CHAPTER 9

The Uses of Justice As a Form of Social Control in Early Modern Europe

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Introduction

As many studies of the history of criminal justice in early modern Europe testify, the number of indictments dropped before a final verdict was reached was surprisingly high.\(^1\) They far surpassed the number of procedures resulting in formal convictions. Apparently, there was a great discrepancy between the number of accusations taken as cases into court and those actually tried. One explanation for the courts’ behavior might be that they considered the issues raised in the accusations irrelevant and wished to unburden themselves of such trifling controversies. This institutional filtering of unwelcome affairs is then construed as a successful example of judicial policies. In keeping with these policies, the courts prosecuted only those cases deemed important by the authorities, the alleged controllers of the institutions of justice. This interpretation has been offered for the French judicial policies of the 1760s, when the prosecution of violence was toned down in favor of the prosecution of theft. Similar spurts in the criminalization and decriminalization of certain offenses have been observed elsewhere. In this view the institutions of justice were merely instruments in the hands of the authorities; it was a question of “top-down” social control.

However, when viewed from a different perspective, that of the actual plaintiffs, the large number of dropped cases may be explained in another way. It might equally be argued that having recourse to justice was never intended to institute and conclude proceedings. Rather, lodging a complaint was merely one of a myriad of possibilities for making oneself heard in a conflict out of court.\(^2\) Submitting a case to court was simply an instrument for advancing the settlement of a personal conflict by taking it to a higher—mostly a government—authority. To put it differently, the many cases dropped could indicate that people used the institutions of justice merely as an additional instrument of everyday
social control, not dissimilar to an admonition or a form, even a violent form, of self-help. Lodging a complaint, then, was merely a judicial step. Whether that procedure also led to a formal conviction was totally inconsequential to the parties involved. Adopting this perspective, namely the plaintiffs’ motivations, we must first examine the demand for justice.

The concept of the “uses of justice” is interpreted as referring to the many ways in which contemporary individuals have dealt with the courts. It denotes both the recourse to justice and the forms this took. The courts are understood as an institution of the authorities, whose activities were only partially determined by those in charge. In general, the role of the courts was equally determined by the people. In the long term, such processes of appropriation can alter the institution’s nature as much as any reforms of the judicial system initiated from above. Clearly, the uses of justice can tell us much about how early modern Europeans perceived the functions of the criminal courts.

In taking this position, we are confronted with a range of theoretical and empirical perspectives, in the first place with the widespread assumption that in supplying justice the authorities also determined its demand. Writing about some long-term changes in Castilian justice in the Spanish Golden Age, the historian Richard Kagan argued how a first phase of intensive recourse to justice and of institutional development was succeeded by a second one, in which a deliberate establishing of thresholds only widened the gulf between the royal courts and the population. Considering the national and later the urban interests as the driving force behind this development, Kagan considered the plaintiffs’ behavior as merely a dependent factor.3

A similar bias may be found in Wolfgang Schmale’s comparison of the judicial cultures in early modern Saxony and Burgundy.4 Though he takes the demand for justice as his point of departure, his overall perspective is that of a modernization theory centering on the gradual differentiation of our present-day separation of powers between the judicial and the executive. Compared to Burgundy, Saxony experienced more disputes around its judicial system, but these are discussed simply as “system errors.” The author does not acknowledge that people could negotiate the organization of the courts by proceeding more frequently against their functioning. To find out how people maintained their judicial interests, it may be useful to examine concepts other than their legal acculturation or the “professionalization” of the courts.

Again, in relating peaks in the lodging of complaints to the concrete interests of the groups involved (for instance the promoting of stricter morals regarding premarital sex or of stricter poor relief), scholars have already reconstructed collective uses of justice for a variety of issues. The plaintiffs determined a government’s chances of having its policies realized, particularly with respect to moral campaigns. Adopting Keith Wrightson’s notion of the “two concepts of order,” justice might be said to have functioned well in terms of what the authorities envisaged when the government’s concepts of order and those of the population...
agreed. However, the authorities could hardly realize their own concept when
the most prominent sections of the population pursued different interests.

Looking solely at the meaning of the uses of justice for the two concepts of
order would already reduce the analysis of how people confronted the courts to
the issue of social order in general. We learn nothing about the social effects of
those uses of justice that do not agree with the mainstream of a particular phase.
Individual strategies for extrajudicial conflict settlement, the lion’s share of all
activities to generate social order, are left aside.

