Allen Steinberg's *The Transformation of Criminal Justice in Philadelphia, 1800-1880: A Symposium*

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**Editor's Note:** At a meeting of SHEAR (Society for Historians of the Early American Republic) in Madison, Wisconsin in July 1991, a special session was devoted to Allen Steinberg's book, *The Transformation of Criminal Justice: Philadelphia, 1800-1880*. Three leading legal historians offered assessments of the work, and Allen Steinberg was invited to respond. Herewith, revised versions of their remarks.

**Kermit L. Hall**

If all of the world were Philadelphia! Then we would have a far better understanding of criminal justice in the nineteenth century than we presently enjoy. With the exceptions of Boston and New York, no other nineteenth-century city has had comparable level of attention showered on it. Negley K. Teeter's and David Rothman's works on the development of the penitentiary and jail, Alan M. Zachary's and Gerald Sorin's fine studies of pre-Jacksonian social disorder, and Roger Lane's innovative research on violence, homicide, and suicide have all relied on Philadelphia to one degree or another. Allen Steinberg's *The Transformation of Criminal Justice* is a welcome complement to this already extensive body of scholarship and, more generally, to the growing body of socio-legal history. Steinberg's accomplishment, moreover, is distinctive; no other scholar of Philadelphia's criminal justice past has pushed such high quality data with such a firm analytical hand. The result is not only a genuinely comprehensive analysis of the administration of criminal justice but a sophisticated history of its relationship to urban and state politics. *The Transformation of Criminal Justice* is a carefully written and detailed monograph in the best scholarly sense of those terms.

Steinberg argues convincingly that a profound transformation occurred in nineteenth-century Philadelphia. Early in the century the administration of crimi-
everyday lives of ordinary people, and the
decision of urban politics. He ties the history
of Philadelphia's criminal courts closely to
related developments in the city's social and
political evolution, making a contribution
not only to the study of criminal justice but
also to the larger literature on urban, social,
and legal history.

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The Transformation of Criminal Justice
Philadelphia, 1800-1880

by Allen Steinberg

"This book breaks new ground and is a very welcome addition to the
literature on the history of criminal justice. Steinberg has done a
thorough and imaginative job."—Lawrence M. Friedman, Stanford
Law School

"Allen Steinberg has uncovered a lost history of America's urban
courts and evoked their workings with telling and fascinating detail.
His powerful book has the capacity to change the way we see the na-
tion's criminal justice system in our own day as well as in the past."
—Edward L. Ayers, University of Virginia

The Transformation of Criminal Justice

Philadelphia, 1800-1880

Allen Steinberg

"The most important historical study of urban criminal justice published in this decade." —Roger Lane, Harvard College

Allen Steinberg brings to life the court-centered criminal justice system of nineteenth-century Philadelphia, chronicling its rise, and contrasts it to the system—dominated by the police and public prosecutor—that replaced it. He offers a major reinterpretation of criminal justice in mid-century America by examining this transformation from private to state prosecution and analyzing the discontinuity between the two systems.

Steinberg first establishes why the courts were the sources of law enforcement, authority, and criminal justice before the advent of the police. He shows how the city's system of private prosecution worked, adapted to massive social change, and came to dominate the culture of criminal justice even during the first decades following the introduction of the police. He then considers the dilemmas that prompted reform, beginning with the establishment of a professional police force and culminating in the restructuring of primary justice.

Making extensive use of court dockets, state and municipal government publications, public speeches, personal memoirs, newspapers, and other contemporary records, Steinberg explains the intimate connections between private prosecution, the (continued on back flap)
nal justice not only intervened in the lives of working class Philadelphians, but it was an integral institution of working class culture. The parties that dominated the criminal justice dockets also controlled the disposition of criminal justice; the Philadelphia criminal courts were people's institutions before the Civil War. By 1875, however, rapid change was underway; an informal and democratic scheme of criminal justice had yielded to demands for a professional, bureaucratic, and ostensibly more efficient "system" composed of salaried police, prosecutors, and prison and jail officials. It had become modern—state-driven and state administered. Steinberg not only chronicles this transformation but he assesses as well its "costs" in terms of democratic self-governance and legal legitimacy. He argues that, on balance, they were quite high, so much so that today we need to find ways to "revive an American commitment to law and democracy. As a beginning," Steinberg concludes, "we might ask whether we must less frequently be clients and suspects in order more often to be citizens."

The transformation took a particularly heavy toll of working class power, because it ended the practice of private prosecution, the most important avenue available to ordinary people to influence the administration of criminal justice. The pervasiveness, operation, and significance of private prosecution, along with its administration through the minor judiciary (in the case of Philadelphia, the aldermen's courts) is Steinberg's most important contribution to the literature on criminal justice and to the socio-legal history of nineteenth-century America.

Under private prosecution cases were brought and prosecuted by individual victims of alleged crimes rather than by the state. The process was highly political, very open, and also susceptible to corruption. Aldermen's offices were the courts of first resort and aldermen in the Philadelphia scheme had the authority to direct the resulting flow of cases into the next higher level of justice should that be required. In these minor courts, husbands and wives carried marital disputes in prosecutions not only for physical abuse, but adultery, desertion, and in one case loss of sleep! Landlords and tenants brought their battles to court, prosecuting one another for disorderly behavior, forcible eviction, and assaults. Steinberg even finds instances where gamblers turned to the criminal courts to prosecute creditors for collecting when their fates went sour. Indeed, the gambling example underscores how frequently, according to Steinberg, the roles of victim and perpetrator became confused. In essence, the practice of private prosecution gave the citizenry a unique power to define crime. This practice, he insists, also clothed the entire process of administering criminal justice with a degree of legitimacy that was lost once the system became formal, rigid, and bureaucratic.

This loss of democratic capacity within the criminal justice system is the main point of Steinberg's book. The criminal courts of Philadelphia throughout the pre-Civil War era were dominated by the people the criminal law was supposed to con-
trol. No matter how clogged the dockets or crowded the jails, an enormous number of pre-Civil War Philadelphians used the criminal courts and, to quote Steinberg, "no one could stop them."

About two-thirds of Steinberg's book is devoted to analyzing the decline and ultimate collapse in the 1870s of private prosecution and the realignment of the city's courts. Steinberg directs significant energy to recounting the complex story of the coalition building efforts that produced "reform," capped by the successful 1873 state constitutional convention. The new state constitution at once embodied the reform efforts initiated in the 1850s and served as prelude to the even more extensive involvement by the state in criminal justice matters during the Progressive era.

