise; fortunately for Susan Adams, Parliament found it prudent to protect the upper class woman by special Act in 1647. 'House of Lords Journal' Vol. 9: 11 February 1647', *Journal of the House of Lords: volume 9: 1646 (1767-1830)*, pp.3-5

²⁹ Krista Kesselring presents the imbalance of these often related privileges in Appendix II of her book, *Mercy and Authority in the Tudor State*, pp.212-214.

³⁰ 'An Act concerning Women Convicted of Small Felonies' 21 James c.6.

³¹ Garthine Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge University Press, 2003).

about women dying on the scaffolds really subjected women more fully to the law and caused a spike in convictions of female thieves.

A similar series of events occurred before and after 1691, when women were granted the full rights to plead benefit of clergy 'where a man being convicted of any felony for which he may demand the benefit of his clergy.'³² Beforehand, convictions for female shop-lifters were scarce; afterwards, the lists of claimants of benefit of clergy were overwhelmed by female names. Beattie found that while women constituted only 15-20% of criminals, they occupied 51.2% of defendants in the 1690s, just following the grant of full clergy privileges.³³ For instance, in 1693, 28 of 46 claimants of benefit of clergy were women.³⁴ In 1697, 17 women pleaded benefit of clergy, alongside only three men.³⁵ In this case, the application of mercy was designed to enhance conviction rates and draw women more firmly within the power of the royal courts rather than to save the lives of wayward souls.³⁶

For students to appreciate this series of events, a discussion section could brainstorm the students' ideas of what femininity was like in early modern England. Feminine hobbies, character traits, and imagery could be explored through a collection of images and stories from the period.³⁷ Commentary about Queen Elizabeth provides a great divide in contemporary ideals of womanhood; John Knox's 'Monstrous Regiment of Women' could be contrasted with

³² 'An Acte concerning Women Convicted of Smale Felonies' 21 James 1 c.6 Parliamentary Archives, House of Lords HL/PO/JO/10/13/7 and 'An Act to Take away Clergy from some Offenders and to Bring Others to Punishment' William & Mary c 9 Parliamentary Archives, House of Lords HL/PO/PU/1/169/3&4 W&Mn3.

³³ J.M. Beattie, *Policing and Punishment in London, 1660-1750: Urban Crimes and the Limits of Terror* (Oxford University Press, 2001), p.65.

³⁴ These numbers reflect the totals of two pamphlets: Anonymous, *The Proceedings on the King's Commission of the Peace and Oyer and Terminer and Gaol Delivery of Newgate, held for the City of London and County of Middlesex at Justice-Hall in the Old-Baily on Wednesday, Thursday, Friday, and Saturday the 6th, 7th, 8th, and 9th Days of December 1693* (Printed for Richard Baldwin at the Oxford-Armes in Warwick-Lane, 1693), BL 1480.d.21.6. See also Anonymous *Proceedings on the King's Commission of the Peace and Oyer and Terminer and Gaol Delivery of Newgate, held for the City of London and County of Middlesex at Justice-Hall in the Old-Baily on Wednesday, Thursday, and Friday being the 12st, 22nd, and 23rd Days of February, 1693/4* (Printed for Richard Baldwin at the Oxford-Armes in Warwick-Lane, 1693/4).

³⁵ Anonymous, *Proceedings on the King's Commission of the Peace and Oyer and Terminer and Gaol Delivery of Newgate, held for the City of London and County of Middlesex at Justice-Hall in the Old-Baily on Wednesday, Thursday, Friday, and Saturday, being the 8th, 9th, 10th and 11th Days of December 1697* (Printed by JD for Andrew Bell at the Cross-eyes and Bible in Cornhill, and Sold by R Baldwin at the Oxford-Armes in Warwick-Lane, 1697), BL, 1480.d.21.8

³⁶ Lynn McKay, 'Why they stole: Women in the Old Bailey, 1779-1789', *Journal of Social History* 32 (1999), pp.623-39.

³⁷ The *Web Gallery of Art* contains a very large digital database of paintings and artistic depictions that are searchable by 50-year time periods. <http://www.wga.hu/index1.html> [Accessed 22 August 2013].

Elizabeth's speech at Tilbury.³⁸ Then distribute the 1624 law that granted women the right to plead benefit of clergy. Ask students to explain, using the language of the statute alone, why Parliament would give women the chance to escape their punishment.

Finally, after students have offered their interpretations, provide them with two primary sources: the 1691 law granting women full rights to plead benefit of clergy and the online collection of Old Bailey records.³⁹ Have them search in particular for female names among those 'burned in the hand' from 1693 to 1703. Essentially, students would be able to trace what happens to women in the courts directly following the full availability to claim benefit of clergy. A careful analysis would reveal that the rates of conviction rise. Students will then be able to decide for themselves in a class-wide discussion precisely why this happened to women in the late seventeenth century.