Finally, I mention Robert Shoemaker’s study of misdemeanors in London and
Middlesex in 1660–1725, approximately, and his analysis of cycles in the
recourse to justice. His comparison of town and country and his sustainedquan-
tification provide a precise assessment of its structure. He argues how phases dur-
ing which the population relied less on the judicial institutions alternated with
other phases—sometimes short-lived—during which the population displayed greater
confidence in the courts. Examining some recent comparisons of Germany and
the Netherlands, one is even tempted to dismiss the notion of a long-term accul-
turation of the institutions of justice. The Netherlands still cherishes its tradition
of extrajudicial settlement within small social entities, such as neighborhoods or
local and church communities. Certain forms of legal council underscore this
trend. As Dutch public order does not function less than, for instance, that in
Nordrhein-Westfalen, it may be inferred that an expansion of justice is in no way
identical to an analogous increase in public order. Looking at the past, we can no
longer accept assessments that more often than not adopt this very premise.

What these and other findings suggest is that closer inspection of justice from
the perspective of its uses is in order. We are confronted with a history of con-
stant change, not only of the institutions and their supply but also of the pop-
ulation, thus supporting the basic assumption of a permanently variable
relationship between the judicial and nonjudicial settlement of conflicts. This
would apply particularly for those periods in which a balanced legal system and
a well-regulated court system had yet to materialize. Clearly, in analyzing the
role of justice in the generation of social order, a more careful look should be
taken at the importance of the nonjudicial forms of conflict settlement.

The concept of social control that I propose here encompasses both a hori-
zontal and a vertical dimension of control. As such, it accords better with an anthropo-
logically informed notion of history than with the concept—well known in
Germany—of “social discipline” (Sozialdisziplinierung). Social control in its nar-
row sense is understood as “all forms by which historical agents define deviant
behavior and react to it by taking measures.” Society is seen as a permanent process
of mutual social control in which norms compete with one another and are con-
stantly being contested. Accordingly, one should always allow for multiple
instruments of social control and integrate the supply of judicial institutions into
a continuum of everyday strategies. My definition also implies the reversibility
of moral campaigns and their sanctions. Crucial to my definition’s view of society is, of course, the unequal distribution of power resources and spheres of influence among the agents of social control. Starting from here, this chapter aims to clarify the significance of justice as but one of the instruments of mutual social control and so widen the field for a more encompassing analysis of social control.

Helping Oneself or Using Justice?

Basically, it is far from natural to exert social control by appealing to an institution of justice. Most people first try to react directly to deviant behavior or call in a third party as arbitrator. And, there was always the possibility of a partly tolerated, violent form of self-help, which could even take the form of a strongly ritualized and therefore regulated reaction to deviancy. If necessary, people could mobilize arbiters from, for instance, their families, local dignitaries, or the lower clergy. The settlements reached—even in conflicts of a criminal nature—could be registered with a notary in countries where notaries were generally available. With regard to the English justices of the peace, the importance of such settlements may now be assessed numerically. In up to two-thirds of the conflicts examined, the plaintiffs preferred an informal to a formal settlement, and this was the case even with crimes strictly falling under the jurisdiction of the courts.9

In England around 1700 it was far from obvious to crime victims that they should inform a criminal court. Instead, they opted for procedures (mostly extra-judicial) that would result in compensation. Accordingly, most plaintiffs had an instrumental attitude to justice, preferring indemnity of their material interests. Such uses of the judicial institutions tell us little about the people actually endorsing the authorities’ claims in criminal procedures. The plaintiffs often appealed to the courts simply to improve their own chances in the extrajudicial settlements, which they fundamentally preferred.

If informal settlements prospered even in the metropolises of Paris, London, or Cologne, these observations may be expected to apply in particular to the countryside. Shoemaker forwards four arguments to buttress this conclusion. First, the countryside with its notables had more generally acknowledged arbiters available. Second, because there was less mobility, the word of one’s opponent could be more readily trusted. Third, the pressure exerted by the higher legal institutions to conduct a criminal case at the proper court may have been higher in the towns, as professional judges and lawyers competed for their market share. Finally, the less-well-to-do, both in the towns and in the countryside, probably far preferred the cheaper extrajudicial settlements or simplified procedures.10

In London, the lower classes’ demand for informal settlements introduced a new procedure. For a nominal fee the justices of the peace could be asked to issue “recognizances,” which in case of good behavior would not result in for-
feiture. These low-priced threats were intended to achieve the same results as the more expensive formal pleas of guilt. This institutional support is a fine instance of the interplay between the dealings of the legal system and out-of-court procedures. Justices of the peace and judges perceived their role as arbiters as being more prestigious than their role as judges. A negotiated peace enjoyed higher esteem than a formal sentence. As the powers of the lower courts in England were only vaguely demarcated, all parties often preferred a settlement even in criminal matters. These as well as the higher courts worked much longer for negotiating peace than for disciplining. Clearly, by bringing gentle pressure to bear on the parties, the lower-court judges often underscored their readiness for reconciliation. By not accepting all accusations, the legal institutions themselves also encouraged informal settlements.