The new state-mandated system in Philadelphia placed form over function. It was designed, according to Steinberg, to lodge "control over the process in the hands of salaried officials of city administration and to remove it from ordinary citizens and neighborhood politicians." The resulting centralization of the criminal justice process and formalization of its structure fostered a new passive relationship between the citizenry and the state. The consequences of the resulting transformation, Steinberg concludes, are readily evident today in the role of a police-driven criminal justice system, in which the poor and the urban working class often as not suffer the brunt of the system rather than benefit from its protection.

On one level Steinberg's book is remarkably successful; indeed, it is a model of the carefully crafted, skillfully argued, and imaginatively researched monograph. Its strength is in the intelligence of conceptualization that Steinberg brings to the question of private prosecution. The author is smart enough, as many social historians are sometimes not, to understand that the process of government, the establishment of state power, and the conduct of the people's business through public institutions really does shape their day-to-day lives. (If, by the way, there is to be a revival of political history, then it will doubtless look a good deal like what Steinberg has given us in The Transformation of Criminal Justice.) His is a nicely nuanced view of the ways in which power and authority, as molded by structure and popular will, figured in ordinary lives. A reader of Steinberg's book will learn as much about the civic reform movement in nineteenth-century Philadelphia and the politics of local and state governments as he or she will discover about the criminal justice system.

What makes this book an award winner is that the author so nicely blends social science theory with a sensitivity for the people at the heart of any history. Steinberg has formulated an argument that takes both social and political change seriously while not reducing the people of Philadelphia to simple numbers. Such skill is especially welcome; nineteenth-century American history is already littered with bloodless studies of other transformations in law, economics, or politics. One
would never guess, for example, after reading Morton Horwitz's classic *The Transformation of American Law* that people's lives were altered in the slightest as a result of the legal changes he so carefully documents. Moreover, scholars familiar with Francis K. Zemans's brilliant article in the *American Political Science Review* (1983), "Legal Mobilization: The Neglected Role of the Law in the Political System," will appreciate how skillfully Steinberg has incorporated her insights into his own sophisticated analysis of the interaction of the administration of criminal justice and the political system.

Having sung Steinberg's praise sufficiently, I think it appropriate to haul up at least two cautionary flags. The first has to do with the problem of typicality; the second involves the relevance of the Philadelphia experience for the conduct of criminal justice today.

I do not raise the issue of typicality in a social scientific sense. My concern is not, per se, that Steinberg has in Philadelphia the perfect surrogate for all of nineteenth-century America, urban or rural. Lord knows we have to start somewhere, and, as I suggest above, Steinberg's book is worth reading as kind of primer about how to put together social science history that is both methodologically sophisticated and humane. Instead, I raise the issue because his conclusions about the experience of Philadelphia lead to prescriptions about what to do with the present practice of criminal justice mess that are, at least, debatable.

Steinberg does not address the issue of typicality directly, at least in the sense of suggesting how criminal justice was administered in other nineteenth-century cities. Such studies do exist, although Steinberg, perhaps wisely, avoided using them as straw men. All of the major reference points in this book are within the city of Philadelphia and the state of Pennsylvania. As a result, an important question goes unaddressed in the book: how pervasive was the practice of private prosecution outside of Philadelphia—in Pennsylvania, in the Middle Atlantic states, in the nation? If private prosecution was peculiar to Philadelphia and if its uniqueness makes Philadelphia the exception, then, while of interest as an anomaly, how much can a case-study of that city reveal about the issues of democratic self-governance and criminal justice administration?

As Steinberg points out, and as English legal historians know, private prosecutions and the minor judiciary were an integral part of English criminal justice. Steinberg notes as much and holds up Philadelphia as an example of "the creative adaptation of the English common law" in America. Yet one wonders if such a scheme did not, as Steinberg clearly suggests that it did, find particularly fertile ground in Quaker Philadelphia. William Penn and the settlers of Pennsylvania merged the Quaker practice of arbitration with the English tradition of the justice of the peace. The office of alderman had its counterpart in justices of the peace and magistrates in other colonies and later states, but was the same true of the
practice of private prosecution? Greg Roeber’s fine book, *Faithful Magistrates and Republican Lawyers*, that treats the local courts of colonial Virginia, gives no indication that it was. Moreover, his forthcoming book, *Palatines, Liberty, and Property: Cultural Transfer and the Creation of a German-American Republic, 1727-1776*, reveals that the ideas of German settlers about government and law derived from a tradition far different from their English counterparts. While Roeber does not address the issue of private prosecution directly in either work, he does suggest that, at least in Virginia courts, reliance on the state was far more explicit at an earlier time than was true in Philadelphia.

Which leads us back to the question: how pervasive was the practice of private prosecution? Of course, the main outlines of Steinberg’s argument about the shift from an informal, democratic, and open system to one that was formal, bureaucratic, and state initiated could well be true, but the mechanisms of and the reasons for that transformation might have been peculiar to Philadelphia. Or, alternatively, the broad changes he chronicles may well have been the same elsewhere, even where private prosecution had not existed.

In any case, we need to know more about the scope of private prosecution. We also need a much better scholarly fix on the nature of criminal procedure, especially in light of Robert Ireland’s discovery of the highly informal and somewhat boundless character of criminal justice in early nineteenth-century Kentucky. As Ireland has argued, to raise the question of typicality in the context of the present literature on the nineteenth century is really to ask whether arbitrariness or evenhandedness best describe criminal justice, in Philadelphia or anywhere else.

The matter of arbitrariness is important because of the value that Steinberg places on the open, majoritarian, and political character of private prosecution. For a book that is remarkably hardheaded in its methods and in the collection of data, *The Transformation of Criminal Justice* offers a sentimental, even romantic view of the working class and of “democracy.” There is a kind of “world we have lost” quality to Steinberg’s assertion that the decline of private prosecution and the rise of the state as the dominant player in the detection, prevention, and punishment of crime was regrettable, even bad. Peter Hoffer in his comment joins me in challenging Steinberg’s conclusion that the movement from private to public in the administration of criminal justice was really unfortunate.

If Peter is right (and I think he is), then the reform movement that Steinberg describes, regardless of the practice of private prosecution, may have been typical of the time but not much of a model for our own time. Steinberg’s vision of criminal justice closely connects popular majorities, democratic self-governance, and liberty. To make a complex matter perhaps too simple, Steinberg equates the working class majority in Philadelphia with the people and popular majorities with a fair criminal justice system. This description squares nicely with the operable
theory of law and politics at the American founding, which equated liberty with popular consent and control and individual happiness with a close relationship between the people and their government. The Philadelphia scheme of private prosecution and the minor judiciary reflected these assumptions, since it gave greater priority to protecting working class majorities against abuse by government than to protecting minorities from the excesses of popular majorities. That is, even if private prosecution was peculiar to Philadelphia it was nonetheless a piece with prevailing ideas about the relationship of law to democratic self-governance.