The wider importance of benefit of clergy is that it speaks to the global development of punishment for crime during an age of Empire. As England became Britain, and Britain became the British Empire, the number of behaviours deemed to be felonies increased. Historians have theorised that this code of law that relied heavily on capital punishment constituted a 'Bloody Code' that sought to keep the lower classes in check within England and throughout the world.⁴⁰ Yet the very existence of these laws assumed that benefit of clergy and other forms of mercy would be available for petty criminals. Only repeat offenders who sought a life of crime would be affected in the view of those developing the legislation. In this way, massive changes to the later criminal code were dictated by the prominent availability of forgiveness. And this was applied throughout the Empire, as those responsible for the Boston Massacre pleaded clergy to avoid execution and slaves throughout the American Colonies and the West Indies were able to

³⁸ John Knox, 'The First Blast of the Trumpet against the Monstrous Regiment of Women' (1558) and Elizabeth's Tilbury Speech can be found across many well-edited scholarly volumes, but they are also offered online in many places. For instance, see the Knox piece at the Gutenberg Organization, <http://www.gutenberg.org/ebooks/9660> [Accessed on 22 August 2013], and the Tilbury Speech at *Luminarium: Anthology of English Literature*. <http://www.luminarium.org/renlit/tilbury.htm> [Accessed on 22 August 2013].

³⁹ Many of these pamphlets have been beautifully preserved at the British Library (<http://www.bl.uk/>) and carefully scanned for the Proceedings at the Old Bailey, 1674-1913 <http://www.oldbaileyonline.org/> [Accessed 15 July 2013].

⁴⁰ For a sense of the nature of the Bloody Code and whether it was persecuting the average criminal, see Douglas Hay, 'Property, authority and the criminal law' in Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson and Cal Winslow (eds.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York, 1975), pp.17-64. See also E. P. Thompson's somewhat more complex discussion of the role of capital punishment in 'The Crime of Anonymity from Albion's Fatal Tree', *Whigs and Hunters: The Origins of the Black Act* (Penguin, 1990), pp.378-432.

survive trials after running away from their masters.⁴¹ By focusing on this development from roughly 1500 to 1850, students can witness the changing theories of how to punish wayward subjects just prior to the rise of the penitentiary.

4 The Online Database: Cultural Structures of the Law

Academic fields are undergoing a rapid transformation in response to the new online databases that have changed forever the way that students interact with historical resources. Rather than provide students with prepared works and collections, we can send students to databases to have them find significant sources and tell us how those sources have reflected the historical moment of study. These student-led projects show them first-hand the multitude of historic interpretation. In turn, sharing a collection of unique student projects expands the historical understanding of the rest of the classroom. The amount of content covered in depth grows while contributing to the development of project management, oral presentation, and written communication skills for individual students. Inquiry-based teaching allows students to construct projects in order to answer large questions, taking the place of common essay questions often traded on essay mill websites.⁴² Students may now investigate legal databases for clues about social traditions, attitudes of gendered expectations, religious understanding, and political influence. Crime and the law in particular apply to subsets of society and enable students to access the real experiences of often-ignored groups of people. Reading original documents enhances critical thinking and interpretation while creating a more meaningful interaction with collections of original documents.

The use of the keyword search allows students to take an existing body of primary sources and consider it through a very particular lens. Drawing out laws that contain words associated with

⁴¹ Jonathan Dalby, *Crime and Punishment in Jamaica: A Quantitative Analysis of the Assize Court Records* (University of the West Indies, 2000), pp.74-76. England and Wales, *An Abridgment of the Laws of Jamaica; Being an Alphabetical Digest of all the Public Acts of Assembly now in Force, from the thirty-second year of King Charles II to the Thirty Second Year of his present Majesty King George III. Inclusive, as Published in two Volumes, under the Direction of Commissioners appointed by 30 George III cap XX and 32 George III cap XXIX*. St Jago de la Vega, Jamaica: Printed by Alexander Aikman, Printer to the King's Most Excellent Majesty. 1743 The Newberry Library K 2974.45. England and Wales. *An abridgement of the laws in force and use in Her Majesty's plantations, (viz.) of Virginia, Jamaica, Barbadoes, Maryland, New-England, New-York, Carolina, &c. / digested under proper heads in the method of Mr. Wingate, and Mr. Washington's abridgements*. The Newberry Library Case K 383 .015