These findings bring us back to the question whether the courts’ criminal prosecution should be interpreted as justice’s overriding interest or merely as a primary one in cases of strongly deviant behavior. We should try to establish more clearly whether the criminal courts, in their massive everyday practice as a machine of justice, really aimed at imposing norms, or whether the courts, more than has been realized until now, simply felt obliged to inculcate a form of social control. In that case, justice would have considered itself a secondary institution.

Which Court to Use?

Initiating prosecution always pushes social control to a higher, more formal level, especially in criminal justice. To avoid the complex issue of the early modern courts’ confusion of civil and criminal jurisdictions, in the next pages I will discuss only “criminal justice,” meaning (resisting any technical criteria) those legal institutions that at least also had a kind of criminal jurisdiction. The definition thus encompasses marital courts and those institutions exercising moral discipline in the territories of the German Empire boasting an established church. All these institutions had a quasi-criminal procedure. Important to the uses of justice is that there were overlaps, both in the supply of regulations and sanctions, and that contemporaries knew perfectly well how to exploit the situation. They were quite aware of the functionally equivalent role of criminal justice and church discipline. Of course, this can only be assessed historically by taking seriously the daily practices of contemporaries in our attempt to understand historical processes.

Options for appealing to one or the other court and its sanctions were always available when various institutions competed for similar cases. Such competition is found between church courts on the one hand and criminal or similar courts, such as the village and higher governmental courts, on the other hand. People seem to have preferred the institutions directly within reach or the courts not presided over by any persons with a legal training.
Contemporaries understood the particular role of criminal justice. Benoît Garnot, for instance, concludes that the French were quite willing to use alternative courts. The civil courts were more profitable for the judges and consequently more accessible than the coarser network of the criminal courts. The French also avoided the criminal courts because they feared their sometimes unfathomable brutality and the system’s incalculable machinery. Around 1700, hoping to keep the damage under control, the English preferred courts that did not sentence the guilty to houses of correction but rather imposed lesser penalties. The people pragmatically selected those courts that did not drastically contradict their own views of justice and kept open the options for possible reconciliation. In the southwest of France, the fear that justice would penalize crime even more severely led to an increase in extrajudicial settlements. The accordance of the two concepts of order cherished by the population and the authorities held only as long as the court-imposed sanctions were considered suitable.

Since the criminal courts exercised such superior power over the defendants, Garnot’s argument that it was criminal matters that the people preferred to settle out of court seems plausible. In analyzing social control, the greatest insight will probably be gained from studying the uses of justice in the realm of criminal justice. However, care should be taken not to exaggerate the orientation of past societies to consensus. The criminal courts were generally consciously appealed to for a merely civil objective: fearing the nearing execution of a civil sentence, many plaintiffs risked a highly unpredictable ruling.

Even allowing for regional differences, the criminal courts were not particularly accessible, creating conditions in the countryside quite different from those in the towns. Despite the gradual unification of criminal justice in this period, a situation of legal pluralism persisted. It is precisely the longtime underutilization of the institutions that allows us to attempt a reconstruction of the choices either for the courts or for the other institutions and to seek additional clues as to what people preferred.

The Significance of Offenses for the Uses of Justice

Let us look more closely at Shoemaker’s study of London and the south of England, as it perfectly illustrates what has been discussed so far. He first distinguishes two types of offenses: felonies and misdemeanors. Felonies afforded the users of justice less latitude because the interests of public prosecution prevailed. The more serious the offense (looking at the criteria of criminal law), the less elbow room there was for the people. However, crucial to the intensity of prosecution was the presence of judges who were personally involved. Individuals eager to prosecute looked for active judges, thus demonstrating the importance of “lay networks” for the exchange of information about which judges would be best for
initiating prosecutions. Shoemaker rejects older hypotheses positing a direct relationship between demographic and economic trends on the one hand and patterns of prosecution on the other. Statistically, the cultural notions of plaintiffs and justices of the peace came first. Even allowing for a constellation with cooperative justices, the determining factor in criminal proceedings was the people’s handling of accusations, and that was determined by three other factors: the nature of the offense, the person of the plaintiff, and that of the offender.\textsuperscript{15}