Moreover, by the time that private prosecution collapsed these assumptions were in retreat, not only in Philadelphia but elsewhere. The new theory of liberty that emerged in the post-Civil War era stressed the role of courts and law in protecting minorities, initially associated with business and commerce, and later, in the post-New Deal era, with race, ethnicity, and even later with gender, age, and physical handicap. Most of these same minorities, of course, fared rather badly at the hands of the white, Protestant, and Anglo-Saxon working classes in the nineteenth century. The predominant conception of liberty in the twentieth century has stressed, for better or worse, the value of the judiciary as an honest broker, as a force to blunt the majority, and as a servant of the law rather than of men. This vision of government and law, while somewhat disparaged for the moment, assumes that the state through formal legal and constitutional mechanisms can best prevent popular majorities from subverting the rights of minorities.

Today there is a powerful political struggle over how to recast this consensus. The political right complains that the state ought to give less attention to coddling criminals and more to insuring the safety of the law abiding majority. The left objects that state intervention has been a ruse, that a hegemonic class has perpetuated racial, ethnic, and class barriers by cloaking choices about the redistribution of wealth and social prestige in shibboleths such as professionalism, bureaucracy, formality, and the rule of law. To put the matter bluntly, we are deeply conflicted about criminal justice. We expect that the state will simultaneously protect us by detecting, prosecuting, and imprisoning the criminally deviant at the same time that it judicially enforces rights so as to limit the arbitrary power of the very public officials who seek to protect us. Whatever side is ultimately correct, the conclusion is inescapable that we have come to rely on formal rules and structures—most notably criminal procedure, the guarantees of state and national constitutional rights, and the impartiality of courts—in ways that would have astounded our forebears. Steinberg is right; a transformation has taken place in the administration of criminal justice. Whether he is also correct, based on that insight, about what needs to be done is another matter.

Steinberg argues that a more democratic and open criminal justice system, something along the lines of the early Philadelphia model, would work far better
than the present system. Perhaps, but my sense is that we are much closer to having a government of laws and not men than was true in the nineteenth century and would certainly be true today if popular majorities were given the kind of direct access to the criminal justice system that existed in early nineteenth-century Philadelphia. If I am correct, Steinberg’s paean to the power and supposed wisdom of the people offers the wrong prescription for what currently plagues us by holding forth the history of the failed promise of private prosecution in the City of Brotherly Love.

Peter C. Hoffer

Of all the branches of law, crime is the most susceptible to the tools of a social historian. A legal historian can still claim that precept and doctrine espoused in appellate court opinions are the foundations of common law. In our age of statutes, an age stretching back to Jacksonian state legislatures, the representative branches rival the appellate judge, but accounts of the histories of key enactments do not lend themselves to social history. From Emile Durkheim and Enrico Ferri, the operation of criminal justice systems has been deeply sunk into the social sciences. More recent students of culture, notably Michel Foucault, have added new dimensions to our understanding of why and how different communities and states define deviance and punish it. Allen Steinberg’s *The Transformation of Criminal Justice* exemplifies the social science tradition of the history of crime.

Steinberg’s is a powerful book. Its power lies in part in the massive research upon which it rests, research that recovers a lost world of private criminal justice between 1800 and 1880 in that most private of cities—Philadelphia. In the alderman’s courts people who did not have wealth and status were empowered to bring accusations against each other. They made law, with the connivance of the alderman, in a locus, a magic circle, of local politics and local reputation. Neighbors became support groups. African Americans came into the alderman’s office or the court to support African Americans, women to support women, the Irish the Irish, and neighbors, neighbors. Private accusations enabled the poor to gain the ear of someone in authority. Defendants could turn upon their accusers and bring suit. A lost world, like the world of the Lakota on the high prairies in the Oscar-winning movie “Dances with Wolves”—a lost world of honor and personal reputation—comes alive again in Steinberg’s pages.

Steinberg’s book is even more powerful because underneath the masses of data and anecdote there is an arresting thesis. His argument discovers patterns in the data, the patterns of a lost world not of incidents and events, but of structures of authority, of power with a big P. His is a thesis about the “transformation of the
state” (p. 5); and with it the transformation of criminal justice from community theatre, small scale drama that was followed and enjoyed by those who might the next day star in it, a community of equals in a pre-modern society of the poor, to a government by experts and reformers whose monopoly on the power to prosecute did not do justice but merely formalized prejudices; from a contest between equal parties, each pleading their own cause, to a contest in which the state controlled and curbed prosecution, giving implicit aid to a few. In the first, lost, world, private prosecution embodied and legitimated popular culture. In the statist aftermath, criminal justice became an elite preserve in which victim and defendant were excluded from factfinding and punishment. Well meaning but misguided reformers altered the language of criminal justice from one synonymous with the idiom of victim, the defendant and their neighbors, and transformed it into a formal lexicon to which ordinary people had no access.

Steinberg concedes that private justice was not perfect justice, but crowded, dirty, and nosiy though the first courts might have been, they were people’s places, “which allowed citizens to mobilize the criminal law on their own behalf” (p. 25). Into the courts came middle class and lower class “from all walks of life” (p. 38). Such private prosecutions were the “foundation stone of the legal culture” (p. 43). Victim-prosecutors and defendant sought to control the process, and brought multiple overlapping suits against each other. The alternative, civil suit, meant lawyers, expense, and delay. In the alderman’s courts, honor and dignity were immediately satisfied, although the loser, unable to pay the fine or put up the bond, went to jail, and there many languished for a period entirely up to alderman, or, if the case went to trial, to the courts of common pleas. True, such travails led to complaints of corruption, irregularity, partisanship. No doubt the bigger bullies won in these courts as they won in the streets. The imprisoned poor died of cholera and dysentery in the jails. Some aldermen got rich on profiteering, bribes, and sequestrations. Nevertheless, “private prosecution gave citizens the power, in practice, to define crime” (p. 77).

This privatization, with its empowerment of the poor, could not withstand the forces of modernization. Court officers gained control of their dockets, and the voices of the victim-prosecutor and defendant were muted. Worse was to come. The introduction of a professional police force slowly but surely shifted the balance of prosecution for crime from private to public. Reformers might complain of the corruption of the old ways, but more corrupt ward heelers and bosses, and their minions among the highly politicized police forces, took from the poor their dignity and left them their crimes. In the end, the many guises of altruistic reform became the masks of social control.