⁴² Angela Brew, 'Teaching and Research: New Relationships and Their Implications for Inquiry-Based Teaching and Learning in Higher Education', *Higher Education Research & Development* 22(1) (2003), pp.3-18; D Randy Garrison, Terry Anderson and Walter Archer, 'Critical Inquiry in a Text-Based Environment: Computer Conferencing in Higher Education', *The Internet and Higher Education*, 2(2-3) (1999), pp.87-105.

womanhood provides students with an idea of how women were treated by a society at large and empowered by variations in legal performance. A wonderful example of this type of extrapolation can be found in Tim Stretton's excellent work *Women Waging Law*.⁴³ Stretton's focus on women's behaviour before various courts allows him to create complex profiles of otherwise unknown women of a variety of class, geographic, and religious backgrounds. Any one of his chapters would provide students with an ideal product of drawing conclusions from the stories of a particular group employing one type of legal response to real life problems. Specific marginalised groups, from immigrants to poor families, the unemployed or religious non-conformists, come into sharper focus when portrayed through group-specific legislation. Authority figures debated the condition of such people. The product of these debates, read thrice in both Houses of Parliament, were carefully chosen and subsequently published for distribution throughout the realm. Reading these words closely is paramount to understanding the differing world view from those who wrote and designed a law and those who would experience it when standing accused at court. The trial records and legal pamphlets then provide real experiences of people interacting with those new policies. Ideally, students should engage with both the language of the law and the real life consequences of those accused of breaking them.

For a comprehensive collection of digitized legal pamphlets, commentaries, and advice books, there are numerous options. HeinOnline is a collection of millions of pages of legal pamphlets and publications that support the passage of laws from approximately the sixteenth to the twentieth century.⁴⁴ The source material collected in HeinOnline ranges from legal treatises to magazines and newspapers. The organization behind Early English Books Online (EEBO) has digitized almost every single printed piece from the early modern period and contains objects from 1475 to 1700 and beyond. Furthermore, many of the more popular sources text have been made searchable through the Text Creation Partnership sister website.⁴⁵ Where EEBO leaves off, Eighteenth Century Collections Online (ECCO) continues the project.⁴⁶ Together, these databases provide a series of text-searchable materials that students can use to ask keyword-driven questions of the surviving material. In this way, students may engage in IBL determined

⁴³ Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge University Press, 2005).

⁴⁴ For more information, see the 'About' page here: <http://home.heinonline.org/about/what-is-hein-online/> [Accessed on 31 October 2013].

⁴⁵ For more information, see the 'About' Page here: <http://eebo.chadwyck.com/marketing/about.htm> [Accessed on 31 October 2013].

⁴⁶ For more information, see the 'About' Page here: <http://gdc.gale.com/products/eighteenth-century-collections-online/> [Accessed on 31 October 2013].

by personal interests and student-driven research projects tying legal tradition to cultural development.⁴⁷

Lesson plans to interact with these databases are numerous, following essentially the same idea of creating a research question and sending students to seek the answer within a collection of primary sources. Asking students to answer a broad question by using these primary source banks can help personalise their education while encouraging them to design and execute a well-crafted research project. Instructors may draw from their research backgrounds in order to assist students in creating a single research question and a list of appropriate, related search terms. 'What was the status of women in early modern England?' To answer such a question, students may search for a series of terms related to women's experiences and then mine the resulting collection of appropriate passages to draw their own conclusions. 'How did mercy strengthen royal authority?' For this question, students may create a list of the functions of mercy (sanctuary, royal pardons, and benefit of clergy), search for those terms, and then similarly collect passages explaining historical attitudes towards such legal functions. 'What rights and challenges did marginalised peoples experience in early modern England?' Ideally, students would construct a list of groups of people and begin to seek legislation or litigation containing their titles, occupations, or places of birth in order to find examples of that group appearing at court. Among the subsequently discovered examples, students will discover recurring themes that allow them to draw meaningful, historical conclusions about the interaction of legislation and litigation. All of these questions can be put to students for them to answer with their own original research. Rather than lecturing to students or pushing them in a discussion section, students can be trained to interpret the primary source material for themselves and draw their conclusions in original and unique research essays.

