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SHAME, BLAME AND CULPABILITY

CRIME AND VIOLENCE IN THE MODERN STATE

EDITED BY JUDITH ROWBOTHAM,
MARIANNA MURAVYEVA AND DAVID NASH

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Preface

Towards a history of shaming and blaming

Xavier Rousseau

Since the 1980s, the argument for a return to defamatory and stigmatising penalties in criminal justice management has made a reappearance in the West.¹ This resurgence seeks to affirm the legitimacy of public sanctions against behaviours judged to be anathema to law as well as to society. Such impulses are a response to a perceived failure of preventive and reconciliatory policies, particularly incarceration. At a time when the media consistently highlights the negative impacts of crime, resorting to an insistence that miscreants are publicly vilified and/or publicly express their culpability offers a way of escaping the modern reliance on the monopoly of prison sentences as the only available sanction in law. It also enables the 'public' to participate in what has come to be termed 'restorative' justice. In the United States, for example, four categories of delinquents have become the key targets for such defaming penalties: first-time offenders and juveniles, minor offenders, sex offenders and, more recently, commercial offenders.

However, criticisms have also arisen relating to the uncontrollable (and unpredictable) character of those penalties that the state 'legitimately' delegates to the population at large. Such penalties arguably subvert the fundamental ethics on which American democracy was built – i.e. 'restraint and sobriety'.² Jurists, philosophers and sociologists have noted the extent to which a return to defamatory penalties represents a deep rupture with the penal philosophy inherited from the eighteenth century. Many Enlightenment philosophers, whether upholders of the *Lumières*, the *Aufklärung* or English liberal rationality, denounced defamatory penalties that drew on concepts such as the primacy of the individual will (moral freedom or religious choice) or pointed to conduct where the nature and extent of the delinquency involved was debatable (adulterous behaviour, bigamy). Beccaria, Voltaire, Bentham and other critics of *ancien régime* justice powerfully emphasised the destructive effects of defamatory penalties leading to the 'civil' and social death of those condemned. Indeed, the major, contemporary juridical systems of the West were built on the foundations of such lucid analysis of the abuses inherent in shaming punishments. More recently, Foucault, in analysing Damiens' tortures, showed the extent to which the 'infamy' inextricably associated with punishment has served to reinforce the ideology of sovereign power.³ From

the end of the eighteenth century, the laws of national states have favoured the progressive disappearance of both defamatory penalties and public penalties as signs of an increasing 'civilisation' in the moralities and manners of their citizens. Nevertheless, penalisation involving strategies to slander, and so shame, individuals never entirely disappeared as evidenced in the twentieth century by 'totalitarian' regimes or in colonial societies. The stigmatising practices of Nazi, Stalinist or Maoist justice find echoes with the culture of lynching that developed in the southern states following the end of the American Civil War, or the use of public penalties by European colonists to reinforce segregationist policies.⁴ Similarly, the European experience shows the extent to which even parliamentary democracies utilised such forms of popular justice in the aftermath of its two world wars, as illustrated by the shaming treatment of collaborating French women in 1918 and 1943–44.⁵ Far from being eruptions of uncontrolled violence, a recourse to defamatory punishments appears to be a marked phenomenon in periods when there is a reduction of state legitimacy, such as at the end of military occupations or conflicts. Defamatory penalties may, therefore, frequently manifest themselves in the context of a weakened state as a means of political re-legitimation.

This debate around the re-emergence of defamatory penalties invites historians to revisit the history of stigmatisation observable in pre-modern Europe, for example. The emergence of various forms of defamatory sanction at the end of the Middle Ages and their subsequent incorporation within legal processes and penal practices characterised European justice from the sixteenth to the nineteenth centuries. Such penalisation represented innovative attempts to address the issue of problematic public and moral behaviours that had previously been managed by a system of levying fines.⁶ Historians of pre-modern Europe have renewed our knowledge of the mental competencies of pre-modern humanity by drawing on anthropologists' work on 'honour'-based societies.⁷ Anthropological concepts have consequently been used as an interpretational model, particularly when working through extensive judicial archives with material testifying to the range of behaviours and rituals involved in conflict resolution, resulting in the histories of the emotions current in European society from the thirteenth century onwards.⁸ A return to examining emotions through historically inflected legal analysis is perceptible in such a project as this, which tries to look beyond the over-generalising conclusions provided by the interpretations of political or social histories.