Steinberg does not excuse the middle class reformers. Riot and disorder in the streets gave urgency to middle class reform efforts because men of property rightly
recognized that rioting mobs in the streets and mobs of jeering spectators at court
were the same people. The reformers answer to disorder, an increasingly profes-
sional police force and judicial branch, squeezed out the alderman's courts and
began to target "the usual suspects" in urban law enforcement—those very men
and women who had hitherto been empowered by the private prosecutorial sys-
tem. An administrative state brought consolidation of courts, the harbinger of later
progressive era reforms. Neither the police forces nor the children's courts and
other progressive reform measures that were to follow led to efficient justice.
Instead, they killed "a legitimate form of voluntarism on the part of the litigants
and a reliance on popular participation to ensure the authority of the law and the
equality of call citizens before the law . . . [in which] no legitimate differences
among citizens were admitted, and when such differences in treatment became
obvious, both journalists and court officials protested. The era dominated by the
police changed all that. The ideal of this era was expressed in the rules of conduct
instructing the police to arrest persons based on their appearance and wealth (or
lack of it). The police were expected to ensure order and, in so doing, to treat the
poor differently than they did other people" (p. 235).

Steinberg's powerful communitarian, anti-statist vision echoes the work of
E. P. Thompson, Douglas Hay, Peter Linebaugh and others on 18th century English
crime, Sean Wilentz and others on early nineteenth century American protest
movements, the critical legal studies movement on republican values, and the writ-
ings of a number of women's historians like Bridget Hill on the lost world of
domestic partnership. They find the imposition of the modern state not neutral
and benevolent, but camouflage for the powerful corporate interests that have
suborned the state. The government and its agents, right down to the city police,
become the first line of defense of avid capitalism, thereby making sure that work-
ing people deprived of access to the means of production and denied their fair
share in its benefits nevertheless provided cheap labor to insure its success.

Applied to criminal justice, the argument is quite moving, but nostalgic. It
romanticizes a violent past, as Kevin Costner did in "Dances With Wolves." In fact,
without the state, the poor suffered more crime than they do now. We live in a far
less violent age, Ted Gurr and others demonstrate, than our great grandparents
did. Anyone who compares the notorious precincts of "five points" or "hell's
kitchen" in New York City with those same neighborhoods today, cannot fail to
grasp this point. Professional police forces, acting to prevent as well as investigate
crime, are partly responsible for that improvement. When police forces fail, as they
seem to be failing, in the inner cities of our nation, we return to levels of violence
characteristic of early modern England and her colonies.

The victims of crime in a system of private prosecution, by Steinberg's own
reckoning, got no justice. They could perform in the theatrics of the alderman's
office or the court of common pleas, but nothing availed them. There was no fact finding apparatus to determine who spoke the truth other than the rudiments of public quarrel. The alderman kept order and the county judges heard cases, but they hardly dented the level of crime, much less ferreted out or prevented its perpetrators. The parts of the city Steinberg describes were riven with crime, and the poor suffered almost all of it. That they could bring their own claims meant little, for they had to leave the alderman’s office or the trial court and go back to the hardship and dangers of their lives—certain that they would again be a victim of their neighbors. Nothing in this private world empowered anyone to better themselves or elevate their children from its dangers.

And the stranger— liken him or her to academics who venture forth armed only with our capacity for sentimentality—did not gain at all from a system of privatized justice. No visitor to the rookeries of 18th century London or the Southwark of Philadelphia expected succor from community justice. Robbed, threatened, afraid, they turned to the magistrate—just as we, today, would look for the transit patrolman on the subway when confronted with suspicious persons. We would not turn to our fellow straphangers. They, just as most neighbors in the Southwark, would turn their heads—letting private quarrels remain private quarrels. Steinberg implies that we would be better off without the intrusion of experts and professional officials managing our criminal justice system, but in our modern world we are all strangers to each other. We cannot depend upon pre-modern, localized, criminal justice systems for relief. Then as now we must turn to the state to aid us. The myth, and it is a myth, that colonial or early republican courts empowered the poor because no distinction was made based on status is contradicted by Steinberg’s own evidence. The alderman certainly took the clothing of the parties into account because they decided whom to fine and whom to bond or whom to send to jail. Everybody knew as much. Colonial courts did the same—read Michael Dalton or William Lambard’s manuals for justices of the peace, widely copied in early America.

At the same time, the truly viable structures of early American criminal justice, the structures built upon genuine visions of a caring mutually supporting society—not upon ruthless gangs and quarrelsome outcasts—did survive into the present. This ideal of local justice thrives in the modern state. Alternative dispute resolution, mediation and arbitration are alive and well. Small claims courts, municipal courts, magistrates courts, successors to the town and church courts of the New England and middle Atlantic colonies, provide swift and thoughtful local justice.

Steinberg is right—something happened. And I think that shorn of all the asides about the superiority of the world we have lost, he has got the story almost right. Criminal justice in Philadelphia was always sensitive to power and status, to influence. At their best, good alderman and judges who cared about their jobs and
the people in front of them, dispensed justice. That is, they took into account the
hardships, the relationships, the character, and the circumstances of all the parties
before them, and tried to make the world whole. Good magistrates do this today.
Anyone familiar with Philadelphia in Mayor Rizzo's tenure will see that a program
of law and order is not necessarily justice to anyone, but this was as true of some of
the alderman and judges in 1830—or 1750—as it is today. Local justice, whether in
the hands of magistrates or police, is only as just as the people in it.

David J. Bodenhamer

In The Transformation of Criminal Justice, Allen Steinberg offers a unique per-
spective on the development of criminal justice in the nineteenth-century United
States. Focusing on aldermanic or justice of the peace courts, he describes a legal
world populated by characters straight from a Hogarth sketch or a Dickens novel:
quarrelsome neighbors, rogues, beggars, thieves, and powerless women and
blacks regularly crowded makeshift courtrooms run by petty officials who wielded
authority in an overtly personal and political fashion, settling disputes, remanding
to jail or binding over to higher courts, declaring guilt, and fixing punishments.
High drama was noticeably absent in these courts. There were few lawyers, and
certainly none of the verbal pyrotechnics popularly associated with criminal trials.
Magistrates did not sit enthroned above the melee, acting dispassionately and
enforcing order; rather, they stirred the rabble, always with a keen eye on mone-
tary or political reward. These courtrooms are from Hill Street Blues, not Perry
Mason.

Here, Steinberg argues, was the real stuff of nineteenth-century criminal jus-
tice—raw, common, petty, and often corrupt, but also democratic. The lowest
courts were open to everyone, and everyone used them. More importantly, people
engaged primary justice directly, without the intervention of the police. Private
prosecution was the hallmark of this legal system. Men and women took it upon
themselves to enforce the law, not for some broad public purpose but for personal
reasons. Ordinarily citizens exercised real power in the courtroom, asserting con-
trol over their individual lives in ways not available through other institutions of
government. Aiding and abetting them were the aldermen, justices of the peace
who ran these courts and used their positions to exercise power far out of propor-
tion to their lowly offices. The justices' courts were the true government of Phila-
delphia.