The first factor is the clearest when taking the example of violence. After all, murder was not always murder. Its meaning changed, depending on whether it was committed in sixteenth-century Rome, the eighteenth-century Massif Central in France, or eighteenth-century Paris. In the sixteenth century the level of violence in southern Europe was double that of Europe north of the Alps, a gap that seems to have widened in the eighteenth and nineteenth centuries with the divergent development of the two areas, though north of the Alps we also note different trends in the violence registered for town and country. Underlying these changes in criminal statistics are also changes in the perception of violence. In France’s Massif Central it was far from natural to report a murder even in the nineteenth century. To defend their honor, the inhabitants traditionally chose to take the law into their own hands. People acting on notions of honor perceive violence very differently from those geared to a public order guaranteed by the state. Depending on the amount of violence involved, the non-reporting of murder thus reveals a general restraint with respect to the courts.\textsuperscript{16}

Violence was also differently perceived by its victims, meaning that even identical offenses may have been reported differently. Crucial to this are the limits of tolerance in the plaintiff’s social environment and objectives, not the seriousness of a violent act as established in a legal text. In the area of sexual offenses, a woman’s extramarital pregnancy and the bearing of an illegitimate child could generally go unreported, if she was protected by her environment—for instance, because she was reputed to be a good worker. Such cases were decided out of court, by local public opinion following its own views of what was socially acceptable. It might merely pass a provisional sentence or initiate prosecution for a formal conviction. In the early modern perception of things, the plaintiffs and offenders as people were more important than the offenses themselves.

The Plaintiff’s Significance for the Uses of Justice: Who Uses Justice Actively?

Societies appear to allow for a certain degree of social deviance, although such tolerance may diminish when societies come under duress. We should therefore look beyond individual offenses and presume levels of tolerance that could vary in time and place and move in several directions simultaneously. For instance,
it may well be that at the end of the eighteenth century an increasing tolerance for violence and extramarital sex went hand in hand with a decreasing tolerance for property crimes.

However, times of tolerance alternated with times of anxiety about personal safety, public morals, or one’s socioeconomic position, making people more inclined to file charges. When societies feel insecure because serious crimes remained unsolved, as happened for instance in Paris after the Cartouche case or in London in times of demobilization, brief bursts of lodging complaints take place. This heightened readiness to report offenses reveals that at such moments people looked upon one another with greater suspicion and used justice mainly to reassure themselves.

Religious groups involved in moral campaigns have somewhat different motivations. These “virtuosos,” to quote Max Weber, tried to impose a more “Christian” life on their environment, believing this to be the only way of securing their own salvation and that of society as a whole. Relatively independently of any particular confession, though more widespread in Calvinist than in Anglican, Lutheran, or Roman Catholic contexts, for some years they would report offenses they saw as particularly dangerous, such as idleness, public games, drinking, dancing, and so on. Often coming from the middle classes, these religious crusaders deliberately searched for active justices of the peace to exploit the judicial system for their own purposes. Occasionally they succeeded in heightening the intensity of prosecution. They could also address consistory and church courts in territories dominated by the Calvinist and Anglican churches. In these campaigns it was exclusively the person of the plaintiff and his orthodox belief that determined the uses of justice.

A third type of accusation wave had a slightly different structure, arising mostly from socioeconomic tensions, for instance, from changeover crises in the country. In these cases the more affluent smallholders—who usually reported offenses—were the ones opposing a new emphasis on socially accepted relationships and the guaranteeing of hereditary succession. The charges particularly affected widows, single women, and the local youth. Illegitimate offspring should not become a public charge any more than needy strangers. Here justice is pragmatically exploited by the local upper classes and occasionally also by the middle classes precisely to ensure the unequal distribution of wealth. As the village of Terling reveals, such an increase in prosecuting offenses could easily be reversed following a community’s economic recovery.

Besides these waves in the lodging of complaints, other motives related to the person of the plaintiff that favored or curbed the uses of justice may be distinguished. In all rural societies, so it seems, strangers hardly ever lodged complaints, confirming the notion that people only appealed to criminal justice as a last resort. Obviously, there had to be a long previous history and the insight that people had to get along with each other before an offense would be prosecuted. Still, this did not prevent the local population from being disturbed by strangers and
prosecuting them to protect their local concepts of order from any deviancy. It is difficult to say whether this model also holds for the towns, where establishing just who was or was not a stranger was even more of a problem. The perception of otherness may tell us more about the uses of justice in the countryside than in the towns.