The anthropological approach to honour and shame as the bases of social relations in pre-industrial societies also influenced Norbert Elias' perspectives on the transformation of moral values in the West. He delineated two tendencies: one *top-down* and the other *bottom-up*. The socio-political perspective (*top-down*) insists on the actions of a modern state in gradually imposing a monopoly on the legitimate use of force. This evolution is manifested by the disciplining of populations via public expressions of shame. The socio-anthropological perspective (*bottom-up*) sheds light on the development of Western societies towards an increasing individualisation in

lifestyles. On the level of individual mores, this movement is accompanied by an internalisation of the values of honour and shame. Elias' approach does not contradict Foucault's conclusions, but underlines their common descent from Max Weber's central assumption about the ability to detect (in Western history) a process of rationalisation, involving the gradual emergence of those bureaucratic forms of power which constitute the modern state. Among the most efficient of these, law and an associated model for the public delivery of justice have, over the long term, steadily imposed themselves as practices rationalising the processes involved in conflict resolution. This was Western society's mighty Leviathan, guaranteeing the stability of conflict resolution between citizens, between communities and between states. Such forms of justice delivery were imposed first by an integration within state-managed legal systems of the existing stigmatising practices and functions of local communities, and subsequently by their reduction over time to a minimal expression involving such communities. Thus, a position developed where the death penalty had to be performed without accompanying shaming rituals, and then without public visibility, as expressed first in the development of the guillotine during the French Revolution, followed by the disappearance of public executions in France.

After the first conference volume devoted to a multidisciplinary approach to violence,⁹ *Shame, Blame and Culpability* extends SOLON's investigation of the modernisation of European societies by exploring the dimensions of the transition to modernity from pre-modern society, a transition which is clearly illustrated through change and continuities in the uses of law and criminal justice processes. As a number of the case studies reveal, the volume also shows the dangers of and limits to the current 'rediscovery' of the social power of shame, pointing up the destructive uses that post-modern states can make of such policies. This volume therefore presents an important revisiting of a nexus of values relating to norms within modern societies. It does so in a number of ways, including its discussion in various chapters of the anthropological concepts in use in modern law and justice systems; by a continuing emphasis on research undertaken in Southern and Eastern Europe to challenge the certainties of established European research; and, finally, by its comments on the transformations of what constitutes 'shame' in modern societies.

The value of this work lies in its insistence on the phenomena revealing shame's complexity and the polysemia of shaming practices. On the one hand, it insists on the variety of 'reputations' depending on cultures, social memberships, gender and age. However, additionally it particularly insists on the ambivalence of *fama* (reputation), coming into play in slandering processes and in the subsequent practices aimed at recovering individual honour. The volume demonstrates the range of ways in which, over time, modern states constructed their modernity, by differential integrations of the oppositions between cultures of responsibility and ones of guilt. Thus, a valorisation of practices for allocating blame and culpability enabled their widespread emergence in modern Western Europe. In this sense, shame is a 'social

emotion'. If expressed differently in pre-modern and modern society, it remains at the heart of modern society, now fostering individual and internalised guilt instead of externalised dishonour. Finally, regulation by shame, if it largely depends on values popularly promoted as constituting social status, leaves room for personal agency in the construction or reconstruction of individual honour.

The second characteristic of the volume before us is its presentation of a variety of case studies, including pre-modern Russia, the Balkans, Greece and even Australia. This contributes substantially to a 'de-Westernising' and thus a globalisation of the debate process on shaming. Lastly, these contributions highlight the extent to which the processes of *shame*, *blame* and *culpability* are at the heart of the evolution of relations between communities and the modernising state, including explorations of individuals torn between their community and the state. Crimes of honour and defamatory penalties are two manifestations of shaming at the extremes of the legal/judiciary chain. This work thus insists on the transformations manifest in shaming processes in the eighteenth and nineteenth centuries and their integration into law and judicial practices, as shown by the distinction that modern jurists have consistently made between natural and civil honour. As a complete and rounded volume, the editors and contributors invite us to reflect on a history of honour and shame, examining both the heights and the depths of humankind and human nature.¹⁰