Unfortunately, the ease of prosecution and the fee structure of the courts
encouraged vindictiveness and corruption, two faults that elite critics seized upon
in a decades-long struggle to reform local government. Late in the nineteenth cen-
tury a new criminal justice system, anchored by the police and the public prosecutor, replaced the alderman and the private litigant. City hall, not neighborhood courtrooms, became the new center of government. In the shift, ordinary citizens lost power to bureaucrats, and criminal law became more an instrument of coercion used against common people and less a way of governing, important to both rulers and ruled. This change was emblematic of a far more significant and fundamental redistribution of power from the citizenry to the state. Indeed, Steinberg suggests, we can see the rise of the modern state, with its narrower and more attenuated definition of the public sphere, in the metamorphosis of primary justice in Philadelphia. It is a change he regrets.

What about this world we have lost? Was Philadelphia typical in its administration of nineteenth-century criminal justice? How do Steinberg’s conclusions fit or reshape what we know about the role of law during these decades?

The modern focus on national rights, including rights of the accused, obscures the fact that throughout American history decentralization and discretion has characterized criminal justice. To a degree unparalleled among western nations, the American legal system reflects community norms and rests upon local control. Legal scholar David Fellman puts it well: the administration of criminal justice “depends upon the temper of the community, the nature of its prejudices and values, the character of its scapegoats, the state of the economy, the quality of its bench and bar, its educational system, and related nonlegal factors.”

Local values have always influenced criminal justice in the United States. This truth was abundantly clear to legal commentators of the nineteenth century, and numerous developments, ranging from the emergence of police forces to the mid-century debate over the role of the grand and petit jury, underscored this point. Leading authorities such as Joel P. Bishop believed that the intimate relationship between the criminal law and the daily life of every member of the community made local control not only inevitable but desirable in a democracy.

Steinberg is well aware of the local nature of criminal justice, and he notes it repeatedly. Indeed, his emphasis on it implicitly cautions us not to assume that the system he describes in Philadelphia was present elsewhere. Consider the role and authority of justices of the peace. These minor officials were ubiquitous, but in many states they did not exercise the authority demonstrated by their counterparts in the City of Brotherly Love. In Indiana, for example, lawmakers as early as 1824 restricted the justices’ authority, permitting them only “to inquire into, and in a summary way to punish by fine not exceeding three dollars” all petit misdemeanors. They were also to conduct preliminary examinations in response to individual allegations of criminal misconduct and to bind defendants over to the grand jury, usually upon their own recognizance, if the evidence warranted it. Under no circumstance could justices imprison a defendant as part of the sen-
tence, and they had only limited power to hold them in lieu of bail.²

Later years witnessed a debate over the role of justices and a gradual expansion of their authority in Indiana, but not for democratic reasons. Instead, legislators wanted to keep circuit court dockets free for more important civil matters, they sought a strict economy in government, and they endorsed the Beccarian notion that it was more important to make punishment swift and certain through the availability of the justices of the peace than to rely on the harsher sentences of the trial court. Even then, justices had only concurrent authority with circuit courts and, importantly, defendants enjoyed certain statutory rights, including six days' notice of an action against them and the election of jury trial or removal of the case to circuit court. Further, defendants, could exercise the right to appeal by initiating a trial de novo in the higher court.³

But what about the practice of these lowest courts? Here too there were differences—and a few similarities. There is nothing in Indiana newspapers or other contemporary documents to support the picture of courtroom activity so vividly drawn by Steinberg, nor does the official record of over 1500 cases admit to such scenes. Justices ran informal proceedings, to be sure, but there is no evidence that they were corrupt or petty men. Also, they were generally not the powerbrokers in community politics that Steinberg discovered in Philadelphia. In their background and activities they corresponded more to the frontier officials John Wunder described in *Inferior Courts, Superior Justice*⁴—respected middle-class businessmen, tradesmen, and lawyers who served for a few years, sometimes for personal advancement but more often as civic duty.

Complainants before Indiana justices tried to secure an advantage from these courts, although not so boldly or so often as did their Pennsylvania counterparts. Most of the actions fell into the categories of assault and affray, although by the 1850s an equal number alleged moral-order offenses, especially violations of liquor licensing laws. (In this latter category, Hoosiers evidently behaved differently than Philadelphians; Steinberg finds that moral-order offenses were not frequent matters before the aldermen.) The available evidence from Indiana does not reveal the extent to which complainants harassed defendants or sought revenge, but there is ample evidence of at least one party to an incident appearing before justices to confess, have a small fine levied, and thus secure a claim of double jeopardy against a later prosecution. After grand juries complained of this practice, the state passed remedial legislation requiring that both parties always be present at the hearing and have the option of a circuit trial.⁵

In Philadelphia, private prosecution was the hallmark of the system of primary justice. Through this device, Steinberg argues, people made the law their servant rather than their master. Indiana too had private prosecution, but in a much different sense. In the antebellum decades, sheriffs, deputies, justices, and later the
police could arrest only upon view, that is, if they witnessed a crime. Otherwise, arrests occurred upon the filing of a complaint by an aggrieved party, who then became the complaining witness at the justices’ preliminary examination and then before the grand jury. But the responsibility of the complainant did not extend to actually presenting or prosecuting the case.

From the adoption of Indiana’s first criminal code in 1817 an elected or appointed official conducted the prosecution in the name of the state. At first circuit courts named a prosecutor for each county, but in 1824 the state established circuit prosecutors as state officers. Counties could continue to maintain a county prosecutor who would be available to the justices’ courts to present the case in the name of the state. Initially responsible only to the circuit courts, state prosecutors by 1850 had to attend a case in the justices’ court if requested by an aggrieved party. During the 1850s this practice became the norm. And to ensure that complainants did not abuse the system, justices had the authority to compel them to appear before the grand jury. Private prosecution in Hoosier courts took the form of complainants hiring private counsel to assist the circuit prosecutor in presenting the case at trial. Even then, the state always controlled the criminal process. So in this matter, at least, all the world was not Philadelphia.

