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Comment: Law and Disorder in Nineteenth-Century Kentucky

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Robert M. Ireland's Article, "Law and Disorder in Nineteenth-Century Kentucky," centers on the state constitutional conventions of 1849 and 1890-1891, spiced with newspaper accounts, statutes, court cases, and legislative records. He has said that his Article presents a preliminary overview of some of the principal problems of the criminal justice system of nineteenth-century Kentucky. I hope this means he intends to continue his study so that soon we can expect a full examination of the criminal justice system in that state. I also hope that other scholars then will be inspired by his example to examine other contemporary state criminal justice systems, because only when we have more comprehensive and comparable data will we have any reliable understanding of this important aspect of nineteenth-century legal history.

Professor Ireland begins his Article by changing the traditional Kentucky trilogy of good bourbon, fast horses, and beautiful women to a new tetralogy of horses, whiskey, hemp, and lawlessness. "Even those counties not afflicted by feuds," he reports, "found themselves awash in bloodshed by the end of the century." He explains that members of every part of the criminal justice system contributed to this circumstance—not only the criminals, of whom there appear to be an unusual number, but also the prosecutors, sheriffs, judges, legislators, and the laymen who made up the grand and petit juries. According to Professor Ireland, all their actions were grounded on a chaotic statutory base that had no state code of criminal practice until 1854, and that maintained a variety of local criminal statutes until 1891. Professor Ireland presents an appalling picture, with colorful details about unprepared prosecutors rushed to trial, packed and prejudiced juries, unchallenged judges, and corrupt governors who misused their pardoning power. It is not a portrait of enlightenment.

I am not a native Kentuckian, and I generally consider myself immune to the chauvinism of many people in my adopted state. But I am skeptical about Professor Ireland's basic premise—that Kentucky was the Corsica of America—and its corollaries—that only Arkansas and Mississippi rivaled Kentucky in capital crimes, that

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Kentuckians were notorious for being "a lawless and bloodthirsty kind of people," and that Kentucky "excelled most in crime." All these things may have been true, but I do not think Professor Ireland provides the data, statistical or otherwise, to support them. Without that very fundamental information, I am afraid that we simply are perpetrating another myth in legal history. My skepticism is bred by my own research in Kentucky's federal court records.[1] During the first generation following the adoption of the constitution, the Kentucky federal courts followed a notable standard of traditional due process in both criminal and civil cases. I question whether Kentucky changed so greatly between 1816 and the mid-century, as Professor Ireland's Article implies, or whether the anomaly can be explained by a difference between the law practiced in the federal courts and the state courts.

It may be difficult to obtain hard comparable evidence about crime and criminal activity, considering that even today sophisticated critics question, for example, Federal Bureau of Investigation statistics. Yet there are a number of students of criminal justice whose published studies suggest fruitful areas for research.[2] Much of the evidence in Professor Ireland's Article, especially the quotations from delegates to state constitutional conventions, may have been intentional political hyperbole, intended to inspire contemporaries to improve a legal system that admittedly was imperfect, but not intended to be taken as statements of fact. I suspect that Kentucky was fairly representative of the period. One does not have to look far from Kentucky, after all, to observe a great deal of lawlessness and unpunished criminal activity in the nineteenth century. Farther South one finds lynch law and the Ku Klux Klan; farther West, the vigilantes; not far North, the Robber Barons; not very far East, the stock market manipulators. I suspect that Kentucky was typical, not exceptional, and certainly not unique.

In that light, I examined what another preliminary overviewer, Lawrence Friedman, had to say on the subject of nineteenth-century justice. He, too, found that juries rarely convicted for murder. Friedman based his conclusion on a study of antebellum South Carolina, which possessed many of the problems that Professor Ire-

1. M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816 (1978).

2. *See, e.g.*, H. GRAHAM & T. GURR, THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES (1969); R. LANE, POLICING THE CITY: BOSTON 1822-1885 (1967); E. MONKKONEN, THE DANGEROUS CLASS: CRIME AND POVERTY IN COLUMBUS, OHIO, 1860-1885 (1975); Johnson, *Crime Patterns in Philadelphia, 1840-1870*, in THE PEOPLES OF PHILADELPHIA: A HISTORY OF ETHNIC GROUPS AND LOWER-CLASS LIFE, 1790-1940 (A. Davis & M. Haller eds. 1973).

land found in Kentucky.[3] Friedman states that in Maryland, also, jurors were judges of law as well as fact, and that in many places the upright complained that failures in the system were encouraging violence in America.[4]

I find Professor Ireland's Article to be particularly illuminating, however, in the descriptions of the roles played by the many participants in the Kentucky system of criminal justice. It should serve as a reminder to us as citizens of the continuing highly experimental nature of our system of participatory democracy—and as a warning of the many places that the system can break down and diverge from the ideal of equal justice for all. The Article also should challenge us as scholars to be more comprehensive in our analyses of legal history and to include evaluations of the performances of all the participants in our judicial system—not only the lawyers, judges, and prosecutors, but also the legislators, governors, and the lay public who serve as witnesses and veniremen.

Professor Ireland's particular talents as a reformed lawyer turned historian, and his sophisticated understanding of how nineteenth-century governmental systems actually worked in Kentucky, will be especially useful as he expands this preliminary overview into a more comprehensive analysis of the criminal justice system in that state. I hope his work can be placed in the broader context of American, or even Anglo-American, legal history in the nineteenth century, although that placement may be only speculative until there are more people working in the field.[5] I believe this progress can proceed more rapidly and extensively if we rely more on quantifiable data like arrest and conviction records, court dockets, and criminal appeals, and less upon the exotic opinions held by such insiders as grandstanding politicians, or by such outsiders as easterners who still romantically perceive Kentucky as the lawless and shoeless frontier.

Both Robert Ireland's and Maxwell Bloomfield's Articles provide valuable glimpses into different aspects of nineteenth-century southern legal history, and both, by being paired in a single publication, illustrate one of the principal problems of American legal history: the lack of comparable data and the absence of parallel studies. As these preliminary overviews are expanded, I hope that others will examine the nineteenth-century criminal justice system of Texas and the bar of Kentucky. What might be called "historians'

3. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 251 (1973).

4. *Id.*

5. The similar state of English studies is described in CRIME IN ENGLAND 1550-1800 (J. Cockburn ed. 1977).

legal history" is still in its early days, and much more work in monographic studies must be done before we will have more than bits and pieces of unrelated information. Both Professor Ireland and Professor Bloomfield have made important contributions in filling some of the gaps in our knowledge. But there are few areas in which we are compiling data bases that complement or supplement work in process or completed work. If historians are going to reclaim legal history, as we were invited to do fifteen years ago with constitutional history, we need to encourage our students and ourselves to spend some of our time on inquiries that will challenge, confirm, or illuminate the research of other people.[6] Until more related, concrete facts are developed, the cosmic generalizations we often make are decidedly premature.

This Vanderbilt Symposium, by focusing on the legal history of the South, as well as organizations like the American Society for Legal History and the few sessions that we can garner at national meetings, are truly valuable. We need the intellectual stimulation and rewards of sharing with people of similar interests, but we also need to explore ways to pursue our research interests in a more planned, coherent, and cross-fertilizing manner.

6. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963).