More important is that most of the plaintiffs at the criminal courts—and also most of the defendants—were men. Those disturbances of the peace that the gendered public considered important enough to be tried formally were committed and also caused by men. In the next pages I will modify this assumption somewhat, but it should be borne in mind that women more than men adhered to other agents of social control, such as the nuclear family, the neighborhood, or the wider family. From the perspective of gender history, the analysis of these other forms of social control exerted by and on women even becomes paramount.

Though numerical comparisons of the uses of justice may be biased by circumstances of gender, they provide interesting findings on the opportunities and obstacles women encountered defending their interests before the courts. These findings also allow us to examine more precisely how formal and less formal types of social control interlocked. Unfortunately, as they have hardly been examined, we have few statistical data on the gender of plaintiffs at our disposal. This notwithstanding, women seem to have been most active as such in the field of so-called petty crime. Naturally, such crime and its impact on everyday life were of far greater significance to contemporaries than is suggested by the legal term with its epithet “petty.” Data on eighteenth-century Paris suggest that women disturbed the peace in only one of every four defamation cases. As plaintiffs they figured in every third case and as witnesses even in every two out of five cases.18 Other studies will have to decide whether these findings may be generalized into a hypothesis of women’s uses of justice. As one would expect, women figure most often as plaintiffs in cases exclusively (for instance, in the case of rape) or mainly (in cases such as marital violence) related to themselves. Yet recent research on such offenses discloses that the women themselves often became violent. Men did not prosecute, they just hit harder. Had they not, given prevailing ideas of masculinity, they might have advertised themselves within the community as a “softie” (Wäschlappen, as it was called in Neckarhausen). At the same time, women could exploit their socially desirable self-image by reporting the offense with floods of tears.

Several factors, which could be described as gendered impediments to the uses of justice, may explain why women figured less frequently as plaintiffs before the courts. In a series of offenses, instead of lodging a complaint herself, the woman was represented by her husband. This is also found at the civil courts. A more decisive factor was women’s dependent economic position. A battered wife or a wife swindled out of her inheritance would think twice before she brought her husband, the head of the family business, to court. Still, those who did prosecute a rabid husband were generally protected by the courts.
Such dependency surfaces particularly in cases of sexual aggression, an offense that did not much interest the courts. Because of their dependency, housewives often used the complaints as a warning shot. As women did not have equal access to the labor market, they were not interested in having the main provider of the household confined for any length of time. This and the fact that women rarely had large amounts of money may also explain why they preferred the simpler and cheaper procedures. In England, however, there is a vast difference between women in the country, who rarely lodged complaints, and those in town. Sometimes having a profession or living of their own, the latter were economically less dependent and used the courts and similar institutions with greater frequency. They primarily prosecuted by recognizance, which Shoemaker relates to their shortage of money. Working women used the judicial system more frequently and preferred its tougher procedures.19

Despite these findings for a European metropolis, having recourse to justice remained an option favored less by women than by men. On the whole these data do not allow any broader conclusions on the actual readiness of women to fight unwelcome behavior in a formal procedure, but they do reveal a range of specific impediments and inform us about the different options for men and women in similar situations.

To have access to justice, the plaintiff’s class situation or socioeconomic position hardly mattered: plaintiffs and defendants often came from the same class. An important threshold was the expenses already referred to. Tariff reductions sometimes tripled the number of accusations, giving us an idea of how the uses of justice in the past were hampered by economic considerations. Judges in England—and they may have been typical—advised their poorer plaintiffs to invest their money in clothes for the family rather than in trying to obtain expensive indictments. In this way these plaintiffs were dissuaded from having recourse to justice because of the costs involved as well as the disdain of many a judge. As a consequence, they had to develop other forms of social control.

The Significance of the Offender for Lodging Complaints: Against Whom Is Justice Being Used?

In the last twenty years or so, historians have written extensively on the social profile of those subjected to criminal justice. Some tolerance thresholds held for all offenders: only crimes perceived as serious or committed repeatedly were reported to the courts. A premise of the tolerance of local societies is their ability to maintain the social order even when confronted with a certain degree of deviancy. But this is possible only when a code of conduct guarantees a fair and independent regulation of deviancy. This would not work without equal opportunity for the settling of disputes. Accordingly, an attack by ambush, as a particularly condemned
act, was reported to the courts. Even a local person who obstructed a fair conflict settlement within his or her community could expect to be summoned before an outside institution of justice. Tolerance thresholds reveal both the central importance of informal settlements in early modern societies and the limitations of their integrating capacities. The self-regulating qualities of the countryside seem to display, no less than in the larger cities of the time, a striking boundary vis-à-vis strangers; people were more inclined to use justice against them.