Philadelphia’s experience may have been unique in other ways. Prevailing ideas about criminal justice, defendants’ rights, and governmental power evidently had little impact on the structure and practice of aldermanic courts, except for complainants’ belief that they had a right to use the law for private ends. An opposite conclusion more accurately describes the situation in several other states. Throughout the antebellum years there was vigorous discussion concerning the proper ends of criminal justice and the relationship of the criminal process to the nation’s republican heritage and its increasingly democratic future. Important to this dialogue was the belief, fresh from the Enlightenment, that men were capable of reform if criminal codes and institutions were humane and rational. Lawmakers and politicians, judges and grand jurors, newspaper editors and private diarists agreed that the pursuit of criminals must not breach the republican principle of limited government or the constitutional commitment to due process. We can see this consensus in the debates over criminal law, the creation of the penitentiary, and, especially for Indiana, the proper role for grand and petit juries. The concern for fairness and limited power even extended to the authority of justices of the peace. In an early opinion upholding the justices’ limited power of summary judgment for certain misdemeanors, the Indiana Supreme Court held that such discretion was the very “reverse of oppression” because defendants could claim a jury trial, a right that was “not intended to guaranty to the community, that every offence should have an adequate punishment.”

Countervailing demands for order and economy in government ultimately
upset this consensus, especially during the two decades prior to the Civil War. And here the development Steinberg describes is consistent with what happened elsewhere. Increased immigration, especially from Ireland and Germany, the heightened mobility of the population, regional economic integration, and the growth of cities, small by the size of Philadelphia but still large compared to the average town, led to new and stronger demands for the control of crime. Now we find parallels to Philadelphia, at least in the patterns of criminal prosecution and in the desire to limit popular control of the criminal process. Indiana in its Constitution of 1851 granted the legislature the authority to abolish the grand jury, an action considered but rejected in two other midwestern states, Ohio and Michigan. One result was the emergence of prosecutorial presentments to initiate a criminal action. Also, police forces and mayor’s courts became common in the state’s larger cities. And the Indiana Supreme Court in the late 1850s strengthened state power at the expense of defendants’ rights. As in Philadelphia, a professional and bureaucratic criminal justice system gradually emerged, with elite support. The transition was not always smooth, nor did it enjoy uniform success. An 1840s’ movement to restrict the power of petit juries failed when the voters ratified a new constitution with its express provision that jurors were the sole judge of law and fact in criminal trials. Still, the transition continued, as more and more defendants chose to plead guilty in an implicit bargain to avoid the uncertainty of a jury trial. Significantly, however, the battles over criminal justice in Indiana were more ideological and less tied to political compromises imposed by petty officeholders than Steinberg discovered in Philadelphia.8

Why was there such difference between Philadelphia and Indiana? There are several reasons. First, Indiana was a younger state than Pennsylvania—it was a post-Revolutionary state—and its criminal justice system more clearly reflected the influence of republican and Enlightenment ideas and beliefs. Pennsylvania’s decades-old process of lay arbitration and its tradition of neighborhood justice proved more impervious to change. Second, Indiana’s population was much more homogeneous than was Philadelphia’s. Not only did citizens share many of the same values, their common culture provided other institutions, public and private, for the resolution of disputes. Interestingly, the push toward a more bureaucratic criminal justice system in Indiana comes in the 1840s and 1850s, decades of Irish and German immigration and ethnic strife. Third, Indiana was a rural state, with only one medium-sized city by the time of the Civil War; Philadelphia was one of the nation’s largest urban areas. There was a distinctive urban-rural split in antebellum criminal justice: urban and even urbanizing counties differed markedly from their rural counterparts in such things as patterns of prosecution and conviction, court structure, and law enforcement practices. In Indiana, for example, the rapid growth of Indianapolis in the 1850s led to experiences with crime, courts, and even reform efforts that mirrored in small scale those of Philadelphia.
Finally, the differences may be attributable more to our sources of evidence and to changes in popular culture than to any significant shift in the practice of criminal justice. Much of what we know about primary justice during the antebellum decades comes from newspapers; justice of the peace dockets, when available, contain only a bare record of the proceedings. Yet crime reporting, especially in big cities, underwent a change that undoubtedly influences our perceptions of what was happening in the lowest courts. David Ray Papke, in his book, *Framing the Criminal*, persuasively argues that reporters from New York City papers regularly attended the city's police courts in the 1830s and provided a sympathetic profile of accused laborers and clerks, while charging that corrupt officials manipulated criminal justice for their own purposes. By the 1890s the newspapers received their information from police departments, rather than trial courts, and came to share police perspectives on crime control. Thus, crime was not a discrete social fact, but the product of political labelling. If true, then this phenomenon affects our analysis in at least two ways: the class bias in newspaper reporting skewed contemporary understanding of the problem, fueling the elite drive to reshape criminal justice; equally, it distorts our own view of the changes, leading to an exaggeration of both the virtues of the earlier system and the detrimental impact of the reforms.

As with so much of what we do as historians, the test of Allen Steinberg's thesis will come only when we have a sufficient number of studies from other jurisdictions. But for now, we can acknowledge his great contribution in forcing us to think more critically about the important but neglected topic of primary justice and its relationship to democratic culture in the American past.

Notes
Reply, by Allen Steinberg

Second only to praise, authors cherish attention, and so I am very grateful to Kermit Hall, David Bodenhamer and Peter Hoffer for taking the time to comment on The Transformation of Criminal Justice, and for providing the occasion to discuss some of the issues it raises for the history of criminal justice and criminal law.

Two related concerns are at the core of their comments. The first was whether Philadelphia's system of criminal justice was typical, and whether the transformation I claim followed was at all representative of broader changes in American communities and the American state? There is good reason to wonder about this. Only a few historians have studied the urban criminal courts, especially at the lowest level, and as Kermit Hall points out, one has to start somewhere. Moreover, because as David Bodenhamer adds, studies of criminal prosecution must be local, the future research that will determine the extent to which Philadelphia was typical will emerge only slowly, place by place.

So it may seem audacious to try to make any generalizations from what is after all only one case study in a field in its relative infancy. Accordingly, for most of the book, there are precious few of them, keeping it perhaps focused too narrowly on Pennsylvania. Only at the end did I brazenly leap into the jungle of generalizing, cast clearly in the form of preliminary speculations, even if on broad and major themes about the history of the relationship of the citizenry to the state in the United States (I am especially grateful to Kermit Hall for recognizing that opening up this subject within social history was one of my main aims in writing this book).

Despite my caution, I think that the Philadelphia experience will prove to be typical enough, for reasons that both Professors Hall and Bodenhamer supply. Certainly no two places will be exactly alike, and it is unlikely that private prosecution developed into so strong a component of criminal justice in many other places. It did so in Philadelphia because of local peculiarities, like the Quaker tradition of arbitration and the radically decentralized structure of local government in the city. But this is the point. Criminal justice was a local phenomenon, and through the first half of the nineteenth century (and even later in western cities) this localism was the fundamental principle of the American public system. Given the ubiquity of the justice of the peace, the widespread inheritance of the English common law, the failure of American cities to establish effective centralized police forces before mid-century, and the close tie between local politics and local law enforcement in most cities, it is a good bet that if not private prosecution, then many of its essential features—such as easy accessibility, corruption, informality, and a great gap between legal ideals and everyday practice—were present in many places. This will perhaps prove to be truer of cities than smaller places, but in many ways Transformation is about the peculiarities of the city, and I would be neither surprised
nor disappointed if most of its lessons pertain particularly to the urban experience.

