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DISCUSSION

The Rule of Law on Trial

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***Diebe vor Gericht. Die Entstehung der modernen Rechtsordnung im 19. Jahrhundert*. By Rebekka Habermas. Frankfurt and New York: Campus Verlag, 2008. €34.90**

A major purpose of this unusually interesting investigation of property and the legal system in the nineteenth century is to undermine the liberal narrative of the progress of the rule of law. Rebekka Habermas wishes to show that the implementation of liberal ideals of justice—public, oral jury trials and equality under the law—led to results quite different from what the proponents of those ideals envisaged, which were no improvement over the judiciary of the old regime. If the book is thus a critique of nineteenth-century liberal ideals, it is also a critique of the critical interpretation of these ideals as a form of bourgeois repression of the lower classes, whose increasing impoverishment led them to engage in appropriation by theft. Although the author mentions as a characteristic example of this critical interpretation Michel Foucault, her own accounts have a distinctly Foucaultian tone to them; the brunt of her criticisms falls on Dirk Blasius's studies of the history of crime.[1]

Habermas employs the methodology of contemporary legal anthropology, whose proponents study what they call 'doing law', the way the legal system functions in everyday life, and the sometimes clashing cultural constructions of the different actors within this system. Justice, they argue, emerges out of the intersection of these cultural constructions. Contemporary anthropologists, of course, can just go to a courtroom, and observe trials, a form of investigation impossible for historians. The closest historical equivalent would be the analysis of trial transcripts, but German archivists have a distinct penchant for discarding such materials, for reasons of records management: legal records are much larger and bulkier than those of the administrative bureaucracy. The rarity of trial records has made it more difficult to study the everyday functioning of the modern German legal system (sources are generally better for the old regime) so that works utilizing this material, such as Regina Schulte's book on crime in nineteenth-century rural Bavaria, are few and far between.[2]

Habermas has found a cache of court records in the state archives in Marburg. Her work is based on the extensive study of trials for theft in the Principality of Hessen, during the quarter-century following the introduction of a new legal system in the wake

[1] Michel Foucault, *Surveiller et punir: naissance de la prison* (Paris, 1975); Dirk Blasius, *Bürgerliche Gesellschaft und Kriminalität* (Göttingen, 1976).

[2] Regina Schulte, *Das Dorf im Verhör. Brandstifter, Kindsmörderinnen und Wilderer vor den Schranken des bürgerlichen Gerichts. Oberbayern 1848–1910* (Hamburg, 1989).

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of the revolution of 1848. In contrast to Schulte, whose interest in criminal records was primarily for their use in understanding lower class mentalities, Habermas, following her anthropological model of the law as an arena of clashing cultural conceptions, has a broader purpose. Evaluating court documents with an eye to the cultural assumptions behind them, and carefully comparing her analysis of the nineteenth-century legal system with works on the old regime judiciary, the author makes a very well constructed case for her assertions, although some questions about her analysis do remain.

Fundamental to her study is an observation about the social setting of theft cases. Upper Hessen was 'Germany's poorhouse', as contemporaries said, and the decades following 1850 were characterized by the departure of large portions of the rural and small-town lower classes for North America or the expanding urban and industrial centres of the Ruhr Basin and the Rhine-Main region. Perpetrators of theft were mostly young men (and a few women) from this social group who had remained behind, and earned a living combining a variety of expedients, including wage labour, begging, and dependence on family members and their modest property. The victims of theft were generally also poor, and the objects of appropriation were all too often trivial—a few slices of bread, a hat, a couple of torn shirts.

Habermas argues it was less the material or economic value of the stolen objects that was at stake, but the social relations in question. Theft was a means of impugning the honour of the victims, and the response of reporting the thief to the authorities—a very difficult step for members of the lower classes, who preferred to keep their distance from the state—and subjecting him to legal procedures was a counter-stroke, designed to force him into the degradation of arrest, trial and imprisonment. In the old regime, such social conflicts were understood as offences against honour, and most criminal trials concerned injured honour, but nineteenth-century conceptions of honour reserved it for the upper classes, so that similar social and cultural conflicts came to be staged in a different legal arena.

Habermas argues that the legal system was designed to abstract from and to hide the social context of the crime and, instead, to focus on the property involved, in this way developing a new, bourgeois conception of property in terms of its owner's exclusive possession and full disposition. Investigations of the crime centred entirely on establishing who owned the object under dispute. There was no place in these investigations for sharing items, loaning them out or non-owners' usage rights. Elaborate lists of everything stolen were drawn up; detailed sketches of the scene of the crime made; witnesses were questioned and indictments framed exclusively in terms of ownership of objects and their illegal appropriation.