Similarly, in moral campaigns the lower classes, immigrants, and young single women who had recently moved to town were singled out for prosecution, even for minor offenses. In the case of older single women, the combination of age and sex led people to assess their chances of defending themselves as low and so they were particularly prosecuted against. In England the less severe procedures were more frequently instituted against women and the sentences were generally milder.

The socioeconomic position of one’s opponent had other consequences for the uses of justice. For instance, it was more efficient and easier to negotiate extrajudicial settlements with people of property, because they could be expected to effectively find sureties. In England, therefore, the poor were more readily indicted or committed to a house of correction. This was done more easily as they could not afford professional legal assistance, and they were exposed to harsher proceedings. If committed to a house of correction with all its various costs, they incurred higher expenses than the people of property with their sureties.

**How Were the Procedures for Prosecution Used?**

Because popular views of the law were basically instrumental, its users may be expected to have acted strategically. Examining the way the complaints were recorded, it appears that the victims could submit their charges orally to a clerk, possibly legally trained. If courts were not within reach, complaints could be submitted in writing, drawn up by the plaintiff himself, or if he could not write by a third party. It is difficult to say how in the sphere of criminal justice the professional or nonprofessional phrasing of the complaint affected the argumentation and the plaintiff’s chances before the court and how this changed in the course of the sixteenth to the eighteenth century. Discourse analysis may be helpful at this point, because at courts with both a civil and a criminal jurisdiction the skillful composing of the events could decide which procedure would be followed. Even conflicts entailing bloodshed could be filed as civil cases, although the victims of serious crimes seem to have preferred a criminal procedure to bring the conflict to a higher, more official level.

Important to a successful staging in behalf of one’s interests was the exact moment when the history of the conflict with the defendant began. It allowed the plaintiff to determine the nature of the investigation to a substantial degree and to keep the court in the dark about the actual background to the complaint. It was
advisable to represent oneself as a peace loving man or as a helpless woman, just as it was prudent to present oneself as having acted on impulse or under the influence of alcohol. Another way of rhetorically enhancing one’s peacefulness was similarly used by plaintiffs in Paris, who emphasized that they felt compelled to come forward. They merely intended to employ the nonofficial instruments for keeping the peace, not to appeal to a court.20

Since only the written complaints have come down to us, we must bear in mind that this process of recording altered the original complaint: it was smoothed out and regimented by the clerk’s questions and the discussion of the events. Crucial was the inclusion of the criminally significant features of the events, as these produced the legally relevant narratives that could win the case. The necessary cooperation between the clerk, with his specific legal expertise, and the plaintiffs makes these sources cultural hybrids. They inform us about the plaintiffs’ agility, but the idea that popular culture would manifest itself here does not generally hold true. Instead, it is more useful to establish the plaintiff’s linguistic latitude for each institution and each type of complaint. As such these texts constitute a nearly classic example of discourse analysis. As a discourse formation the judiciary only allowed for certain truths, although it also provided opportunities for saying things that otherwise would have been left unsaid.

People had many options for how to proceed with the judiciary. Probably the most important strategy, at least for the defendants, was simply to duck the courts. Considering early modern judicial organization, this was relatively easy, though it was more readily available to the floating groups among the population and to individuals repeatedly accused. Those who stayed could be prosecuted in case they did not show up. Another strategy was to deny the act. If the procedures were based on a defendant’s confession, this could considerably affect the establishing of the truth. In a society characterized by elementary solidarities, the manipulating of witnesses played another prominent role. Although we only hear about such practices when detected, they were probably widespread.

Finally, at various phases of the proceedings, people asked for grace. At the moment of apprehension, authorized individuals, such as the offender’s relatives, local priests, and local notables, could act to thwart the arrest. The notables could also influence the procedure at the hearing of witnesses. Asking for grace may be seen as another important aspect of the uses of justice. Widely practiced up to the end of the early modern period, it was even continued in the form of petitions. A last example of such practices is the special procedures, originally based on the king’s right to pardon and submitted in letters bearing his seal (lettres de cachet).21 In France they offered a noteworthy alternative to criminal proceedings. A convict’s last chance was to negotiate to have the penalty changed. This is another aspect that has hardly been investigated for the early modern period. However, a relevant study of the later Middle Ages suggests that there may have been similar chances in the uses of justice in later periods. All these aspects reveal
that the courts supplied numerous options for an active appropriation of justice in one’s own interest. Justice, then, emerges more as an arena of divergent interests than as a locus of acculturation or social discipline.

How Did the Uses of Justice Work and What Do They Mean for the Original Conflicts?