Ultimately, all of these databases provide a limited glimpse into the daily lives of the past. The lens of the law can reveal conflicts of average people, rich or poor, recording lives that have otherwise been lost to time. The word search key in all of these databases allows students to focus on a specific tradition or trend, from the institution of marriage to the development of specific crimes over a certain period. By searching for 'buggery' or 'atheism', students can use the law and changing perceptions of criminal behaviour in order to ask important questions of the past in their own original research. As a result, such projects prepare students for later, deeper historical research or for project creation and direction in their future careers. Inter-

⁴⁷ Garrison et al, 'Critical Inquiry in a Text-Based Environment'.

disciplinary research on the effective use of IBL suggests that all professions require a broad range of skills including the management of colleagues, the creation of reports, and the presentation of proposals that might solve challenges specific to each institution.⁴⁸ The consequence of this style of training has positive effects in creating collaborative employees for the workforce with strong communicative and administrative skills.⁴⁹ The study of the law through IBL helps students to develop these valuable skills while also unmasking the real people who experienced broad historical trends. The legal approach in creating projects therefore narrows the field of history enough to make it tangible, yet covers such wide ground that the historical events become simultaneously personal and universal.

Conclusion

Although students may consider the law to be primarily the concern for lawyers and criminals, it provides students and teachers alike with a common and repeated lens for viewing continuity and change over long periods of time and across vastly different civilizations. The law also serves as a common theme throughout history with compelling personal stories that can inspire a wide student audience. By focusing on legal codes, a classroom can construct common themes and focus on a wide variety of historical groups who might otherwise be lost in the grand narratives of the undergrad classroom. Each collection of rules codified into punishment allows historians and students alike to measure the challenges believed to be most threatening to lawmakers and leaders. However the study of law is reduced to a study of the ideas of the powerful if there is no accompanying analysis of real life consequences. Not all laws have been enforced equally, and some forbidden actions were codified with penalties as a way for politicians and legislators to posture among each other rather than propose a real-world problem facing the community.

This article has sought to highlight the unique benefits of teaching history through a lens of crime and the law. From the expressions of power in reading the language of legislation closely to the accessibility of real people's lives as conveyed through litigative records, the study of crime can draw students of varying backgrounds into historical survey courses. When employed with the IBL style, this focus can lead students from all majors to new accomplishments in

⁴⁸ Elisabeth J.H. Spelt, Harm J.A. Biemans, Hilde Tobi, Pieternel A. Luning and Martin Mulder, 'Teaching and Learning in Interdisciplinary Higher Education: A Systemic Review', *Education Psychology Review*, 21 (2009), pp.365-378.

⁴⁹ Christopher Justice, James Rice, Dale Roy, Bob Hudspith and Herb Jenkins, 'Inquiry Based Learning in Higher Education: Administrators' Perspectives on Integrating Inquiry Pedagogy into the Curriculum,' *Higher Education*, 58 (2009), pp.841-855.

project management. Students can draw their own conclusions about subjectivity and power across cultural lines and time periods. Comparing this to systems in the modern and contemporary world is a natural next step, regardless of whether the student is studying law, history, or another subject.

These sources discourage the tendency of undergraduates to organize all of history into 'good' and 'bad' while conveying the complexity of methods of authority. Features of the law that thread mercy into its criminal code benefit the entire community by conveying increased loyalty and popularity to the power that grants it by the person who receives it and their friends, family, and allies. Not all subjects were allowed to claim such elements of mercy, and their very exclusion reveals more about English society itself. The foreigners, illiterate, Catholic recusants, and other groups demonstrate the values of different members of society in the minds of Parliament representatives.

Finally, these resources may be further understood by incorporating more social, cultural, and legal elements into the study in the classroom. Databases have introduced us to a new era of research in which students can incorporate their personal interests in science, business, accounting, or medicine into their classes on history. The sheer varied yet centralised nature of crime and the law can facilitate a successful application of inquiry based instruction, which is designed to develop independent project management in students. This approach allows instructors to hand the reins of research to students without sacrificing the main goals of the course.

Ultimately, the study of crime is the study of the intersection of social expectations, power, individual motivations, and loyalty. Social interactions are captured in the tensions and struggles at court, either from individuals against each other or a subject versus the state. One might argue that these dynamics are the underlying theme of most historical research, from the military and political to the dynamics of gender and controlling the body or explorations in economic development. In this way, the study of the conflicts in law or at trial represent to students the tensions they experience in their daily lives. The compelling stories of the past draw them in, while common themes make historical cultures feel familiar. The law can speak to students in a way that complex gender theory might not: by bringing base fears, violence, and criminal activity to the fore and revealing how subjective those categories are to cultural norms. In turn, students will begin to appreciate more clearly how the laws of their own state and

community are constructed. In addition, by employing IBL, students can direct their education to apply to their professional goals. Rather than force a series of standard essay questions upon them, student-generated learning allows them to develop set skills by investigating topics of personal or professional interest. In this way, they can focus on honing project management and leadership skills while inserting their own personalities into each assignment. When the study of crime and the law is incorporated to elements of mercy, the balance of legislation and litigation, and the method of inquiry education, the product will be a student capable of critical analysis and project management with a better understanding of globalised and connected communities.