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# Editorial

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## **EDITORIAL**

This editorial is being completed in the context of the terrorist attacks in Paris between 7 and 10 January 2014, and the consequent debates about terrorism, human rights and freedom of speech. The news depicts apparently hardening reactions to the motivations for the attacks in both the West and the Islamic world, and an increased sense of justification for the respective stances on both sides of the divide. The challenge of terrorism is now high on the global agenda. Back in 2011, at the SOLON Crime, Violence and the Modern State conference in Lyon, a powerful and important plenary was given by Anicetu Masferrer, of Valencia University. It seems even more so today. He pointed out that over the last two centuries – since the French Revolution, ironically – terrorism has posed a threat to democratic government and its associated, increasingly cherished, ideas about the value of freedom of expression and to its responsibility to operate as agents of the rule of law. Certainly it was at that historical point that terrorism took its modern form. In many ways it could be argued that in pre-modern societies, the greatest perpetrators of terror in states were the governments of those states, and/or religious authorities. The law, either secular or religious, was regularly used to terrify a populace into compliance and submission, if not enthusiastic support for a particular regime or conformity to a religious belief. Thus the executions of political prisoners could be carried out in imaginatively unpleasant and gruesome ways, accompanied by a subsequent display of body parts as reminders of their unpleasant ends; while heretics (those who made the ‘wrong’ religious choices) could also find themselves being put to death in ways intended to encourage orthodoxy of belief. This aspect of terror has, arguably, come back to haunt a West with its own uncomfortable past in this respect in the shape of Islamic State and its activities over the last nine months. Claiming to be a state, and therefore to have government (and religious authority) and the legal privileges that follow such status, IS leaders have enthusiastically targeted heretics from the Yazidi and Christians to fellow Muslims who do not adhere to their version of Islam.

But, from the 1790s on, Anicetu Masferrer argued, there was a new aspect and more recognisably modern aspect to terrorism – and to the challenge that this new type of terrorism has posed to the maintenance of the rule of law. Modern terrorism is characterised by individuals and small groups, not states, with a fanatical attachment to an ideology or belief and an insistence that this had awarded them the right to create a situation where, despite small numbers, they can hope to influence a larger target community by intimidating them through the use of ruthless extra-legal terror tactics. During the Reign of Terror in France, the revolutionary state sought (pretty successfully) to terrorise the population through use of its official state powers: but its opponents increasingly resorted to tactics such

as assassination to counter and undermine the revolutionary state. Since the nineteenth century, Western states at least have increasingly modified or even abandoned the visible use of state forms of terrorism, while – thanks to modern technology in communications as well as ways to kill – non-state terrorism has flourished.

One key challenge to governments has been how to fulfil its implicit contract with citizens (to protect them from threats to their individual and communal welfare as encapsulated, for instance, in human or civil rights concepts) without resorting to authoritarian measures and legislative action which is arbitrary and secret, and so contrary to normal expectations of the rule of law. In many ways, and purely serendipitously, the articles in this issue as well as several of the books reviewed, touch on aspects of this challenge and reactions to it, past and present. Chronologically, the earliest article is that by Robert Shiels, dealing with the 1877 Sheriff Court reforms in Scotland – and it is a refreshing and very welcome contribution to have a paper with a Scottish focus. We hope that this will stimulate more offerings dealing with aspects of Scottish law in action, and its impacts. It is also worth bringing up here that, as the report by Cerian Griffiths on the British Crime Historians Symposium of September 2014 records, Richard Ireland went out of his way to lament the neglect of studies on the Welsh experience of law, including its response to the English system of criminal law imposed on it. Study was needed to estimate how far the Welsh ‘circumvented and undermined this imposition through methods of local alternative dispute resolution’, for instance. Again, we would welcome articles reflecting this perspective, along with articles illuminating the Irish experience. And, as ever, articles with a focus on African, Asian, Russian, Chinese, South/Latin American or Antipodean and Pacific legal history would be welcomed with open arms to amplify the offerings we get (still too few) on European and North American legal history.

One of the important points of this article is that it reminds us that Scottish law is, and was, significantly different, not just in legal detail but also in terms of the wider significance of the role played in the socio-political culture of Scottish society. A key part of the Scottish reality over centuries has been that part of the government contract with its citizens where there has been a willingness in government to assume the role of public prosecutor in criminal trials. This was very different to the experience in England and Wales – though it was an approach

increasingly being used in some colonies within the British Empire.<sup>1</sup> It underlines also just how careful scholars must be not to assume a universality of experience across a state.