Socially, recourse to criminal justice bespeaks a rift and—regardless of what traditional legal historians may say—should therefore not automatically be assessed as a means of pacification. On the contrary, appealing to a court initially intensified the conflict. At the same time, the rift was never so great that it could not be healed by the parties involved, as indicated by the huge discrepancy between the number of accusations and formal convictions. By nevertheless arriving at an agreement, plaintiffs withdrew numerous conflicts from the judicial system; they usually preferred to return to the less expensive forms of dispute settlement. It is exactly this massive, purely instrumental use of justice in order to enhance one’s settlement chances that reveals how people chose to exert social control as autonomously as possible. A pacifying function of justice would then, paradoxically, come down to the fact that it was merely exploited additionally. Only in a minority of the cases leading to a conviction could it permanently end or intensify a conflict.

Nor should justice’s pacifying effects in other constellations be overestimated. For instance, cases in which the filing of criminal charges was meant to prevent the execution of a civil sentence reveal that one legal option was chosen in order to thwart the arbitral effects of another one. Trials lost constituted the background of one-seventh of the Parisian honor conflicts I examined.22 Such switching from legal proceedings to often violent behavior has been observed elsewhere. Obviously, the courts could broaden the social rift. For some who lost a trial, then, the recourse to justice could increase the need for other forms of social control. The uses of justice were only a part of a continuum of such tools and were not perceived by contemporaries as superior in any way. The specific impediments encountered by women and the poor also had their secondary power effects on informal mediation. Since these groups could not successfully threaten to take people to trial, they had a lesser chance of succeeding by settling out of court.

What Do the Uses of Justice Contribute to the Realization of Local Peace and State Building?

Asking what the uses of justice meant for the role of criminal justice in early modern state building, we may look first at the context in which the government institutions were appropriated. The clearly discernible practice of a self-reliant
recourse to justice confirms what we know from other fields in the administration of justice, such as the prosecuting of witches. Walter Rummel, for instance, demonstrated how in filing charges people greatly appropriated the government-inspired discourse on witchcraft while simultaneously pursuing their own interests in the unmasking of other witches. Similar inversions have been described for postrevolutionary France. The history of denouncing demonstrates the misuse of special courts and special police forces. Again, in peasants’ revolts the conscious uses of justice alternate with violence just to dodge an institutional order that was perceived as unjust. And, in Saxony, the peasants and the authorities fought a long battle over the institutions of justice.

Such influencing from below is found already in an earlier period in the representation of the estates. Recently, studies on the filing of petitions demonstrated the degree to which subjects cooperated in the enforcement of law and indirectly even in the process of legislation. In seventeenth-century England women petitioned for and eventually succeeded in obtaining pensions for soldiers’ widows, though this was not what the legislator originally had in mind. Under the ancien régime, petitions deciding individual cases were as typical for the legislation as the Policey- or Landes- ordinances, meant to guide such decisions. Subjects, then, could contribute considerably to the realization of public order and in this way were not subjected at all.

The self-reliant use of criminal justice was part of a continuum of options, open to early modern subjects, of negotiating political relations. The important and powerful party of the state was a natural quantity in this negotiation process. Surprisingly, issues of crime and prosecution have so dominated the study of criminal justice that scholars have hardly queried the motivations and practices of its users.

The example of the procedures for prosecution invites us to interpret the judicial culture of the ancien régime more strongly from an enculturation paradigm and to focus in particular on the learning processes between criminal courts and the people. The acculturation paradigm centers too much on a perspective from above and underestimates the people’s contribution in changing this culture. Similarly, the concept of Verrechtlichung overemphasizes the systemic aspects in a history omitting the people, and it overlooks that the historical agents, whether authorities or subjects, first had to learn how to handle the developing institutions. Enculturation stresses the mutuality of the learning processes and through its inclusion of culture the systemic changes as well. Seen from this perspective, the question of the uses of justice serves primarily as a heuristic device to trace those fields that should be examined first for this different understanding of criminal justice and its social effects: the people’s daily practices and perceptions, which develop under restrictive conditions, generally also have a structuring effect because of their massive nature. Of course, the uses of justice interact with the two other analytic approaches to justice, the logic of the
institutions and the interests of those who run the courts. Here we have merely examined the least analyzed approach to date. Another significant theme, that of popular attitudes to the law, had to be omitted.

