Justice Fielding, the Novel, and the Law


Allen D. Boyer

For as I am, in reality, the founder of a new province of writing, so I am at liberty to make what laws I please therein.

— Henry Fielding

Henry Fielding, who wrote the English language’s first good comic novels, was the man who founded England’s first modern police force. This understanding lies at the heart of *Henry Fielding: A Life*, by Martin Battestin, and it matters far more than many better-known connections between law and literature: that Scott was a lawyer, that Kafka was a lawyer, that Dickens was a solicitor’s clerk, that Melville spent his working life surrounded by judges.

The most revealing passage in Fielding’s novels comes near the end of *Joseph Andrews*. Joseph, his betrothed Fanny, and Parson Abraham Andrews have undergone a particularly harrowing journey across the English countryside—mistaken for robbers, set upon by robbers, cursed at by innkeepers, scorned by parsons. Fanny, at last, is kidnapped, carried off by a crooked old soldier, one of the local squire’s henchmen. They meet one traveler; Fanny cries out that she is about to be raped; the captain explains that he is carrying home his runaway wife. But then they meet two outriders for a coach:

[T]he captain abused her violently for breaking his commands, and threaten’d to gag her; when two more horsemen, armed with pistols, came into the road just before them. She again solicited their assistance; and the captain told the same story as before. Upon which one said to the other—“That’s a charming wench!” . . . But the other, instead of answering him, cried out eagerly, “Zounds, I know her:” and then turning to her said, “Sure you are not Fanny
This is the novel's technical climax; henceforth the bedraggled trio of travelers will roll steadily toward home. That Fielding balances his novel upon this scene reveals his strong, implicit faith in order, law, and the police. Virtue will be preserved, deception unmasked, and merit finally rewarded—thanks to one alert, good-hearted lawman.

This is the first full-scale biography of Fielding to be written since 1918. Battestin's understanding of Fielding's legal career shows in the space which he allots to these years: of the text's 623 pages, 367 deal with Fielding's time as lawyer or magistrate. A professor of English at the University of Virginia, Battestin draws on a wide variety of sources: newly-discovered letters, newly-attributed articles, hundreds of newspaper references to Fielding's justice work, even Fielding's surviving bank statements. (Many of these documents were uncovered by Ruthe Battestin's research in British archives, a massive and painstaking effort for which her husband gives full credit.) The resulting text is dense with detail. In some places, Battestin knows when to summarize and abridge. He also knows, however (and not all biographers do), when to let his man speak for himself. Ultimately, this book succeeds as a portrait of both Fielding and his environment—Georgian England, with all its gilt highlights and grimy crevices.

I. THE LAW AS SOURCE

From some of Fielding's characters (most notably Booth in Amelia) Battestin draws many personal details. We can tell, for example, that Fielding dipped snuff, gambled too heavily when young, was fond of driving his own coach-and-four, and paid some debts while not paying others. His success as a journalist and his well-known opposition to the government of Robert Walpole ensured that the newspaper record would contain a steady stream of invective against him; he can be tracked by the mud his rivals slung. Where such records fail—and at the dawn of the modern era, they fail very often—the law provides a durable substitute.

From the registry records, it can be learned that Henry Fielding was born on April 22, 1707, the eldest son of Edmund Fielding and Sarah Gould. We also know that Sarah later died, and that Edmund soon remarried. Chancery pleadings reveal much more. Edmund's second wife, Anne Rapha, was "a widow, an Italian, a person of the Roman Catholic profession who [had] several children of her own, and one who

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[had] kept an eating house in London."

Lady Gould, Henry Fielding's strong-willed grandmother, had no intention of letting her grandchildren fall under such pernicious influences; she sued for her grandchildren's custody.

The barrage of depositions which followed, as Edmund countersued and Lady Gould redoubled with an ejectment action, provides early evidence of two traits which defined Fielding. As a boy, he proved "headstrong and undutiful," and he showed a precocious sense of irony. Once, running away from Eton, he bluffe his grandmother into giving him shelter by praising the Pope and the Roman church. Faced with proof of her worst fears, Lady Gould took him in—even though this meant a siege by Edmund's servants, who hammered on the door and cursed her roundly.