At a time when Scotland had an increasingly sophisticated system of public management of prosecutions in its criminal justice system being implemented by the Westminster Parliament, that same Parliament was debating, with evidence of considerable reluctance amongst MPs, whether or not to accept the establishment of a public prosecutor's office. It shows a very different conceptualisation of what constituted the public interest at this time between Scotland and England and Wales (and, indeed, Ireland, and the British Empire more widely). Scotland took it for granted that a public prosecution system, rather than one privileging privately funded prosecutions as was the English and Welsh reality, was in the best public interest. There was considerable doubt that this was the case in England (and Wales, by default), especially after the high profile 'failure' of the Boulton and Park prosecution between May 1870 and May 1871, where the Treasury Solicitors Department had intervened in what was widely advertised in press and Parliament as the public interest. The failure of the prosecution to prove their case that Boulton and Park were guilty of unnatural practices as well as being a public nuisance because of their cross-dressing habits had proved to be a real embarrassment and, along with the failure – also in 1871 – to secure a prosecution in the Eltham Forest murder case.<sup>2</sup> As a result, the Prosecution of Offences Act 1879 was only passed two years after the reforms to the Sheriff Courts in Scotland – and only introduced a very rudimentary public prosecution system which focused heavily on indictable offences.<sup>3</sup> The point is made, very cogently, in this article that 'criminal trials are never exclusively about the identification and punishment of wrongdoers; they are always also about the relation between the legal and social order.' That, in effect, sums up the issue of how the public interest is judged – and why there can be such differences within an apparently unitary state.

It is also important to remember, as the article by David Ruth emphasises, that a feature of modernity has been a critical comparative consciousness of law in action, and underpinning legal systems, that operate internationally, and not just intra-nationally. The ruthless re-

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<sup>1</sup> It is tempting here to speculate just how much the heavy involvement of Scots in that Empire had to do with a promotion of an expectation of an increasingly centralised funding and delivery of criminal justice.

<sup>2</sup> Jane Clousen was found, savagely attacked, by PC Donald Gunn, to the side of Kidbrooke Lane in April 1871, and subsequently died of her injuries. The son of her previous employers, Edmund Pook, was accused of her murder – but acquitted at his trial at the Old Bailey in July 1871. Many people blamed both the police and the prosecution for the unsatisfactory outcome.

<sup>3</sup> At this time, over 90% of all cases were concluded in the summary courts and so were generally considered to be not falling within the public interest to see a public prosecution.

ordering of the French legal process expressed in the Code Napoléon was the basis for such comparison, though the will to order or codify a state's laws was something which had already begun to happen as a result of the Enlightenment-inspired will to classify and arrange information in a more systematic and accessible way.<sup>4</sup> But from the start, Napoleon's intention was to establish a system of laws for France which would also be readily transferrable to other European locales under French rule or hegemony. It was accessible to a widespread critical gaze because it was not based on earlier French laws and customs, but instead looked to something universally accessible to men educated in the Western Classics-orientated tradition – Justinian's codification of Roman law, the *Corpus Juris Civilis*. Throughout the nineteenth century, law reformers deliberately invoked the modern model of the Napoleonic Code when considering improvements across Europe and also in European colonies. Thus the point made by Ruth, when considering the Caryl Chessman episode in American legal history, that one reason why his case was so significant was because of the way that it was viewed *outside* the USA, and not just within it.

As John Walliss' fortuitously timely review of Lizzie Seal's monograph on the abolition of the death penalty in the United Kingdom also underlines, both the issue of capital punishment as a legal remedy sanctioned by the state and the perception of the state's will to impose it as part of the cultural national identity, were and are part of an on-going debate. America, as a global super-power and one of the two key protagonists in the Cold War, found itself the object of morally-based judgments about its relationship with its citizens and its use of the law to enforce order amongst them. The efficacy and purpose of penal systems, another manifestation of a modern government's responsibility to promote the public interest by protecting the law-abiding from criminal depredations, have been widely debated since the late eighteenth century. For instance, does prison work – and if so, what end does it work to promote? Purely a deterrent and punitive one, or a rehabilitative and reformist one? Equally, what is the point and purpose of capital punishment? What sort of sentencing policy best suits the public interest in terms of value for tax-payers' monies? These, and related questions, have failed to achieve conclusive answers of the last couple of centuries, and so it is hardly surprising that a case such as Chessman's should have provoked such interest. It tapped into all of these questions, not just for Americans but also for those observing the USA and considering it as a role model for Western-style liberal democracies elsewhere. Did the treatment of Chessman show that the USA was living up to expectations of it – or was it, dangerously, letting down both its own citizens and its international supporters?

