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Book Review: Felony and Misdemeanor: A Study in the History of Criminal Law, by Julius Goebel

Graham Parker
Osgoode Hall Law School of York University

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Felony and Misdemeanor: A Study in the History of Criminal Law.

By JULIUS GOEBEL. Philadelphia: University of Pennsylvania Press. 1976. Pp. xlv, 455. (No Price Given)

This is a reprint of a book first published in 1937 and is one of a series on medieval history published or re-issued by the University of Pennsylvania Press. Many of the books are of interest to legal historians; these include studies of the Burgundian Code and the Lombard Laws, and three volumes of Henry Charles Lea's excellent study called *Superstition and Force* which examines the duel, the oath, the ordeal and torture.

Julius Goebel intended *Felony and Misdemeanor* to be the start of a trilogy on the history of English criminal procedure but the Second World War and other historical pursuits prevented completion.

In an introductory essay, Edward Peters pays tribute to this remarkable scholar who took great pains to examine the history of the law in the broadest possible perspective. *Felony and Misdemeanor* is a difficult book because it presumes much knowledge in the reader and also shows the remarkable depth and breadth of Goebel's research and scholarship.

This re-review can hardly say anything new or original about *Felony and Misdemeanor* because it was very fully and favourably reviewed forty years ago by scholars much better-equipped to assess its many good qualities.¹ Instead, I would like to spend more time on the ideas and work of the legal historian Goebel, who died five years ago.²

* David N. Weisstub, of the Faculty of Law, University of British Columbia, Vancouver, and of the Clarke Institute of Psychiatry, University of Toronto.

¹ E.g. Jolliffe, Book review (1938), 38 Col. L. Rev. 1039; Riesenfeld, Book review (1938), 26 Cal. L. Rev. 405; Kantorowicz, Book review (1938), 11 Camb. L. J. 446; Plucknett, Book review (1938), 54 L.Q. Rev. 295. All commented that Goebel may have been a little harsh in his criticism of his protagonists in the peace debate. Riensenfeld and Kantorowicz complained that Goebel's scholarship suffered from an almost impenetrable density so that occasionally the footnotes on philology and medieval historical sources tend to create an imbalance.

² See Smith, Julius Goebel, Jr. — A Tribute (1973), 73 Col. L. Rev. 1372, for a biographical sketch of his life.

Goebel's greatest contribution was to correct the impediments under which legal history had suffered. First, legal history, particularly in Germany had suffered from large generalizations which were not supported by equal development in cultural studies and anthropology. Secondly, German legal history too frequently imposed a nineteenth century standard of historical and anthropological change on the very different societies of the early medieval period. A final disadvantage, as Peters shows (in his Introduction to this reprint) was "the authority of the legal profession . . . which tended either to surround legal history with the arcana of professional discourse or to satisfy itself with a perfunctory 'historical introduction' to internal principles of contemporary law wholly without reference to changing concepts of historical interpretation".³ Goebel, in his usual pungent style, also commented on lawyers' history as a ritual, which has become "a matter of mechanical gesture, bereft of all piety, pervaded with pettifoggery"⁴ and said that there were too many who being "untouched by any sense of historical values, they treat the growth of doctrine as something projected on a horizontal plane of rational manipulation unmindful of its perpendicular support in time or circumstance".⁵

Goebel also questioned the reverence in which judicial pronouncements were held and the "intellectual tyranny" which they exert:

It is a truism that to know the common law, its history must be known. Our courts, however, seek enlightenment on the past chiefly in the judgments of their predecessors. These judgments are rarely treated as single but complex assessable facts, for the mass of relevant data of which they are merely parts is usually ignored. In consequence, the antecedent judicial opinion is elevated to a status of preposterous importance as a source. Worse than this, the pronouncement of the bench . . . becomes authoritative as history. . . . The fine gilding of rationalization conceals the inherent flaws, but it can never avert the peril that bad history may in turn make bad law.⁶

Holdsworth seemed to disagree when he said that a little bad history is not too high a price to pay for certainty in the law.⁷ Perhaps the justices in the school integration case in the United States Supreme Court would agree⁸ but at least one English judge has

³ Peters, "Ex parte Clio", p. xiv.

⁴ Goebel, p. xxxiii.

⁵ *Ibid.*

⁶ P. xxxiv.

⁷ See generally, Parker, *The Masochism of the Legal Historian* (1974), 24 U. of T. L. J. 279, at p. 288.

⁸ Kelly, *Clio and the Court: An Illicit Love Affair*, [1965] Sup. Ct Rev. 119.

recently shown that law and policy could become more rational and just with some proper historical investigation.⁹

Goebel also warned us that we would find no assistance in the writings of the systematic jurists who,

... oblivious of the fact that the fruit of a transcendental history may be a revealed jurisprudence, they are embarrassed only by what cannot be disciplined into their systems.¹⁰

Instead, we need an enlightened historical research which is an "inquiry animated by a lively appreciation of the law as a cultural phenomenon, conducted with critical detachment and tolerant of sources other than those in docket or opinion book".¹¹ He also had some advice for law reformers; he hoped that they would "perceive that a thorough understanding of the historical antecedents of their problems can be of substantial aid in determining what should be rooted out and what should be preserved".¹²

When he examined the previous history of criminal procedure, Goebel complained of the narrowly conceived history which was "accurate in detail but unreliable in generalization and unintegrated with the social and political life of the period".¹³ He had the more specific complaint that the English legal historians' most baleful influence was found in "the transplantation of the notions of folkpeace and King's peace into early English law as the basic point of departure in our criminal procedure".¹⁴ This was partly due to the Victorian cult of Anglo-Saxonism.¹⁵ *Felony and Misdemeanor* rectifies this and other misconceptions.

