Dale, Elizabeth: *Criminal Justice in the United States, 1789–1939*. Cambridge: Cambridge University Press 2011. ISBN: 978-1107008847; 192 S.

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Elizabeth Dale's *Criminal Justice in the United States, 1789–1939* is the third book in Cambridge University Press' series on New Histories of American Law. Intended as a series of textbooks for student use, the editors promise „bold, synthetic, and concise interpretive books." Dale's account of the changes and continuities in U.S. criminal justice over the long nineteenth century is a prime example of exactly that kind of book: It presents the unique and at times controversial perspective of a leading scholar in the field in the form of a compact yet complex and nuanced narrative that, moreover, masterfully combines synthetic overviews with vivid accounts and analyses of exemplary cases.

Dale begins her history of criminal justice by sketching what other „[h]istories of criminal justice in the modern West" usually do and contends that the standard Weberian framework that considers the State's monopoly over the use of force the basis of the modern nation state is not appropriate to account for developments in the U.S. Instead, Dale sets out to write the history of criminal justice from 1789 to 1939 as the story of an ongoing struggle between governmental and popular forces over control of the justice system, a struggle in which federalism and populism continued to undercut the nation state's authority. Ultimately, she sees the criminal justice system as dominated by popular notions of law grounded in local custom: „the picture that emerges from this study 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).

Dale demonstrates how the criminal justice system slowly and haltingly grants the „law" increasing weight over „men." She consistently moves on three intersecting planes of analysis: federal law versus agents of popular justice; state law versus agents of popular justice; and federal versus state law. In her rich narrative she clearly delineates broader, national developments in the system of criminal justice but, at the same time, also registers regional difference. Moreover, Dale not only shows the interactions between governmental and popular justice, but also between formal law and legal culture. She integrates constitutional and legal history, decisions of the U.S. Supreme Court and substantive and procedural law including the actions of lawyers and legislatures – fields that too often remain separated in histories of American law.

The process of negotiation between governmental and popular justice in the long nineteenth century can be divided into four major periods, according to Dale: the period from the ratification of the Constitution to 1840, the following two decades before the Civil War, the period from the Civil War to the turn of the century, and the period from 1900 to 1936. Dale shows how until the 1840s the criminal justice system was largely decentralized and rested on judgments passed by ordinary citizens based on local custom. The trial of Joshua Nettles and Elizabeth Cannon (1805), who presumably conspired to kill Cannon's husband, serves as an example to show how key actors in the process from the detection of a crime to the actual trial were ordinary members of the community, how legal arguments had little impact on the outcome of the trial, how jurors judged the law rather than the facts, or how Nettles did not appeal his eventual conviction. The state and the people, in this period, cooperated in order to achieve justice. Dale contrasts this case with the case of the rape and murder of Jennie Bosschieter in 1901 to show how attitudes and practices changed over the century, but also to point out the continuities of popular dynamics within criminal justice.

In Dale's account, the decades before the Civil War are characterized by increased efforts to centralize the justice system. She focuses on the establishment of police forces, the reform of the prison system, procedures to standardize the law such as the dissemination of appellate opinions, and the way in which lawyers and judges began to control juries. In this period, popular forces were no longer part of state processes. After the Civil

War, the State again tried to take control over the criminal justice system. In this period, the Supreme Court also became active for the first time in the shaping of criminal law. Dale describes the first three decades of the twentieth century as a time during which the calls for an end to popular justice – which expressed itself not only in lynchings but also in progressive era reformers' extralegal attacks on bars and brothels – became stronger. The years of 1937 to 1939, which Dale devotes her last chapter to, witness a paradigm change that leads to the establishment of a new constitutional order that checked the power of the people: it redefined the citizen in terms of his or her rights vis-à-vis the state rather than as a sovereign of the state. However, as Dale notes, this paradigm change does not eliminate the forces of popular justice but rather provides it with different tools to check the State's power.

Dale's explicit positioning of her own perspective vis-à-vis other scholarly views, such as her divergence from Weberian assumptions, is one of the great strengths of this book. Nevertheless, Jeffrey Adler has pointed out specific issues that Dale interprets in controversial ways and implies that in those cases one might wish for more detailed justifications of Dale's interpretations. These include her view of private policing and low conviction rates in homicide cases as expressions of popular justice and her understanding of „state-sanctioned executions as evidence of the growth of government authority at the expense of lynch mobs and popular justice."[1] From the perspective of student readers, it might indeed be helpful if Dale spelled out more of her own and counter arguments. This is particularly true with regard to her reading of a legal institution like the death penalty that is still in place in the twenty-first century and still debated in similar terms.

From a European and, even more so, from a German reader's perspective, another controversial issue is too briefly dealt with: the widespread adoption of plea bargaining in the nineteenth century. Plea agreements, according to Dale, make a „mockery of the careful statutory schemes and criminal laws passed by legislatures" and must thus be seen as an element of popular justice (p. 73). She later refers to plea bargaining as „the most crucial trend of the late nineteenth century" that remains „unchanged" in the first three decades of the twentieth, yet offers readers only a paragraph of data that demonstrates its pervasiveness (p. 105). Like the death penalty, plea bargaining is still very much of a twenty-first-century institution: approximately 95 percent of cases in the U.S. today are resolved by plea agreements instead of trials.[2] In that light, and as other Western nations greatly restrict plea bargaining on the very basis that it may threaten to undermine the provisions of the law, a more detailed explication of why the emergence of plea bargaining in the nineteenth-century U.S. should be considered a practice that erodes the rule of law would have been desirable.[3] However, it should be stressed that Dale eventually does invite her readers to explore the issues at hand beyond her own argument: an excellent 40-page bibliographic essay that outlines diverging positions in the field concludes the book.

Dale offers readers an engaging legal and social history of the nineteenth-century United States that draws on a breathtaking wealth of knowledge of the criminal justice system and the constitutional order. Her book is a challenge to student and professional readers alike to rethink the connections between government and popular power and their implications for the stability of the Western nation state, historically, today, in the U.S., and across the Atlantic.

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[1] Jeffrey S. Adler. Review of Dale, Elizabeth, Criminal Justice in the United States, 1789–1939. H-Law, H-Net Reviews. March, 2012, <http://www.h-net.org/reviews/showrev.php?id=34781> (26.07.2012).

[2] Richard L. Lippke, The Ethics of Plea Bargaining, Oxford 2011, p. 1.

[3] On the restrictions of plea bargaining in European countries versus the U.S., see Yue Ma, Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective, in: International Criminal Justice Review 12.1 (2002), p. 22–52. The question of whether to create a formal framework for so-called „deals" or „Urteilsabsprachen" within the German system at all was hotly debated in the last decade. §257c StPO (2009) now also allows for plea agreements in a highly restricted form.

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