This episode, another tale told by the court papers, illumines Fielding's larger story. The jealousies surrounding him suggest the reason that his first reported work was "a Comedy, in which he had drawn the characters of his Father and Family." As Battestin notes, "he had early recognized that he could best master his energies or exorcise his private demons by mocking them."

At the age of eighteen, Fielding attempted to carry off his cousin Sarah Andrew, a fifteen-year-old heiress. She may have been willing; her uncle and guardian clearly was not. (The declarations exchanged at this juncture reveal that Fielding was still spelling his surname "feilding, in his family's older style.) The tally of legal actions in which he figured outlines the life of a Georgian gallant: brawls with servants, a battle over his uncle's will, suits by tradesmen and livery-stable keepers, arrest for debt, possibly even debtors' prison. An early writer quipped that "Fielding's knowledge of the law was principally obtained in experiencing the consequences of its violation." The statement is a half-truth, but Fielding would have applauded its wit.

These early encounters with the law are reflected in the "trials" undergone by the heroes of Fielding's picaresque novels. Battestin writes:

Fielding's own character and progress—his personal development from a passionate and unruly young man into the sagacious and indefatigable reforming justice of his last years—are shadowed in the pattern of *Tom Jones*, whose bumptious hero, before he can be united with the beautiful young woman whose name signifies Wisdom, must learn to discipline his appetites and the energies of his heart through the acquisition of Prudence—the supreme rational

4. Id. at 36 (quoting Horace Walpole).
5. Id. at 36.
6. JONES, supra note 2, at 13 (quoting an article by E. P. Whipple in the January, 1849 issue of the NORTH AMERICAN REVIEW).
virtue of antiquity, and, by tradition, supremely the virtue of magistrates. "Prudentissimi," aptly enough, is the distinguishing superlative on the slab that once marked the grave of Fielding's grandfather and namesake—Sir Henry Gould, Judge of the Queen's Bench. As a playwright and novelist, Fielding drew on law for analogies, settings, and characters—usually as a target for his satires. His career as a crusading magistrate drew on the same skills he had displayed as a writer: the ability to assay character, to explore and reveal motive, to take charge of an assembly of unruly characters. The path of the law traced out the pattern of Fielding's career.

II. FIELDING AND THE THEATRE

Battestin quotes George Bernard Shaw's declaration that Fielding was "the greatest dramatist, with the exception of Shakespeare, produced by England between the Middle Ages and the Nineteenth Century." Battestin agrees with this opinion, adding a possible reason for Shaw's approval: Fielding's works, like those of the later playwright, were "written with an intent to reform the vicious institutions of society by means of a sobering ridicule." The summaries which this biography gives of Fielding's major theatrical works (The Tragedy of Tragedies, The Author's Farce, Don Quixote in England, The Modern Husband, Pasquin, all of which date from the first phase of Fielding's career, before the theatres were closed to him in 1737) suggest that these plays should be staged more often—if not for any surviving moral usefulness, then at least for their bold, expressionistic inventiveness. The Author's Farce (1730), for example, presents a strange version of the play-within-the-play. Some characters are human, like the hero and heroine Luckless and Harriet, but others are puppets, played by actors marching about with ropes draped over their shoulders. "As if in some surrealist drama of Ionesco," Battestin comments, the puppets express in their rigid motions and squeaking voices the very essence of those empty "Pleasures of the Town" which have driven legitimate drama from the stage. . . . By the end of the play, to complete the confusion of boundaries and identities, the puppets merge imperceptibly with the characters in the frame play—with Luckless and Harriet his love, the landlady and the constable and the parson, who instead of closing down the show falls in love with the puppet Mrs.

7. Battestin, supra note 3, at 5-6.
9. Id. at 130.
Novel; indeed, Punch and Joan themselves prove to be brother and sister to Luckless and Harriet. To top all off the audience is treated to a spectacle not to be attempted again on stage until 1981—an epilogue spoken by a cat.

Other plays, like *The Covent-Garden Tragedy* (1732), the plot of which revolved through London's well-known bordellos, were damned in print for their low humor.