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<sup>4</sup> Consider, for example, the Codex Maximilianeus bavaricus civilis, established in Bavaria in 1756, and just before the Code Napoléon, the West Galician Code, of 1797, within the Holy Roman Empire.

One of the other significant elements in this review is the focus on the use of the media to publicise the case – including, and unusually, the voice of the perpetrator/victim. It had been, throughout the nineteenth and earlier twentieth centuries, the media which had shaped and sustained public interest in the treatment of those who broke the law. The consciousness of the importance of the media in purveying the ‘real’ narratives revealing the ‘truth’ of crime in particular had been capitalised on as early as the nineteenth century by criminal justice professionals such as lawyers in Britain. But over time, other commentators beside professional journalists and lawyers had used the media to put across particular arguments and perspectives. In Britain, for instance, as the question of the efficiency of the legal system and the nature of law reform became a party political matter, politicians increasingly used the media to press their opinions. But while a number of prison narratives had been published, it was still comparatively rare for the subject of a criminal prosecution to use the media to make their voice heard. Chessman’s successful autobiographical publications, and the reactions to these (including the film made of his first effort, *Cell 2455, Death Row*) ensured that the debates during the 1950s on his situation and the appropriateness of his location on Death Row were not just focused on the merits of the legal process and the moral abstractions of punishment. Chessman used the media to get across to a wide audience his view that he was inappropriately situated on Death Row. His voice was a clear factor, as this article underlines, in convincing many commentators inside the USA as well as outside it that he should be reprieved.

Again, it underlines the power of the media – especially when, as has become the norm in liberal democracies – that media is substantially uncensored; and raises questions for governments about where the real public interest lies. Something that Ian Marsh highlights in his debate piece (more of which below). Does it lie in permitting the publication of voices such as that of Caryl Chessman, because it is plain that the whole episode would have been far less high profile and sensational without the public dissemination via the media of his autobiographical narratives? While there were not, in America in 1960, when Chessman was finally executed, riotous public demonstrations of feeling – the potential for such was there, and as one of the key elements in preserving the public interest could be said to be the maintenance of order, was the publication of his autobiographies in the public interest? The same question is very much at the forefront of current debates about the publication of *Charlie Hebdo*, considered by many to overstep the mark and to encourage racism and bigotry. Will its sale, or reproduction of parts of it, and the continued publication without censorship of similar media productions, lead to further terrorist activity and public disorder, for instance? Where, for liberal governments, does the balance lie?

The need to rethink what amounts to public order and its maintenance by the law, rather than by custom and consent, is central to the final article in the issue: that by Colin Moore and Gerry Rubin on the policing of the British Army via its own military police force. Back in the days of the Napoleonic Wars, the Duke of Wellington – surveying his troops – had commented of the men under his command that he was not sure whether they would frighten the enemy but ‘by God, sir, they frighten me’. At that time, the British army regularly incorporated men who were criminals – convicted or unconvicted.<sup>5</sup> There was, throughout the nineteenth century, even as the army was professionalised and reformed, a continuing expectation that – when not actually fighting or awaiting conflict – British soldiers would be both dishonest and disorderly within the ranks. Kipling’s stories of his Soldiers Three – Privates Ortheris, Learoyd and Mulvaney – showed them to be consistently a challenge to authority and guilty of ‘genial blackguardism’, which basically came down to petty theft, fraud and deception, all usually involving misuse of army property. Kipling’s affection for his three rogues cannot disguise the problems that the British army had in managing to instil and sustain order within the ranks as late as the end of the nineteenth and into the early twentieth centuries. But, by the end of the Great War in 1918, there was a feeling that tolerance of such criminality, minor though it might be, was unacceptable – particularly because the realities of modern warfare, involving the civilian as well as the military population, meant that the military had to provide role models for good behaviour in a way never previously anticipated.