But even this may be too narrow. As Hall notes, the essentials of private prosecution were "of a piece with prevailing ideas about the relationship of law to democratic self-governance," in the countryside as well as the towns. David Bodenhamer is struck by the differences, but there are strong similarities between Philadelphia and the western, rural Indiana he describes. For example, the restrictions Indianans placed on the authority of the justices of the peace were very similar to those imposed on justices in Pennsylvania. What made the justices' power so imposing in Philadelphia was that their actions departed not only from the letter but sometimes also from the spirit of the laws restricting them. Only when we know more about the practices of justices in Indiana can we compare them to their brethren in Philadelphia. The same distinction applies to the role of the public prosecutor. Pennsylvania law required that an official of the state conduct all prosecutions in the state's name. It was even more rigorous than Indiana law in protecting against unnecessary prosecutions, by requiring grand jury hearings for even the most minor misdemeanors. But in practice, in Philadelphia, none of this meant that "the state always controlled the criminal process." Perhaps it did in Indiana (although I doubt that there was any more uniformity among its localities than among those of other states), but it would take detailed examinations of its local courts to find out. Also, like other antebellum Americans, Pennsylvanians and Philadelphians conducted an ongoing and rancorous debate about the ends, structure, and substance of criminal law, and about the relationship of criminal justice to republicanism and democracy. The Transformation of Criminal Justice is peppered with their comments. Without them it would have been far more difficult for me to unravel the complexities of criminal prosecution in Philadelphia. These ideas may indeed have had, if not little, then less impact on the actual practice of criminal justice in Philadelphia than they did elsewhere, but as we all agree, we won't know until we know more about practice elsewhere.

Most likely, the greatest similarity between other places and times and nineteenth-century Philadelphia will be the gap between the ideals of the criminal law and the conduct of criminal justice. This makes the relationship between ideals and practices an important, even central, point of inquiry for the history of criminal justice. Although equality, fairness and evenhandedness were the great ideals of criminal justice in nineteenth century Philadelphia, at no time did they so simply characterize its practice. But this is part of the second, more important set of concerns. Here, the question is not whether any generalizations can be drawn from Philadelphia, but which are the right ones, and the problem is not the absence of intellectual company, but the company one chooses to keep.

I situated my interpretation of criminal justice in Philadelphia in an emerging genre of studies on the Anglo-American laboring poor, popular culture and the
criminal law, and, especially according to Peter Hoffer, I will have to live with their sins. Lamenting the lost past, this work ignores the benefits of a century of social change and instead wallows in a muddle of sentiment, romanticism and nostalgia. As with most caricatures, there is a partial truth here. My main interpretive concerns were about how the abolition of private prosecution might be related to some of the major problems of contemporary criminal justice and public authority, and this does link me to writers including those mentioned by Professor Hoffer. However, there are two separate problems with this complaint, one regarding my efforts, the other the genre as a whole. On the first, by pigeonholing a book one reads it with sensors bared for anticipated faults, poised to seize upon ideal types and tendencies as if they were descriptions of reality and crude absolutes. It is not true that the victims of crime “got no justice” in a system of private prosecution, as Hoffer contends, and there was a considerable gap between the ideal (that Hoffer terms a myth) of “no distinction based on status” in early republican courts and the actual practice of those courts. Private prosecution’s empowerment of ordinary and propertyless citizens rested on nothing so simple as either that ideal or the system’s adherence to it. It may have been a source of empowerment at times, but it was hardly a “paean to the . . . supposed wisdom of the people,” as Professor Hall asserts the book contends. It was not a direct reflection of the will of popular majorities, nor was it necessarily “fair” regardless of how well such an equation of those two characteristics would have squared with “the operable theory of law and politics at the American founding.”

These misreadings make the *Transformation of Criminal Justice* seem simpler and cruder than it is. Having been derived from a critique of a genre, however, their greater significance lies in what they reveal about the treatment of this genre by some of its critics. Social historians of the American state and American democracy are likely to face similar responses as the field develops, just as the “new” historians of the American working class have faced them and revisionist historians of the origins of American capitalism are facing them today. It seems that when one wants to examine the social relationships that provided some power for ordinary people, or when one wants to analyze the social spaces where participatory democracy emerged, one is going to be understood by some as a crudely pro-majoritarian, sentimental champion of the inherent goodness and fairness of the “people,” regardless of what one actually writes about. Accusations of romanticising a “lost world” have an important, if unfortunate, consequence, which is to trivialize and obscure the fundamental intellectual challenge the revisionist studies pose. Rejecting the dominant positivist and progressive interpretation of American history, these historians argue that the present was not, through eternal American traits like individualism, liberalism and the entrepreneurial spirit, incipient in the past. Instead, the past was fundamentally different
from the present. For many Americans from the Revolutionary through the Jackso-
nian eras, patterns of exchange and authority were different, and so were the val-
ues and ideals upon which these patterns were based, however imperfectly. Dur-
ing the middle and late nineteenth century, fundamental transformations
occurred, amidst great conflict, changing the economic, social, political and even
legal face of the nation, and undermining the economic and civic cultures upon
which for many, the republic was based. To argue this is not to construct an idyllic
republican America (slavery was after all, completely of a piece with it, and no one
I know of extolls its virtues). But it is a bold challenge, especially to progressive
interpretations of American history and those that emphasize the fidelity the
present to historically-rooted Americans values. Still in its formative stage, hardly
conclusively established, it is an argument that should be joined directly.
Unfortunately, some critics choose instead to dismiss the challenge by characteriz-
ing it as romantic and thus rendering it harmless. They can then, like Peter Hoffer,
even agree that "something happened" and that the story of transformation is "just
about right" (although I am unable to discern from his comment either what
Hoffer thinks did happen or what he thinks I got right).

