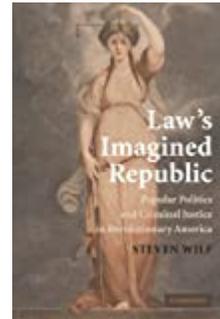




Steven Robert Wilf. *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America.* Cambridge: Cambridge University Press, 2010. 248 pp. \$25.99 (paper), ISBN 978-0-521-14528-2.



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Published on H-Law (June, 2010)

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Very Flawed Founders

Can a history of the founders be brilliantly original and exasperatingly elusive at the same time; replete with insight and still riven with jargon? The answer plainly is yes, and exhibit A is Steven Wilf's remarkable essay on the role of criminal trials in the framing of American legalism. Wilf credits Robert Cover, Larry Kramer, and Christian Fritz as inspirations, but Wilf's persistent reference to "law talk" hints at the real inspiration for his work (and so much of our understanding of how law works). Hovering at the edge of all Wilf's stories, peeking mischievously around the pages, is the ghost of Karl Nickerson Llewellyn.

Llewellyn taught his law students that "the meaning of the law in life and in the practice of lawyers is its meaning not to courts but to laymen."^[1] He was a brilliant realist, but indulged himself by labeling some of his most novel notions with legalese like "jurisprude," and "law stuff." Wilf repeats the feat, the innovative and the impenetrable.

I am not sure that I buy all of Wilf's thesis, but no

one will ever write about revolutionary legalism without having to deal with it. He joins Bernard Bailyn, Jack Rakove, John Reid, and Gordon Wood (I apologize for omitting a number of other leading accounts) as mandatory cites on the founders' legal ideas. Wilf boldly asserts: "My hope is that by returning to the well-spring of law talk—recovering how late eighteenth-century Americans mixed criminal law and politics, and used this intoxicating combination as a means to mobilize citizens, both elites and common people—we can elucidate how Americans ultimately transformed rule of law into a dominant cultural feature of the early Republic" (p. 4).

The trick is to leave the elegant but arcane discourse of constitutional theory behind and "read" the law talk from the bottom up, the "mix of gossip, politics, sensationalism, tales of murder, and astute attention to the procedural norms" of trials that was the popular face of law (p. 4). Everyone attended these events, so what was said and heard of them was closer to "the people" than the readers and writers of pamphlets. Servant and slave, woman and child, Indian and immigrant, were all

exposed to this law talk in a way that they could not access the constitutional discourse. In a certain way, then, it is possible to speak of the criminals at the core of such stories as founders and the way they told their stories might be described as the late eighteenth-century version of kitsch legalism (p. 3).

Then, when the clarity of Wilf's argument seems to break upon us like a crisp autumn dawn, he lugs in Llewellyn-like jargon. While certainly they employed a panoply of techniques for interpreting legal expression during the period [1754 to 1790], one stands out—intertextuality. Cases were read against other law cases, text was read against the narrative of its political context, and the American legal doctrine was read comparatively against its English counterpart (p. 3). This is nonsense on stilts, and Wilf has already told us why. His criminal founders shared an oral culture with their auditory. The stories they told about themselves and their cohorts were read aloud and spoken of. Intertextuality, whatever that neologism adds to any account, was something that the elite embraced. They knew how to read cases and compare them with one another, and to lay the texts of American criminal law alongside those of English criminal law. They did this not in the streets around the gallows, but in their legal libraries. Theirs was not a popular exercise of the legal imagination but a studied and rarified exercise of the intellect. And it is something we already know a good deal about already.

But before one consigns Wilf's essay to the flames as one more example of law school metaphysics, one should read the stories. Ignore the macrointertextual reading (p. 9) and listen to the voices of the men who tell us about their law in the shadow of the gallows. This law was open to people at all levels of society (p. 10). But that open quality of law did not last. Just as the independence of juries was foreclosed by the rise of a professional class of judges in the first years of the nineteenth century, so the 1790s witnessed the waning of vernacular legal culture, participatory justice, and the kinship of legal discourse with politics (p. 11).

To recover these voices (not texts!) of the law, to see and hear law rather than simply read it, Wilf turns to hanging ballads, bits and pieces of iconography, pardon petitions, diaries, contemporary accounts of punishment, mock executions and execution narratives, and descriptions of official execution rituals as well as the more conventional sources (p. 11). As a sometime practitioner of sensory history myself, I find this effort both laudable and likely to lead to new understandings of law.

Here, it does.

The first story shows how common people spoke the language of the common law in a myriad of microhistorical settings, or in other words, there was a popular version of law that people could oppose to official versions. Not quite cracked mirror images, the episodes of popular protest demonstrated that law in real life was not text law at all. In the winter of 1770, Ebenezer Richardson of Boston found himself the focus of popular anger. A scion of good puritan Massachusetts stock, with no prior history of criminal activity, he objected to the crowds besieging a neighbor's home. When the mob turned its venom on him, he shot randomly at it, killing a schoolboy who had joined the throng. Saved from the noose by patriot leaders and taken into custody, Richardson's steps were dogged by an ever-growing mass of angry Bostonians. The key to the story is that the very individuals who directed the protests against Britain were the ones who insisted that Richardson's case follow established legal process.