Fielding's experience in writing for the stage is reflected in his prose fiction. In *Tom Jones* (1749), his playwright's ear is at its keenest: the lively monologues of Mistress Honour and the explosive outbursts of Squire Western establish character and quicken the narrative. Similarly, Fielding's justice work reflected themes first seen in the early plays. As a judge, Fielding located the roots of crime in the corruption of the body politic, and Battestin finds traces of this social theory and morality even in *The Covent-Garden Tragedy*. In defending his plays, Fielding relied not upon artistic freedom (or license), but rather upon the moral they taught.

In this passage, Fielding speaks with three voices. There is the high tempered young gentleman, giving the lie to an accusation. There is the Etonian alluding to Molière. And underlying both, insisting that all good art is moral, is the voice of the future magistrate, son of a general and father of an Anglican divine.

Fielding's plays were also political ventures. In London's theatre circuit, government patronage determined what plays were staged. Political factionalism played off show-business rivalries; disturbances in one realm were felt in the other. As one of the wits arrayed against Prime Minister Robert Walpole, Fielding finally goaded the government once too often. In 1737, the Walpole regime passed the Licensing Act. Until repealed in

10. *Id.* at 84-85.
11. *Id.* at 141.
12. While Fielding did not recommend whoring and drunkenness, he does not seem to have avoided them. In *AMELIA*, he recalled the difference between courtesan Betty Careless's demeanor at the theatre, "so modest and so innocent," and her appearance "in bed with a rake at a bagnio, smoking tobacco, drinking punch, talking obscenity, and swearing and cursing." 

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*HENRY FIELDING, AMELIA* 144 (David Blewett ed., Penguin Books 1987) (1751). In 1732, he reputedly made and lost nearly a thousand pounds in a few weeks' time, giving up at the gaming-table what he had made from *The Modern Husband*. This experience would be reflected in his warnings that gambling led too many into debt and ultimately crime.
1968, this act forbade the production of any play not approved by the Lord Chamberlaim.

The reason, ostensibly, was to prevent production of a work called *The Golden Rump*—the name of which speaks for itself, the more so as the text is lost (if it ever even existed)—but the real reason was to silence Fielding. The season of 1735-36 had been his best, with no fewer than ten of his plays in production. From Walpole's perspective, the prospects were grim: Fielding had begun producing plays as well as writing them. *The Golden Rump* appeared as a godsend. As one of Fielding's players recalled,

Sir Robert was the best-natured gentleman that ever lived; but he had received such provocations from Mr. Fielding, in his plays and farces . . . that he was not displeased to have it in his power to stop the current of stage abuse against himself, which then ran very high.

Fielding, in his Eurydice Hissed, had brought the Minister upon the theatre in a levee-scene; and in his Historical Register, he had introduced him as a fiddler, playing on his fiddle, and followed by the members of parliament, who danced to the tune played by the Premier.  

The brilliant simplicity of this satire had doomed it. Fielding's friend James Ralph recognized the perverse compliment of the Licensing Act: "The Legislature made a Law, in order to curb one private man."  

On closer examination, however, the relationship between Fielding and Walpole is marked by ambivalence; flashes of open hostility mixed with periods of détente and even covert alliance. When it came to political journalism, Fielding advertised himself as a mercenary, as able as a barrister to take any side of any case. In the 26 March 1748 issue of *The Jacobite's Journal*, Fielding wrote:

I do not think a Writer, whose only Livelihood is his Pen, to deserve a very flagitious Character, if, when one Set of Men deny him Encouragement, he seeks it from another, at their Expence.... Why should a Liberty, which is allowed to every other advocate, be deny'd to this?

Fielding may have taken money to keep certain satires out of print; certainly he did not object when Walpole subscribed rather handsomely toward the publication of his *Miscellanies*. From the government's viewpoint, he was too useful to alienate altogether: he moved too easily in the same social circles. Even when constables were raiding his playhouse,
literally chasing the actors with libel warrants, Fielding enjoyed a miraculous, unruffled immunity from harassment. That he flourished under Walpole, both shifting in and out of each other's favor, reveals the tightness of the Whig elite. The forces in which the two men were caught were both centrifugal and centripetal.