Conclusion

My empirical findings disclose the structural restraints of justice’s pacifying functions. Because of the central significance of other agents of social control, scholars should study not only the criminal courts, including the moral courts and other institutions of justice, but also the family, the neighborhood, guilds, fraternities, and so forth, from a microhistorical perspective and as analogous to one another. Explanations perceiving the supply of justice as the driving force in the development of judicial culture should be modified, just like the functionalist explanations that construe the uses of justice as determined by socio-economic changes. Similarly, the notion of concepts of order overlooks the central significance of informal mediation in deciding whether to use justice or not. Though the supply of justice logically comes first, the nature of its uses depends primarily on how people assess their other options of social control. Taking into account aspects of gender, age, and social status, as well as the offenses and offenders involved, they carefully judge their uses of justice in relation to the availability of other, preferable forms of social control.

Clearly, we cannot grasp the long-term changes in social control on the basis of theories emphasizing exclusively the institutional supply and its internal developments. Instead, empirical findings from various countries may prompt us to examine more closely the uses of justice. Only this perspective will allow us to understand the judicial system in its social contexts. The development of justice and its uses varied from place to place.

Taking a long-term view, the outstanding feature of the early modern period—that it did not yet have an extended system of justice with all its institutions—now appears less exotic. Although the choice of various institutions still allowed for wilder uses of justice than in the nineteenth century, present-day discussions on the reform of criminal justice reveal that the forms of social control are still changing. Campaigns of criminalization and decriminalization, often discussed in terms of a higher institutional efficiency, alternate with one another. Expanding the police forces; delegating criminal cases to civil jurisdiction, social workers, psychiatry; and the inclusion of neighborhood control in police strategies are the institutional alternatives of today.

In the early modern period, one notices trends of Verrechtlichung, for instance, an increase in the uses of judicial institutions. However, taking stock of the many insignificant frictions fought before the courts, one wonders whether in many areas perhaps more matters were taken to court than today.
Crucial is that in most criminal cases people did not intend to use the institution until a formal conviction was passed. Therefore, a term such as Verrechtlichung, which merely calculates the number of formal uses, is too vague. Moreover, longtime trends in Verrechtlichung, if they occurred, often alternated with phases of deinstitutionalization. Nevertheless—and this is even more important for the prospects of criminal history—the functional alternative between the uses of justice and other forms of social control obviously remains and if needed is revived time and again, partly by the users, partly by the institutions.

The view of the uses of justice as only one form of social control may stimulate us to combine studies of a quantitative and qualitative nature from a new perspective. It may provide us with a new classification of societies from the perspective of social control and show us how the significance of the uses of justice has changed over a long time. German historiography is not alone in cherishing a state-building history that has taken hardly any notice of the popular demand for social control. In itself, the supply of legal institutions does not produce public order. Nor is such order dependent on socioeconomic or demographic pressure, driving the groups involved to file accusations. Rather, it is the outcome of a complex interplay of all these factors as they are assessed by historical subjects, deciding whether they will use justice in the first place or opt for a settlement of their own making. Findings on present practices in the Federal Republic of Germany reveal the actuality of such considerations to the uses of justice in the early modern period.27

Notes

This essay is based on my German article “Justiznutzungen als soziale Kontrolle” in Blauert and Schwerhoff, eds., Kriminalitätsgeschichte, 503–44. See that article for a more extensive annotation and bibliography (as of 2000).


4. Schmale, Archäologie, 189 et seq.


6. This tradition continues to the present in the form of pre-judicial offers. Cf. Blankenburg and Verwoerd, “Prozesshäufigkeiten,” 322. For the social control function of neigh-


8. For an explanation of this definition, see Dinges, Maurermeister, 169–74. There must be a precise and empirically verifiable definition if the concept is of any use. For another opinion: Scheerer and Hess, “Control,” 103.


10. Ibid., 90–92.


15. Shoemaker, Prosecution, 76–79; see also Beattie, “Crime,” 62 et seq.; Schnabel-Schüle, Überwachen, 170; Schwerhoff, Köln, 88; Rousseaux, “Initiative.”


17. Peveri, “Cette ville”; Shoemaker, Prosecution, 250; Blastenbrei, Kriminalität, 53 et seq.

18. Dinges, Maurermeister, 183 et seq.

19. Shoemaker, Prosecution, 211. On early modern labor relations, see Wunder, Er ist die Sonn, esp. 89–154; Wiesner, Women; Lorenz-Schmidt, Vom Wert; Simon-Muscheid, Was nutzt die Schusterin.


21. Farge and Foucault, Familäre Konflikte; Spierenburg, Prison Experience, 223 et seq.

22. Dinges, Maurermeister, 178.


25. Schmale, Archäologie, 189 et seq.


27. Hanak et al., eds., Årgernisse.