Notes

- 1 John Braithwaite, *Crime, Shame and Reintegration*, Cambridge: University Press, 1989.
- 2 James Q. Whitman, 'What is Wrong with Inflicting Shame Sanctions?', *Yale Law Journal*, 107(5), 1998, 1055–92, p.1089.
- 3 Michel Foucault, *Discipline and Punish, The Birth of the Prison*, New York: Vintage Books, 1979.
- 4 Pieter Spierenburg (ed.), *Men and Violence: Gender, Honor, and Rituals in Modern Europe and America*, Columbia, OH: Ohio State University Press, 1998.
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- 6 Xavier Rousseaux, "'Sozialdisziplinierung'", *Civilization of Manners and Monopolisation of Power: Towards a History of Social Control in Southern Netherlands 1500–1815*, in Maria Ågren, Åsa Karlsson, Xavier Rousseaux (eds), *Guises of Power: Integration of Society and Legitimation of Power in Sweden and the Southern Low Countries, ca 1500–ca 1900*, Uppsala: Uppsala, History Department, 2001, pp.109–31.
- 7 Julian Pitt-Rivers, *The Fate of Shechem or, The Politics of Sex: Essays in the Anthropology of the Mediterranean*, Cambridge: Cambridge University Press, 1977.
- 8 Daniel L. Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264–1423*, Ithaca, NY: Cornell University Press, 2003.
- 9 Shani D'Cruze, Efi Avdela and Judith Rowbotham (eds), *Problems of Crime and Violence in Europe 1750–2000*, Lampeter: Mellen, 2010.
- 10 Daniel L. Smail, *On Deep History and the Brain*, Berkeley and Los Angeles, CA: University of California Press, 2008.

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Introduction

*Judith Rowbotham, Marianna Muravyeva
and David Nash*

Background

The legal history of crime and violence, and its management by the state, is a well-established field of study, and one with an extensive historiography, especially for Western Europe and the Americas.¹ This is the second volume in a series that seeks to widen considerations of this socio-legal history by examining these themes within the context of the management of crime and violence by states. The series also does this by approaching these concepts from interdisciplinary perspectives (chiefly law, history and criminology), and also by expanding the usual locational perspectives for such studies, to include Northern as well as Eastern Europe in this comparative exploration of themes and issues. As with the first volume, *Problems of Crime and Violence in Europe, 1780–2000*,² this collection emerges from an important conference, Crime Violence and the Modern State II: Blame, Shame and Culpability, which took place in St Petersburg in May 2009.

This conference adopted the tropes of shame, blame and culpability to advance understanding of the processes through which crime was managed and, in particular, punishments, formal and informal, have been used by the modern state and accepted (or not) by societies or groups within these states. There are often expectations that ‘shaming’ punishments do not easily fit into a ‘modern’ state framework for the management of crime and violence, and that the ‘civilising process’ means a move away, over a historical timeline, from shame to the more ‘sophisticated’ and ‘modern’ conceptualisations inherent in the operation of blame and culpability. These were stereotypes we sought both to explore and to challenge, by asking the extent to which all three approaches could, in theory and in practice, work together within state management processes.

Our starting point was to query the extent to which ‘modern’ states have, from medieval times and with surprising longevity, continued to find it important to use the concepts of blame and culpability in association with shame as the end product of criminalisation processes, making all three core pillars of a criminal justice system. This of itself raised several questions, including the apparent or even alleged ‘modernity’ of such concepts and their

usage in this context. How has blame/culpability been placed and described by particular societies in particular times and places? Have certain types of individual or group conduct been targeted increasingly for attention by state authorities (local or central) within this process, especially that coming under the heading of interpersonal violence, and, if so, why? Historically (with the exception of murder) everyday interpersonal violence has been seen as more 'private' and less part of the public province of the state.³ Is it a feature of 'modernity' to find it being progressively targeted by state procedures instead of being left to internal community management, or is the interest of the 'modern' state simply an enhancement of a pre-existing interest in interpersonal violence? This is an approach that takes further, and questions, some of the issues raised by scholars of violence in the modern era such as John Carter Wood.⁴