III. FIELDING AT THE BAR

Fielding's work as a barrister, the trade he set himself to learning when the theatres were closed to him, was serious but undistinguished. He amassed a substantial library—including Coke upon Littleton, Coke’s Reports, Croke’s Reports, Wood’s Institute, and Hawkins’ Pleas of the Crown—and his friends attested the intensity of his studies. Once admitted, he faithfully followed each summer’s circuit of Western assizes.

His background and reputation, however, were sometimes professional disadvantages. In 1744, a pseudonymous verse satire appeared, savagely roasting the late Lord Chancellor, serving Lord Chancellor, Lord Chief Justice, Master of the Rolls, Attorney General, and both incoming and outgoing Solicitor Generals. So many people thought that Fielding was the author that he rushed to print a denial. Eventually he found ways to balance his practice and his writing:

At his Lodgings, upon ye Circuit he was often working on his Peices of Humour, which when Business was approaching, soon vanished out of Sight, while ye Law Books and the Briefs with their receptacle ye Green Bag lay on ye Table ready displayed, to inspire the Client with proper Sentiments.16

Fielding’s career as a novelist counterpointed his career in the law. In 1740, while Samuel Richardson was finishing Pamela, Fielding was called to the bar. Both Shamela (1741) and Joseph Andrews (1742) played off Richardson’s sanctimonious epistolary tale, with Fielding growing from a satirist into a novelist. Legal metaphors now came to dominate the rhetoric of Fielding’s essays and fiction, as he claimed to hale his targets before his courts of Conscience, Honor, or Literary Criticism. The problems posed by the mistaken decisions of characters throughout Tom Jones (on which he began work in this same period) suggest, metaphorically, the need to qualify and temper the reader’s own critical and personal prejudices. Arguing for good-naturedness, he prescribed judgment as exercise.17

16. Id. at 273 (quoting Harris, supra note 14). This experience may be reflected in Joseph Andrews, when Mr. Wilson tells how his own former career as playwright had handicapped his efforts to become a scrivener. “I had an acquaintance with an attorney,” Wilson says, “and to him I applied: but instead of furnishing me with any business, he laughed at my undertaking, and told me ‘he was afraid I should turn his deeds into plays, and he should expect to see them on the stage.’” FIELDING, supra note 1, at 209.

17. Professor Raymond Stephanson has written, “Fielding repeatedly insists on the court metaphor when he wishes to speak of interpretation or judgement of any kind, whether literary-
The publication of *Tom Jones* was first rumored in September 1748. In October 1748 Fielding took office as justice of the peace (a reward for his service to the government during the recent Jacobite rising). By the summer of 1749 the novel was established as the greatest bestseller of its day, and at this time Fielding also began to outline his vision of English law and the magistrate's role.

As chairman of the Westminster Quarter Sessions, Fielding was responsible for opening grand jury proceedings. Like other JPs, he published the charge he issued to the grand jury as a pamphlet—a valuable document, as it marks his first at-length investigation of social issues and charts the course his future writing would take. Most of the cases on which Fielding sat involved street crimes. What dominated his *Charge to the Grand Jury*, however, were moral offenses: blasphemy, free-think-
Boyer, Jacobitism, the keeping of brothels and gambling-houses, street theatre, and libel. This was the result, Battestin argues, of "the radical change which [Fielding's] experience of the magistracy had already effected in his understanding of his role as an author." The Charge to the Grand Jury shows Fielding as a man who was examining his nation's legal institutions, with the ultimate view of rooting out social corruption. "As magistrate," Battestin notes, "he had become in fact what in his early days as journalist he facetiously claimed to be in metaphor—that is, the 'Censor of the Age,' Britain's 'Champion' and 'True Patriot.'" At the same time, Fielding's review of the history of the grand jury (which he ascribed "very probably" to the ancient Britons, and traced through Bracton and Magna Carta) showed a concern with the role and responsibilities of the English justice system—anticipating his later suggestions for systems of reform. Amelia (1751), Fielding's only novel after the Charge to the Grand Jury, would reflect his knowledge of social ills gleaned as a magistrate and evident throughout the Charge. Seen in contrast to Amelia, Tom Jones represents the last rollicking, carefree novel Fielding wrote. Amelia is shaded with motifs of confinement. It opens with a wrongful arrest, winds through debtors' prison and the cheerless self-confinement debtors used to avoid the bailiffs, and ends with a trial and the hanging of a crooked lawyer for forgery. As Battestin rightly observes, it is the language's first novel of social protest, a reformer's dramatization of the problems Fielding confronted every day in his Bow Street courtroom.

