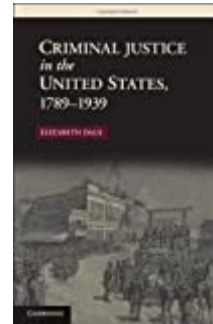




**Elizabeth Dale.** *Criminal Justice in the United States, 1789–1939*. Cambridge: Cambridge University Press, 2011. 192 S. \$23.99 (paper), ISBN 978-1-107-40136-5; \$85.00 (cloth), ISBN 978-1-107-00884-7.



**Reviewed by** Jeffrey S. Adler (University of Florida)

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## Popular Justice and Criminal Law

In a concise, engaging, and provocative synthesis, Elizabeth Dale challenges much of the conventional wisdom about the development of the American criminal justice system during the long nineteenth century. She dissents from the Weberian framework that posits that the state-formation process spurred a shift from localized to centralized criminal justice institutions, from informal to formal mechanisms of dispute resolution, and from popular justice to the rule of law. Instead, Dale offers a more complicated interpretation and emphasizes powerful elements of continuity in criminal justice. She argues that popular notions of justice (and long-established responses to perceived injustice), ranging from lynching to jury nullification, proved to be remarkably persistent and resilient, at times undermining state formation and at other times operating alongside centralized, bureaucratic legal practices. The ambiguities and complexities of American federalism also stymied the maturation of the state, further undercutting the centralization process. "The picture that emerges from this study," Dale argues, "is that of a criminal justice system that was far more a

government of men than one of laws in the first 150 years after the ratification of the Constitution" (p. 5).

An expanded version of her essay in *The Cambridge History of Law in America*, Dale's book offers an accessible but still sophisticated and nuanced blend of constitutional history and social history.[1] She covers core themes in institutional and legal history, such as the rise of the police and the prison, the Supreme Court's gradual embrace of a philosophy of rights, and the expanding influence of the federal government in the criminal justice system. Yet Dale also manages to include people in her narrative, leavening her analysis with detailed accounts from little-known trials. Furthermore, she frames her argument in national terms. Although she recognizes regional variations, Dale highlights broader social and legal processes. She avers, for instance, that southern lynching, western vigilantism, and northern mob violence do not reveal regional differences as much as they represent related expressions of popular justice and shared forms of resistance to the rule of law and the centralization of the state.

A wide range of institutional and popular pressures blunted state formation in nineteenth-century America, according to Dale. State and federal law makers often worked at cross purposes, just as courts and legislatures frequently embraced divergent, contradictory perspectives on law, sovereignty, and authority. But popular notions of justice, often abetted by tacit approval from the courts, imposed the most powerful and important brake on criminal justice centralization and bureaucratization. For all of the state-building reforms of the era, local custom and popular justice endured and typically prevailed, shaping or at least profoundly affecting the definition of deviance, the behavior of law enforcers, and even the treatment of defendants. Her interpretation devotes particular attention to the dynamic interplay among formal law, legal culture, and social custom, focusing on the ways in which informal pressures, populist sensibilities, and plebeian rituals infused, informed, distorted, and disrupted the operation of the criminal justice system. Crowds interfered with court proceedings; rioters meted out rough justice; vigilantes punished those who violated local custom; lynch mobs enforced racial hierarchies and conducted extralegal executions; duelists and brawlers rejected the authority of the courts and resolved disputes through violent self-help; and jurors ignored formal law and reached verdicts based on unwritten law. At least until the 1930s, popular notions of justice trumped the rule of law and reined in the state-building efforts undergirding it. With the social instability of the late 1930s, however, Congress and the courts embraced a new commitment to the ideal of equal justice (p. 134). With this shift, the courts (and the Bill of Rights) became the protector of individual rights. Rather than relying on longstanding custom and taking to the streets to redress injustice, citizens turned to formal legal proceedings to check the power of the State, finally changing the balance between popular justice and the rule of law (p. 134).

Dale defines popular justice in expansive terms. While many historians of such informal mechanisms of dispute and grievance resolution focus on rioting, vigilantism, feuding, and lynching, Dale includes dueling, local gossiping and shaming practices, and even the law-and-order leagues that spearheaded political repression at the turn of the century. Furthermore, she identifies parallels between lynching and the crusades of elite, Progressive reformers, such as the leaders of New York City's Committee of Fourteen, who pressured local policemen to arrest prostitutes and johns. Both sadistic lynchers and high-brow reformers anointed themselves defenders of moral order, acted according to their own

informal sensibilities, and secured punishment for those they targeted, the niceties of formal law notwithstanding.

Other scholars have sometimes interpreted the same evidence and activities in different and even opposite ways. Whereas Dale views private policing and the efforts of moral reformers as expressions of popular justice and as challenges to state formation, some historians have argued that these private-public collaborations constituted crucial elements in the expansion of state authority, particularly since government officials gradually borrowed and then appropriated the undercover surveillance techniques pioneered by reform organizations, such as the Committee of Fourteen.[2] Similarly, Dale interprets America's low conviction rates in nineteenth-century homicide cases as indicators of jurors resisting the authority of the state and deferring to popular justice, but historians of Victorian England, such as Carolyn A. Conley, have also found low conviction rates, even though the English state was considerably better established than its American counterpart.[3] Moreover, while Dale sees state-sanctioned executions as evidence of the growth of government authority at the expense of lynch mobs and popular justice, other scholars, including David Garland, have argued that capital punishment, and particularly its regional concentration, reflects the persistence of localism, antistatism, and informal, popular sensibilities regarding justice and moral order.[4]

These issues, however, do not reflect shortcomings in *Criminal Justice in the United States, 1789-1939* as much as they underscore the richness of Dale's argument and its engagement with myriad literatures and approaches. Rejecting a linear and evolutionary explanation for legal change, Dale offers a far-ranging and compelling analysis of the halting process of state formation in nineteenth-century America. Most important, she demonstrates the ways in which traditions of popular justice survived well into the twentieth century, sometimes challenging formal legal institutions, sometimes undermining them, sometimes subtly influencing them, and often disrupting the rule of law in the process.

#### Notes

[1]. Elizabeth Dale, "Criminal Justice in the United States, 1790-1920: A Government of Law or Men?" in *The Cambridge History of Law in America*, vol. 2, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2011), 133-167.

[2]. For example, see Jennifer Fronec, *New York Undercover: Private Surveillance in the Progressive Era* (Chicago:

University of Chicago Press, 2009), 145-188.

[3]. For example, see Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991), 51.

[4]. David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge: Harvard University Press, 2010), 192, 196, 251.

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