Maine had said that the history of the law was secreted in the interstices of procedure. Goebel also wanted to show the historical importance of procedure; its vitality, he said, "lies less in its relative stability of form than in its responsiveness to change in respect of function".¹⁶

⁹ See the dissenting judgments of Lord Diplock in *Hyam v. D.P.P.*, [1975] A.C. 55 and *Regina v. Knuller (Publishing etc.) Ltd.*, [1973] A.C. 436. Compare a less satisfactory "historical" examination by Lanham, "Larsonneur Revisited", [1976] Crim. L. Rev. 276, which raises more historical problems than it solves.

¹⁰ P. xxxv.

¹¹ *Ibid.*

¹² P. xxxvii.

¹³ P. xxxviii.

¹⁴ P. xi.

¹⁵ P. 2. Holdsworth, *History of English Law*, vol. II (1923), p. 146 said "England probably had little to learn from Normandy itself, from Norman institutions and Norman law". Compare the appreciation of the Frankish pedigree of English law in Brunner, *Entstehung der Schwurgerichte* (1872), pp. 127-131.

¹⁶ Goebel, p. 1.

One of the most important themes in Goebel's book was his insistence that the concept of the peace had been exaggerated or, at least, had intruded into the history of Anglo-Saxon and English legal institutions too early. Goebel argued that this misconception was partly due to the attribution of statehood to primitive organisations which were not much more than family tribes. Goebel claimed that the notion of an overall peace—or King's peace—can only be recognised with the reign of William the Conqueror.¹⁷ He also said:

. . . the crown in Henry I's time has a law which is not feudal, and the content of this law we believe was built up by the Conqueror and his sons by ordinance and by the maintenance of a monopoly over criminal procedure to the sole use of the crown.¹⁸

Closely related to the "peace" notion is the question of outlawry and feud. Goebel contended that the premature "peace" advocates wanted to give general credence to outlawry as a manifestation of a breach of the "peace", when outlawry was only of limited application. Goebel added:

If outlawry is merely withdrawal of legal protection, *i.e.* essentially a negative concept, then it is difficult to construe a general duty to pursue and a right or duty to destroy property. Even under the "shoot-on-sight" theory, there is no rational explanation offered as to why an outlawry of property is involved so that it could be destroyed. The whole theory smells of the briefcase.¹⁹

Goebel showed that English law owes much to Frankish law, and that the evolution of procedure and jurisdiction was not a simple progression from folk-peace to royal criminal courts. The relative power of the church and of the local barons, the immunities granted by the ducal authority and the inter-relationship of land tenure and jurisdiction over wrong-doing were variables which did not accommodate a uniform development.

Historians of crime for later periods have become increasingly interested in the use of the criminal law as an instrument of public order.²⁰ These themes were explored by Goebel in his excellent introductory chapter "The Foundations of Early Law Enforcement".

In discussing the world of the Germanic tribes, Goebel observed that there was "reason to doubt whether there is originally involved at any point any conception of 'public' order (excepting the few

¹⁷ P. 296.

¹⁸ P. 409.

¹⁹ P. 100, n. 117.

²⁰ *E.g.* Hay, Property, Authority and the Criminal Law, in Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (1975), p. 17.

cases, like treason or desertion) either in the sense of a state guaranteed by law or at least in the sense that such a guarantee was the aim of primitive regulation. If there is any concept of public order it is very vague and has its limits in social rather than legal implications''.²¹

He suggested that instead of a notion of public order originally evolving from "peace" or outlawry, "the evolution of procedure for pacific settlement offered opportunities for the piling up of minute interferences with the parties' freedom of action that in the end would add up to a substantial measure of control in the interest of public order without destroying the idea that a misdeed was essentially the concern of the kinsman on the two sides".²²

The private aspect of what we would call criminal justice remained pre-eminent until the Crown stepped in to cope with two serious situations which are equally familiar to us a millennium later—the thief and the professional malefactor.

With the idea of an official interest in some kinds of crime came the duty imposed upon the citizen to report those kinds of wrong-doing which could not be subjected to private revenge except in cases of necessity. Then follows the idea of the inquest. Goebel commented: ". . . the judge's privilege of questioning and the inquest's duty of answering tended to increase the state's initiative and to strengthen the authority already asserted".²³

The state only gradually took an initiative in punishment. At first it simply exercised supervision over execution which was still carried out by the aggrieved party or kin. The state eventually appropriated this function not as much to control the physical punishment but to assert public order (and make a profit) by means of confiscation of property. Once again, we must remember that in the ninth, tenth and eleventh centuries, this assumption of anything like a central authority is a very precarious power because frequently local barons were too unruly to be brought to order. Only the Normans were able to achieve this as a permanent arrangement from which evolves the English law of felony and misdemeanor.

GRAHAM PARKER*

²¹ P. 19.

²² P. 24.

²³ P. 77.

* Graham Parker, of Osgoode Hall Law School, York University, Toronto.