IV. NOVELIST AND MAGISTRATE

Over the last two decades, the common law's history has been blackened with the argument that it was consciously rigged to favor the English ruling class. Writing in Albion's Fatal Tree, Douglas Hay argued that

[i]t]he private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy, in the most exact sense of the word. The king, judges, magistrates and gentry used private, extra-legal dealings among themselves to bend the statutes and common law to their own purposes.

21. BATtESTIN, supra note 3, at 470.
22. Id.
According to this theory, the absence of governmental prosecutors left law enforcement to private citizens—that is, to the propertied classes. The large, increasing number of capital crimes set the stage for a regime of upper-class terrorism. The arbitrariness of the system let prosecutions be brought at the discretion of the squirearchy. Complainant, magistrate, grand jury, and judge were united by ties of class interest. Moreover, popular belief in the legal system's fairness facilitated control by the governing class. "The genius of the law" was that it allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy. . . . Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity. . . . And in the countryside the power of gentlemen or peers to punish or forgive worked in the same way to maintain the fabric of obedience, gratitude, and deference. The law was important as gross coercion; it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission, the "mind-forged manacles" which Blake saw binding the English poor.24

As caricatured by his enemies, Fielding fits squarely into this historical vision. He has been derided as a hypocritical magistrate of the obese, harrumphing sort—fawning on the rich while abusing the poor, thunderously denouncing vices in which he himself had once indulged.25 The historical record, however, tells a different story—both in Fielding's case and in the larger story of English law.

The gentry conspiracy thesis has been answered by John Langbein.26 It is true that JP's had to meet substantial property requirements. (Fielding had trouble meeting his.) It is broadly correct to view Georgian grand jury proceedings as decisions, by a county's most influential citizens, as to whom should be prosecuted for what. The rural gentry did indeed preside over criminal sessions and assizes—which were, as well, the greatest events of a country town's social calendar. The legal system, however, was buttressed by the participation of all classes. It was Eng-

24. Id. at 48-49. Cf. George Orwell's observation that "[t]he hanging judge, that evil old man in scarlet robe and horsehair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is one of the symbolic figures of England." GEORGE ORWELL, England My England, in A COLLECTION OF ESSAYS 252, 261 (1946).

25. These charges were current in 1752 and reappeared as recently as 1975. See BATTLESTIN, supra note 3, at 529 (citing The genuine Trial of Mary, late Cook-Maid to Sir Simon Pride, Knight, before the worshipful Mr. Justice Feeler, for lying a-bed in a Morning, &c. &c.). See also Peter Linebaugh, The Tyburn Riot Against the Surgeons, in ALBION'S FATAL TREE, supra note 23, at 65-117.

land’s “middling men” who brought prosecutions and sat on trial juries. And the greatest problem with the haphazard system of private prosecutions was not that prosecutors used their power to gain social leverage. It was that citizens hesitated to follow through on prosecutions. (Prosecuting a case involved time, money, and the risk of reprisal from a defendant’s fellow-criminals.)

Fielding’s novels, the works of a man who saw first-hand the English system of criminal justice, also impeach the gentry conspiracy theory. If England treated its criminals harshly, this callousness was not derived from squirearchical hauteur. It embodied, instead, a primitive hostility toward anyone outside the pale, which was not far removed from the mob violence of lynch law. *Joseph Andrews* portrays what justice must too often have been: the young men of a village, turned out in a late-night hunt across the countryside, grabbing any passerby as a likely malefactor; the JP holding court at his dinner-table, bullying the prisoners and making drunken jokes at their expense. The community’s hot-blooded pursuit of wrongdoers was what the medieval hue and cry had sanctioned. A century later Dickens would depict such group violence—witness the death of Bill Sykes, hunted along the rooftops by a furious crowd of citizens, constables, and gentlemen.