The same process of abstraction and decontextualization characterized the treatment of the accused. Wanted notices described individuals exclusively in terms of a stereotyped set of physical characteristics, often bearing little relation to their actual social appearance. Habermas suggests that the proliferation of such notices gave rise to the idea of a class of criminals and created a climate of fear of a crime wave. Legal and criminological treatises rejected eighteenth- and early nineteenth-century case studies of individual criminals that discussed the personal backgrounds to their crime as unscientific (*unwissenschaftlich*) and instead concentrated on developing crime statistics. The abstraction and standardization required for the creation of statistics also stripped crime of its social context, and created a picture of an undifferentiated mass of criminals, engaged in a crime wave.

Habermas's criticisms of the criminal justice system continue in her discussion of the way liberal principles were implemented in court. Jurists from bourgeois or noble backgrounds had little connection with the lives of the lower class defendants and no understanding of their values. Most defendants did not receive a jury trial but came before a lower magistrate. Even for those who did go before a jury, the decisive part of the trial was the preliminary investigation, carried out in private, with the accused lacking any legal representation. The actual, public trial largely re-enacted this preliminary investigation. Witnesses were questioned in a very narrow context, once again ignoring the social background of the crime, in order to establish someone's exclusive possession of property and its misappropriation. Defendants all had legal representation—if too poor to afford their own attorney, as most were, they received a court-appointed lawyer—but defence attorneys' personal and professional circumstances made them dependent on judges and the state's attorneys. They had no right of cross-examination, but could only put questions to witnesses via the presiding judge. Most of their efforts went into a concluding plea on behalf of their clients, which gave them the reputation of trying to bend the law in favour of the guilty. Juries did deliver a verdict, but the role of jurors was limited to answering 'yes' or 'no' to a series of questions, asking whether the defendant had, at a particular place and time, taken a particular object in dispute.

The result of Habermas's investigations into doing law in the mid-nineteenth-century Principality of Hessen is to see virtually every step in legal procedure as having an actual significance different from its ostensible one. The crime of theft was about social honour, not property ownership; criminal investigation established conceptions of property, rather than investigated a crime; wanted notices created the image of a non-existent criminal class, but did not portray a wanted individual; public and oral trials did not establish the guilt or innocence of the accused under public scrutiny but ratified the results of a secret preliminary investigation. This system of significations leads her to the conclusion that the nineteenth-century liberal judicial system was, both in its practice and its ideals, no advance on its old regime predecessor.

This is a conclusion already reached by Foucault and Blasius, but Habermas's work undermines their view of the causes of the introduction of a new legal system. She questions their understanding of theft as a matter of material necessity for the lower classes. The value of the objects taken was trivially small, and they were generally not converted into cash or means of subsistence, but used for gifts and gratifications in the system of family economy in which the lives of the poor were embedded. Habermas rejects Blasius's linking of crime rates and grain prices (one other historians of crime have also used), noting that members of the lower classes did not buy grain in the open market, but received it from employers and family members. Since cases of theft involved one poor person stealing from another, it is hard to see how the liberal legal system was designed to protect the bourgeoisie from the efforts of the lower classes to appropriate their property.

The author's combined criticism of both the ideals of liberal jurisprudence and the ideas of its critics represents one example of a trend in the study of the transition from the old regime to a nineteenth-century bourgeois society. It endorses the idea, ultimately Marxist in origin, of a movement from one form of oppression and injustice to another, in which ostensible progress rebounds to the disadvantage of impoverished and disinherited social groups. But, unlike Marx's original critique or its post-1945 variant, propounded in different ways by Foucault and Blasius, it takes away the idea of intentionality in the form

of class agency, in this case, of the establishment of a new legal system as a result of the self-conscious implementation of bourgeois class interests. Habermas certainly notes many forms of class-related social and cultural constructions, from the rural lower classes' ideas about honour, to jurists' career patterns and expectations, to bourgeois fears of a crime wave. But the new system of justice and the new conceptions of property that—following the anthropological approach of 'doing law'—result from their intersection cannot be attributed to the striving for sociopolitical hegemony of any one social class.

While this is, overall, a very convincing work, whose methodology calls for emulation and whose results are quite intriguing, some aspects of it are not entirely convincing. Questionable areas can be grouped into three rubrics: first, some modifications of Habermas's critique of liberal notions of judicial progress; second, some doubts about her criticism of Dirk Blasius's conclusions; and third, some observations about the concept of property developing in criminal law, as compared to the treatment of property in nineteenth-century German civil law.

Habermas certainly shows that in trials for theft, liberal ideals of the citizenry controlling the legal system through public, oral proceedings with jury verdicts were not all that much in evidence. One does have to wonder if such ideals were devised with trials for theft in mind, or whether they were directed more towards trials for political offences. Certainly, in the aftermath of the revolution of 1848, having to conduct public, jury trials of revolutionaries did hamper the repressive efforts of the authorities.