Though crowds gathered for the boy's funeral and public prints turned Richardson into a career malefactor, the ruling precedent was not rough justice but trial before judge and jury. Josiah Quincy, who defended Captain Preston and his men in the Boston Massacre, was named by the court to defend Richardson—not easy, when the popular print was denouncing him. Quincy argued that Richardson acted in self-defense, his home being his castle. But the boy had fallen on the street outside the house. Did Richardson have to wait for the invasion of his home before he could defend it? What was public and what private? Was a brickbat through a window an intrusion into private property? The bench instructed the jury on the law, favoring the defendant. The jury found him guilty of murder. The spectators cheered. Popular justice had triumphed. The borders between courtroom and street corner dissolved (p. 36). Soon the royal courts themselves would be closed by angry partisans decrying the royal plan to pay the judges' salaries.

In the meantime, Levi Ames was pursuing a career of theft and armed robbery. For a final burglary he was condemned to death. But his case was filled with his remorse; conscience-stricken at his crimes, he hoped by confessing them to gain a pardon—to no avail. The public prints made a meal of it, using his case to warn of the wages of sin and crime. Languishing in jail for two years, Richardson was pardoned by the king and released. Once again the popular prints took up the chase, this time printing his mock execution confession while a mob hanged him

in effigy. Tried on the streets of Boston, Richardson's escape from punishment folded into the growing crisis, as the street, as much as the courtroom, was the locus of legal discourse (p. 54).

Vernacular legal culture (p. 58) of the sort that condemned Richardson and sympathized with Ames opened a channel for popular acceptance of otherwise inaccessible legalism. It turned the written into the oral, simplified the language of the law, and reduced rules to stories. To be sure, our knowledge of this vernacular comes from written sources. We cannot be sure that we are hearing and seeing what contemporaries heard and saw. As some critics of sensory history have warned us, the past cannot be recaptured in its sensory entirety. But locals in Revolutionary America did not have to hear the execution sermon to absorb it. They could read the published version. Vernacular is not opposed to the printed word, it mediates between the technical and the popular. It also allowed people to read into the narrative their own values and expectations.

By reading a tale like Isaac Frasier's narrative of his life of crime, they could follow how the deviant criminal came to accept his moral just deserts. Through empathy the reader understood how, in the end, the law was sovereign. Social order required law, but a vernacular understanding of law undermined the arbitrariness of legal authority, and brought law closer to the people.

Wilf deploys narrative theory, borrowing a little from literary criticism, to knit together the religious, the picaresque, and the legal narratives of crime. Citing the Russian literary critic Mikhail Bakhtin, Wilf argues that the crowds watching the punishment fashioned their own language of law. The voices of the criminal and his or her confederates merge with the voices of authority—the minister, the magistrate, and the law itself. In the process, the law becomes less distant. The mock execution, the public shaming, and other highly visible but short-term punishments, blurred the differences between official and extraofficial retribution (p. 89). It will come as no surprise to those who have studied the rough justice meted out by the eighteenth-century crowd that such gatherings saw themselves as law-givers. Placards attached to effigies took the place of formal indictments, and protest bonfires the place of confiscation and escheat.

But to say that through storytelling offenders re-fashioned themselves (p. 105) is a stretch. The colonial accounts were not in the offenders' words, because the offenders did not use the coherent English phrasing one finds in the published accounts. The print is not in di-

lect and surely expletives were deleted. It is even more of a stretch to say that such tales posited a brotherhood of citizens (p. 105) when all of the tale-tellers and the redactors of the tales were subjects of the crown rather than citizens of a republic.

And does the rhetoric and its meaning then change after the Revolution? If so, can Wilf convince us that the crime broadsides either caused or at least reflected republicanized adherence to the rule of law? Let's see if he tries. The context is no longer protest against the crown but instead the protest against capital punishment for crimes against property spreading throughout the new United States. Is the criminal addressing a different audience, profoundly altered in its sense of self by independence? Yes, for the new republican reprobate was the product of anonymous market relations where the only significant factors were the availability of commodities and price competition (p. 129). Gone was the old community; anomie and alienation had arrived. Crime was not sin, it was an act of protest against the heartless new world. Juries recognized this in the criminal as they did in themselves. Increasingly, they accepted the notion that some criminals were simply driven to crime by irresistible forces.

In this not so brave new world, a criminal code based on assumptions of sin had little place. England's criminal law became, in American eyes, a bloody Code (p. 140), inseparable from a social system that had failed. American society was more enlightened, more tolerant, more liberal, and above all more rational. A rage for criminal law reform swept the country. Like constitutional republicanism itself, reform of criminal laws was a noble experiment, a re-imagining of the rule of law rooted not in cruelty but in mild humanity. The increasing violence of the French Revolution, with its capital punishment of political crimes, became a crucial test of the American reforms. Capital punishment as public spectacle raised images of piles of headless corpses and bloody guillotines. The old justice of the Whig crowd, now mantled in the tricolore of French radicalism, became unacceptable here. State-mandated violence must be constrained. The last ironic twist was the Doctors Riot of 1788 in New York City, a public protest against the dissection of executed felons whose aim was entirely opposite the old mob's demanding the execution of sinners.

Wilf concludes that in the years between the French and Indian War and the French Revolution, an untidy story of legal origins (p. 195) exists alongside the canonized legal legacy of intellectuals drafting model con-

stitutions. That untidy alternative source of law was imagined before it was constructed (p. 194). It was popular, fluid, and extraofficial. Its founders were very flawed indeed. And their contribution to our understanding of the law, like Wilf's, cannot be ignored.

Note

[1]. Karl N. Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1951), 17.

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Citation: Peter Hoffer. Review of Wilf, Steven Robert, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America*. H-Law, H-Net Reviews. June, 2010.

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