It is also misleading to suggest that the ideology of law was the quintessential instrument by which the ruling classes ruled. Where the gentry sought to assert personal power, Fielding’s novels witness, they hardly needed to work behind the forms of law. Of the two squires encountered in *Joseph Andrews*, one is the man who tries to kidnap Fanny. The other is a lordling, heir to a manor, who “was as absolute as any tyrant in the universe, and had killed all the dogs, and taken away all the guns in the neighbourhood, and not only that, but . . . trampled down hedges, and rode over corn and gardens.” Such men’s despotism appears as a survival of feudal privilege. This was buttressed by wealth and patronage: in *Tom Jones*, Squire Allworthy supplements the schoolmaster’s meager wages with a yearly Christmas gift of ten pounds. Control of the manor purse-strings counted for more than invoking the terrible fairness of the law.

27. The food riots of early modern England—in which mobs seized stores of provisions, claiming to act under color of ancient rights, and in which local authorities often did not intervene—were the mirror image of the justice process. In one case, claims of legal rights fused with popular violence; in the other, popular violence enervated legal proceedings. In both cases, the officials condoned and legitimated popular sentiment. “The ‘hue and cry,’ the *posse comitatus*, the use of the pillory, but, above all, trial by jury . . . all explicitly required participation in the workings of justice.” *Introduction to An Ungovernable People*, supra note 23, at 17.


29. Sir Roger de Coverley, whenever one of the farms on his estate fell vacant, would “give that settlement to a good servant who has a mind to go into the world, or make a stranger pay the [copyhold] fine to that servant, for his more comfortable maintenance, if he stays in his service.” Richard Steele, *Sir Roger’s Servants*, SPECTATOR No. 107 (3 July 1711).
Tom Jones retells one of the cruelest and most arrogant jests ever made by a judge—in this case, the real-life Justice Francis Page. At one assize, an accused horse-thief was brought before the judge.

[W]hen he asked him, if he had anything to say for himself, the fellow said he [had] found the horse. "Ay!" answered the judge, "thou art a lucky fellow; I have travelled the circuit these forty years, and never found a horse in my life; but I'll tell thee what, friend, thou was more lucky than thou didest know of: for thou didest not only find a horse, but a halter too, I promise thee.” To be sure I shall never forget the word. Upon which everybody fell a laughing, as how could they help it.... To be certain the judge must have been a very brave man, as well as a man of much learning. It is indeed charming sport to hear trials upon life and death.30

The populace, however, mocked prisoners just as bitterly. Popular involvement in the judicial process had its nadir in the procession of condemned criminals from Newgate Prison to the gallows at Tyburn. Sometimes the London crowd cheered and wept for the condemned, sometimes it prayed and sang psalms with them, sometimes it stoned them, so that hanging became the end of the ordeal. Tyburn was a folk event. Fielding wrote:

I had the Curiosity to see the late Jonathan Wild go to the Gallows; but instead of taking any Pleasure in beholding so notorious a Criminal brought to Justice, I was shock’d at the Barbarity of the Populace, who pursued him in his last Moments with horrid Imprecations, and even with brutal Violence.31

Fielding proposed, instead, that executions should be carried out with the greatest solemnity:

Suppose then, that the Court at the Old Bailey was, at the end of the Trials, to be adjourned during Four Days; that, against the Adjournment Day, a Gallows was erected in the Area before the Court; that the Criminals were all brought down on that Day to receive Sentence; and that this was executed the Moment after it was pronounced, in the Sight and Presence of the Judges. . . . I leave it to any Man to resolve himself upon Reflection, whether such a Day at the Old Bailey, or a Holiday at Tyburn, would make the strongest Impression on the Minds of every one.32

The arrogance of Lord Page and the viciousness of the crowds at Tyburn, both of which Fielding hated, derived from a common source: a visceral fury which the justice system did nothing to shape or mediate. Fielding's