The author's use of invidious comparison to attack the concept of judicial progress also seems at times exaggerated. She mocks liberal reformers' idea that juries represented public control over legal proceedings and that such control was an improvement over the old regime's secret trials, by noting that the public involved in juries was exclusively property-owning and male. The point is well taken, although one does have to wonder just what role poor women played in old regime justice. Habermas also consistently compares the continental European version of public and oral justice with the Anglo-Saxon one, to the benefit of the latter. Sometimes her conclusions seem to the point, such as the lack of cross-examination in the Hessian version of criminal proceedings, but other aspects suggest a certain idealization of Common Law jurisprudence. Smaller criminal cases did not come before a jury in the Principality of Hessen, but the same is true for Common Law misdemeanour defendants. The author's assertion that Common Law juries engage in public arguments (*plädiren*, p. 194) in favour of or against the defendant seems exaggerated. The reduction of juries' court role to the response of 'innocent' or 'guilty' to individual counts of an indictment—a distinct nineteenth-century trend in Common Law jurisdictions—led to circumstances quite similar to Hessian juries answering 'yes' or 'no' to the accusations of appropriating individual pieces of property. Common Law grand jury proceedings were and are carried out in secrecy, just like the preliminary investigations of Habermas's Hessian courts.

Elements of her critique of Dirk Blasius's ideas also might need some modification. Habermas is certainly right to point out that most trials for theft were not about the bourgeoisie defending its property against the ravages of the lower classes, since both thieves and their victims were usually quite poor. Blasius, however, following Karl Marx in this respect, formulated his thesis in regard to trials for wood theft—quite another kind of crime, one in which the victims could come from a different and higher social class than the perpetrators. Habermas's criticism of the use of grain prices as an index for poverty

and a key to the crime rate also presents some problems. It was certainly the case that many of the lower classes did not enter the market to obtain their food, and so were not directly affected by higher grain prices. But such a rise in prices was the result of a poor harvest and a general shortage of grain, so that subsistence became a problem for the poor, no matter how they obtained their basic foodstuffs. In fact, Habermas's own graph of the frequency of property crimes (p. 400) shows a peak during the early and mid-1850s, a period of very high food prices, approaching the near-famine years of 1845–47, and a sharp falling off during the period of good harvests in the later 1850s and early 1860s. The effect of high food prices, and, standing behind them, difficulties for the poor in obtaining basic subsistence, may not have been as direct, and following a logic of rational self-interest as Blasius suggested, but a more complex connection—in which cultural assumptions mediated economic developments—clearly existed and deserves further and more careful study.

Criminal law was, of course, not the only way that the nineteenth-century legal system created new conceptions of property. Civil law was also—and entirely—about property. The same judges and attorneys who disputed and adjudicated criminal cases also dealt with civil ones. Habermas tends to neglect this connection. She places the drawing of maps of the crime scene in the context of the geographical practices of nineteenth-century imperialism (p. 116), but the Hessian colonial empire was rather small, and a more plausible precursor—namely the sketches of property boundaries in civil trials and in the cadastre—is outside her view. In my own work on property, society and civil law, I have found a rather different attitude towards property in the nineteenth-century German judicial system.[3] Civil trials used many of the judicial techniques described by Habermas, including lists of property, sketches of the scene of the dispute and restricted forms of questioning witnesses, but the upshot was very different. Civil law recognized precisely those distinctions that Habermas claimed were annihilated in criminal law—renting, borrowing and sharing of property, even, to some extent, old regime usage rights. Far from abstracting from the social context of the possession of property, civil trials positively revelled in it. These differences may reflect to some extent different regions and somewhat different legal systems studied (Hessen vs. the Palatinate; Hessian law vs. the Napoleonic Code) and perhaps the different intentions of the historians' investigations, but the contrasts between the different forms of the treatment of property in the different branches of law still remain striking.

These observations should be understood not as a criticism of Habermas's work but as praise for the new historical vistas it opens up. The virtues of court records for the understanding of everyday life in the modern era, not just in the old regime, the functioning of the legal system in everyday life, the reshaping of legal concepts and popular understandings of property and its implications for social relations and social conflicts—to mention just a few of the many issues brought to the fore in this book—all point to ways to expand the scope of the study of the social, legal and cultural history of the nineteenth and twentieth centuries. One can only hope that other historians will exploit some of these possibilities.

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[3] Jonathan Sperber, *Property and Civil Society in South-Western Germany, 1820–1914* (Oxford, 2005); Sperber, 'Angenommene, vorgetäuschte und eigentliche Normenkonflikte bei der Waldbenutzung im 19. Jahrhundert', *Historische Zeitschrift*, 290 (2010), pp. 681–702.