This was the background to the study undertaken by Moore and Rubin of how the British Army was cleaned up, through the use of its own internal police force – but, importantly, through the importation also of more civilian values and strategies for policing that military community. As their article reveals, it was not just detection and policing strategies that shaped the modern Royal Military Police and its Special Investigation Branch; it was also an expectation that the RMP would maintain a level of order and good behaviour in the military community that could be expected in the civilian population, substantially as a result of increasingly sophisticated policing both of criminality and every day crowd control. This reveals an expectation by the post-1918 period in Britain that without orderliness, there could be no law – and also an expectation that all the arms of the state, including its armed forces, should provide models for good behaviour in the public interest.

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<sup>5</sup> The same held true for the Royal Navy.

The question of what constitutes the public interest is again implicit in Ian Marsh's Debate Forum discussion, exploring the ways in which, within contemporary criminology, media representations of crime and justice delivery are understood. Marsh highlights 'the links between the media and public opinion, and the influence of media representation of crimes, criminals and criminal justice agencies'. He is right to adjudge that the social sciences are approaching this topic in ways that neither media studies or literature as academic disciplines, nor the law itself all too often, have understood it. But this does rather overlook the attention paid by historians and legal historians to crime, justice delivery and their representation through the media and the impact that this has had, over time, on how the public in general have understood the nature of crime and justice. For this reason, we would welcome contributions from scholars in these fields to amplify and explore the issues raised by Ian Marsh, for publication in a future issue. The time seems ripe for a greater consideration of the historical dimension to the evolution of what is considered the public interest in justice delivery and crime analysis, given the historical emphasis reflected in the recent Routledge History of Crime in the UK and Ireland series, where the two books reviewed in this issue are both by criminologists! These are welcome, and rightly interdisciplinary, contributions. And as the conference report on the recent British Crime Historians symposium also underlines – the use of a historical perspective to study and understand crime in ways that have a wider relevance to more overtly present-minded disciplines is flourishing. And it can only be in the public interest, we at SOLON would argue, to promote and encourage that!

As Henry Beckingham comments, reviewing a recent monograph by Henry Yeomans on the history of alcohol regulation, when reflecting on law and what constitutes the public interest when it comes to legal regulation, it is often what we believe about a topic that is most influential in determining that issue. As he points out, the strength of Yeoman's exploration of this issue is the wider message, that we must question whether legislative initiatives do, in fact, spring from popular demand (suggesting that reforms therefore are in the public interest), or whether there is instead an expectation by the legislators that they know, in a Hobbesian sense, what that public interest is. In that case, the inference is plain that policy-makers and politicians, and those interested in justice delivery in various professions, should have the right to act regardless of public opinion. This, again, chimes with the point made by Walliss in relation to Lizzie Seal's exploration of the abolition of capital punishment in Britain: it was passed as being in the public interest in the face of expressed public opinion in the shape of the results from various opinion polls. Certainly, there is still – regularly – a popular



will to see a return to the use of capital punishment for certain heinous offences, as Seal (and Wallis) point out.

What these articles and reviews also demonstrate is the importance of a consideration of the public issue in terms of a public contribution to, and understanding of, crime and justice delivery, past and present. The final book reviewed in this issue; that by Andy Davies on gangs in Glasgow, provides an interesting challenge to academics in particular – as the review itself underlines. In terms of the content of *City of Gangs*, what emerges is a suggestion that, just as in the Glasgow experience, formal interventions by authorities and institutions such as the police may not be the whole answer. As many commentators and some politicians at least are suggesting, the answer to the radicalisation of young Muslims in the West and their consequent attraction to terrorism may lie at least as much in interventions by figures within their own communities, working to provide alternative attractions. Also, playing around with the concept of what constitutes the public interest, is it not valuable that books should both interest a general, non-specialist public and discuss topics which are, very clearly popularly considered to touch on topics which affect the welfare and happiness of communities. We are hoping, in the next couple of years, that SOLON will be able to return to organising conferences and workshops which will address this challenge, reviving the Crime, Violence and the Modern State series as well as Experiencing the Law and the War Crimes series, as well as workshops at local SOLON bases which can address topics of local concern – which are, as ever, likely to have wider implications for research into, and practical management, of law and crime.

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