Hoffer, and in a mild way Kermit Hall, seem to me fall prey to this temptation.
For Hall mine is a pollyannish portrayal of the enlightened and wise empowered
people; for Hoffer, it is a twisting of violent and ignorable lives into independent
and heroic ones. In fact, I neglected neither the exploitativeness nor the violence
of working-class life and private prosecution. Transformation is full of poor people
doing terrible as well as admirable and silly things to one another. Violence was
everywhere; assault was by far the most common indictable crime brought before
the courts. The very marrow of everyday life among the “people” of mid-century
Philadelphia was fragile and arduous. This made seeming trivialities—material and
symbolic—serious matters, and it made people short-tempered. Ordinary people,
not just the “ruthless” and the “outcasts,” were violent and quarrelsome. (Now
who’s being romantic?) Private prosecution was democratic, in the sense that it
was decentralized and accessible, and its legitimacy and accessibility did rest in
part on an ideal of equality of all before the law. But in practice, as befit a radically
local system, it was varied and even arbitrary, as Robert Ireland suggests was true
for the similarly informal and accessible lower courts of Kentucky. The “people”
were not an undifferentiated egalitarian mass; among them were many formidable
distinctions did not always affect criminal prosecution in predictable ways. It was
these distinctions found their way into the courts. But even the influence of these
distinctions did not always affect criminal prosecution in predictable ways. It was
very difficult to find either fairness or systematic bias in the outcomes of the crim-
nal process, which is why my characterization of private prosecution as democratic
did not rest on either claim: Instead, I tried to understand why it was so popular
without relying upon evidence of its fairness, and indeed, I concluded that its popularity rested in part on the fact that it could be quite unfair. But on the other hand, sometimes it could be fair, even if this did not show up in the ultimate dispositions of criminal cases. Battered women were one group of victims who did get justice from private prosecution, not because they often got convictions of their batterers (they didn’t and usually didn’t want to), but because they could invoke the criminal law on their behalf relatively easily, control its course, assert the illegitimacy of the violence, and leave no doubt that the act was indeed a crime.

This has not been so easily done by abused women and their advocates in the twentieth century, which raises another basic issue. Shorn of the misreadings produced by their inclination to render my interpretation romantic, Hall, Hoffer and I would probably agree in most respects about the nineteenth century. However I’m not so sure about the twentieth. *Transformation* was indeed intended to assist in the contemplation of the problems of the present. Certain features of private prosecution—and of the democratic local Jacksonian state in general—seemed to me to capture some of the virtues missing from contemporary public life. To call for a reconsideration of contemporary problems beginning with a recognition of these features is neither to ignore the considerable flaws of the Jacksonian public system nor to call for its wholesale re-establishment. It is however, to leave considerably more open to debate the easy assumption that today’s public system is, in some conclusive or reassuring way, “better” than that of the mid-nineteenth century. This certainly includes, but it goes beyond, matters of criminal law and criminal justice. It includes, but it goes beyond matters of structure and practice, to encompass matters of values and ideals.

Urban America in the late twentieth century is by no means obviously less violent than it was during the first half of the nineteenth. Indeed, there is now a great deal more serious violent crime. Given the long-term changes in the structure of work, the physical structure of cities, health care, education, and material wealth—the things to which historians attribute, much more so than to the police, the decline of urban violence during the early twentieth century—the resurgence of violence in recent decades takes on even more disturbing dimensions. With the highest per capita prison population in the western world, the police whose job it is to catch criminals can hardly be said to be failing on that score. Clearly, the causes of American crime and violence go beyond the failures of the law enforcers, but isn’t it worth thinking about whether the very principle of preventative policing—especially in the contest of criminal justice practice as a whole and the effect of preventive police behavior on the public allegiance to the law—is part of the problem?

Prisons, as we know, serve more to harden than to reform criminals. Preventive policing would scarcely achieve its aim if imprisonment were to be its
consequence, but, despite the enormity of the American prison population, it is not. Unfortunately the alternative is not much better, if the rule of and respect for law is the aim. As Professor Harry I. Subin recently noted, New York City's criminal court delivers "zero justice." It "very rarely conducts legal proceedings or imposes punishment on the guilty." This means that not only do victims get no justice, but, given the total control of the process by lawyers and court officers, and the absence of any principle within the system that even hints that it should be any other way, they are only reinforced in their alienation from the system and disrespect for the law. Instead of engendering a feeling of empowerment, going to law, or more properly watching the engines of the criminal law turn, feeds a feeling of powerlessness. The only one feeling better is the criminal, smirking as he leaves, getting away with it once again, empowered through his lawlessness.

Kermit Hall rightly points out that the great principle of twentieth century American government and legal reform has been to stress the rule of law over the rule of men. In the abstract, this is a comforting and salutary change. How close we are to reaching this ideal, in the practice of criminal law at least, is another matter. Due process, the chief representative of the rule of law in criminal matters, remains an elusive goal. As Subin argues, courts cannot provide it. Almost since the time of private prosecution's demise, the alternative has been plea bargaining, an informal process resting almost exclusively on the discretion of men, and not even recognized as part of official criminal procedure. Now, says Subin, we have not so much plea bargaining as plea "auctioning" in which negotiation is nonexistent and the due process procedures of investigation and examination are entirely replaced by the application of "stereotypical sentencing formulas to stereotypical crime categories and stereotypical defendants."

It may be that this has been a consequence of the rise of the rule of law, which as I argued in *Transformation* has from the start in the practice of criminal justice been characterized by a penchant for treating people not as equal individuals but as unequal members of categories. This is a far cry from the ideal of either due process or the protection of minorities from majorities, the main pillars of the courts' modern ideal of the rule of law. Once again we have the chasm that separates practice from the ideal. But perhaps there is even a problem with the courts' ideal, one of the problems with the way the law has changed in the twentieth century. Like historians too eager to call difference romanticization, jurists' reformulation of legal principle rests on an inability to see the past whole. Private prosecution did not always or exclusively allow majorities to trample on the rights of minorities. This happened, but the system also allowed "minorities," or more properly people who were outside of the confines of the law relatively the less powerful, to sometimes assert their rights, and to sometimes do so successfully. They could do this more than anything else because of the ideal of individual
legal equality upon which the system rested. The replacement of this ideal with an ideal of minority protection, effective as it may have been in correcting the abuses of the old system, has done so at a price. Protecting minorities is not always the same thing as protecting the weak or those who need protection the most. Any even cursory look at the history of American labor law is evidence of that. For the achievement of fairness and equity in the rule of law, jurists might better look at the axis of domination and subordination in social life instead of the majority-minority axis. A set of principles starting from there might better be able to both protect the weak and foster legal equality, or at least to lead to the construction of ideals that, however widely they are honored in the breach, might better produce allegiance to the law. With Peter Hoffer, I am hopeful about the features of early American criminal justice that thrive today (although in many cities they are not so much survivals as recent experiments), but the sea of legal values and practices around them makes their effect different than those of their forbears. We cannot go back again, but it still seems to me that the one thing the transformation of criminal justice demonstrates above all else is how much we need another one.

Notes
3. Ibid.