Blame, shame and culpability – and modernity

Why shame, blame and culpability? What this collection will demonstrate is that these apparently similar terms cannot be seen as interchangeable, and yet there can be complementarities between them, both in the theoretical frameworks in which they operate and the actual practices pursued by states. We here understand shame as an essentially public thing, as part of long-standing community strategies for management of offensive behaviour that may, or may not, have a formal legal dimension to it. Blame rests on ancient cultural formulae for allocating responsibility for 'bad' behaviour among the players in an offending scenario, enabling punishments to be mediated according to the levels of blame allocated to those most responsible for the offending. Culpability, by contrast, is a more mechanistic process, located firmly within formal legal processes and requiring an assessment of 'guilt', rather than blame or shame. Culpability implies offending that results from a state of mind where individuals, either deliberately or negligently, cause harm, but where that harm may not be to another individual but to the state. Thus, in making these terms our defining and unifying core, our aim is not semantic imprecision. Instead, it is an extended and sustained discussion of just why it is important to conceptualise these terms and explore their applications within modern states, especially when looking beyond anglophone scholarship. Use of these concepts also invites the reader, if indirectly, to reflect critically on the usefulness of the civilising trope put forward by Elias and others, which has already received direct critical attention in the previous volume.⁵

The modern state, law and violence

Behind these questions lie deeper questions about the state and its relationship to its citizens. Any normative account of the proper role, reach, content and enforcement of the criminal law depends on a political conception of the role and authority of the state, and how this has changed and evolved over time,

though legal theorists have too rarely articulated such historically inflected conceptions in any depth.⁶ Does an examination of the operation of the law (particularly in the processes of allocating blame, shame and culpability) in historical context reveal a broad consensus about what constitutes criminality within those parameters? Can an historical examination of a criminalisation process, one advanced by ideas of blame and culpability in particular, be revealing of the state responding to popular concerns about violence, or instead be a process where the state and its supporting elites are out of step with popular understandings of what constitutes unacceptable violence? Where does shame locate itself in terms of such popular understandings? Indeed, given that violence as a descriptor in itself carries connotations of conduct that historically go beyond the normal parameters of interpersonal reactions, when (chronologically) and why does the label of violence become applied to particular manifestations of personal conduct? When identifying 'violence' and its application to situations, how far does it signal a transitional community response, reflecting new or enhanced concerns over the acceptability of types of visible behaviour that are labelled as 'violent'? This collection demonstrates that it is by no means clear that there has been a linear development, amounting to modernity, in attitudes towards what comes to be labelled as violence in different times and places. Instead, the chapters show how complex and fluid, over time, such conceptualisations have been in different regions, and for different reasons.

The context in which this is explored is that of the 'modern' state and its laws, broadly comprehended. If 'modernity' in relation to errant behaviour that is targeted by law is a term much used, but not always well understood, the same holds true for what constitutes a 'modern' state. Implicitly at least, those who work in the areas of crime and legal history will look to Foucault and Elias, and the concepts they inspired relating to the modern state as a promoter of 'disciplined' and 'civilised' conduct.⁷ But, as several of the chapters in this collection reveal, even analyses of aspects of criminalisation in Western European states do not always readily fit into a model which, from the eighteenth century on, identifies a will to create a disciplined and orderly state by the imposition of greater central authority upon everyday life through the processes of the law. This collection illuminates this complexity and challenges established certainties about chronologies and characteristics of modernity. A key theme in this book is the promotion of a greater understanding of the relationship between law and culture. Here we look beyond a model that moves from an early modern dynamism to a more modern, state-controlled, ideal type to one that is, again, less predictably linear and where community reactions to state interventions are also less predictable.

For all these reasons, this collection on the 'modern' state includes a wide chronological range to reflect the complexity involved in the development of what can be labelled a 'modern' state. This challenges established understandings of the way in which criminal justice systems have operated by using these concepts (which do, indeed, materialise as social phenomena,