31. BATTESIN, supra note 3, at 46.
32. FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS AND RELATED WRITINGS, supra note 19, at 171.
calls for changing the method of execution were of one piece with his attacks on ignorant and arrogant law officers. He sought to professionalize the judicial process, replacing visceral popular justice with a system which would deal competently with both the causes and results of crime. 33

Battestin gives considerable space to Fielding's two most ambitious social critiques, An Enquiry into the Causes of the Late Increase of Robbers (1751) and A Proposal for Making an Effectual Provision for the Poor (1753). Following Malvin Zirker, Battestin looks beneath the threefold organization of An Enquiry, which called for tighter restrictions on gin, closer regulation of the poor (to curb vagrancy and crime), and reform of the criminal laws with a view toward encouraging prosecutions and facilitating convictions. Beneath this, however, lay Fielding's broader vision:

Just as man is constituted, ideally, of the body's individual members, each working cooperatively in accordance with natural laws and the dictates of reason to effect the good of the whole, and just as this harmony reflects the health and temper of the soul, so Fielding thought of society as an organism whose well-being depended not only on the proper subordination and cooperation of its several members—each, under the government of law, performing duties appropriate to his or her rank—but also on the collective morality of the people. 34

If this looked back to a medieval view of society, A Proposal's plan for large-scale reformatories, where the unemployed would be taught new trades and the incorrigible would be imprisoned, foreshadows Jeremy Bentham. "Once the mischievous exponent and champion of liberty unbridled—whether in his political satires or in the excesses of his private life—Fielding had come to value order, restraint, stability." 35 He could be harsh in brushing aside libertarian objections:

[I]f we must on no Account deprive even the lowest People of the Liberty of doing what they will, and going where they will, of Wandering and Drunkenness, why should we deny them that Liberty which is but the Consequence of this: I meant that of begging and stealing, of robbing or cutting Throats at their good Pleasure. 36

His vision, however, remained a reformer's. Feeling that reforming the

[33. With this went his derision of incompetent meddlers in the law. In Joseph Andrews, Fielding satirizes the rivalry between Rev. Barnabas, who favored Wood's Institute, and the surgeon, who relied on The Attorney's Pocket-Companion and Mr Jacob's Law-Tables. Fielding also mockingly depicts the toady lawyer Scout as "one of those fellows, who without any knowledge of the law, or being bred to it, take upon them, in defiance of an act of parliament [2 Geo. II cap. 23 (1729)], to act like lawyers in the country. . . . They are the pests of society, and a scandal to a profession, to which indeed they do not belong." FIELDING, supra note 1, at 269.
34. BATTESTIN, supra note 3, at 515.
35. Id. at 568.
36. Id. (quoting A Proposal).]
poor would require the coercive force of law, Fielding also looked to training and education. In the reformatory, these were to be balanced with religious observance. This recognition of an underclass, coupled with the desire for its systematic reform, would appeal to future leftist critics. Some have acclaimed him as a forerunner of Marx, and in 1954 the USSR issued a postage stamp in his honor.

Fielding’s original plan for establishing a police force, which Battestin has identified in the British Library, among the papers of the Duke of Newcastle, adds to the tally of Fielding’s social inquiries. These papers document a proposal which was as radical, in Fielding’s day, as his projected national welfare system: “the establishment of London’s first modern police force,” one designed to prevent crime as well as apprehend perpetrators. One detail alone indicates the sweeping change that Fielding proposed: by raising each constable’s nightly salary to eighteen-pence, he sought to double each policeman’s pay. (Consider the change this implies in terms of applicant quality, sophistication of police work, and risks to be anticipated.) This new-model constabulary was to be armed; its members were to carry handbells to sound the alarm. The sort of crimes they were to deal with was also spelled out by Fielding’s report:

The Watchmen after the time appointed for their Watch & while they remain thereon may apprehend all manner of Persons in the Streets arm’d with any dangerous Weapon & all who shall be found in the streets, Inn, Alehouse or any Shop where Brandy or other strong Liquors are sold or any other publick house or place with Arms conceal’d in their possession & all who shall be found playing or betting at any Game whatsoever, & all who in the places aforesaid shall be guilty of any open or direct Act of Lewdness, or who shall be guilty of profane cursing & swearing & all Women who shall stand in the streets or in Corners & Byeplaces to pick up Men for lewd purposes & who shall walk the street for such purpose . . . & all persons who by any Brawls shall raise a Mobb or who shall break windows or commit any outrage Insult or trespass whatsoever, or Balladsingers, & Persons going about with Musick, all Persons being Drunk in any of the Places aforesaid, & lastly all who shall be found after ten at Night in any Alehouse Victuallying house

37. The historical record suggests that basing poor relief on a parish basis, as was done in Fielding’s day, led to a persistent struggle by tax-paying citizens to shuffle the poor off onto someone else. (The citizens of Myddle, as recorded by yeoman churchwarden Richard Gough, successfully staved off responsibility for six of seven potential public charges, including a new-born baby and an elderly blind man.) See Richard Gough, The History of Myddle (c. 1700). Fielding’s plans for institutions which could house the poor of an entire English county would have rendered poor relief impersonal, and hence reduced the stigma and ostracism of poverty.

38. BATTESTIN, supra note 3, at 477. When Fielding took the bench, living men could recall how the English people had rejected the Stuart dynasty’s belief in the divine right of kings, enforced by a standing army. Where such memories survived, the idea of before-the-fact policing seemed a radical innovation. See Patrick Pringle, Hue and Cry: The Story of Henry and John Fielding and Their Bow Street Runners 99 (1955).
or shop where any strong waters or Liquors are sold or all suspicious Persons after that hour walking or standing in the streets Lanes or bye allys who shall by their behaviour give any just Cause of any evil design.\textsuperscript{39}

Equally important, Fielding recognized the importance of information in fighting crime. Rumors of secret executions, he noted, had briefly paralyzed the London underworld. He gave notice to the public that his force of Bow Street runners were available to run down malefactors: upon notice of a crime, the magistrate “would . . . immediately dispatch a Set of brave Fellows in pursuit, who . . . are always ready to set out to any Part of this Town or Kingdom on a Quarter of an Hour’s Notice.”\textsuperscript{40}

In December 1748, less than two months after being sworn in, Fielding published the first account of his work on the bench. (He committed to prison “a certain genteel thief who had victimized a German householder and his maid.”\textsuperscript{41}) Thereafter he figured constantly in the London press—asking shrewd questions, breaking alibis, obtaining evidence at his own expense, and lecturing readers on practical points of law. Nor was he content to rely on existing newspapers. Early in 1752 he began publishing \textit{The Covent-Garden Journal}. Sometimes this journal covered politics or literature; more often it projected social reforms. Even more often it reported new inroads made by Fielding and his men into crime in the metropolis.

Fielding’s efforts as magistrate were thus clear both to those working under him and to the public at large. He stood by his constables when they were wounded in the line of duty. He presided over cheering crowds as his men returned victorious from raids, bearing prisoners and smashed-up gaming tables. In the last year of his life, dying from cirrhosis of the liver, he masterminded a campaign that drove the gangs from the streets of London. Ultimately, Fielding’s most substantial character was one created in his own image. Behind every subsequent tough-minded lawman, every crusading district attorney, there stands the archetype of Justice Fielding.

\section*{V. The Law and the Novel}

In an afterword to \textit{Whigs and Hunters}, E. P. Thompson makes the reluctant admission that the rhetoric of the rule of law “had not been altogether sham.”\textsuperscript{42} That this was true, that there grew up an independent law to which England’s magnates and gentry could ultimately yield power, was due in no small part to the changes wrought in Fielding’s

\begin{footnotes}
\item[39.] \textit{Id.} at 709 (Appendix I).
\item[40.] \textit{Id.} at 579.
\item[41.] \textit{Id.} at 461.
\item[42.] \textit{THOMPSON, supra} note 23, at 269.
\end{footnotes}
day. Every decision made by a professional lawman meant more true authority for the law, less power for the mob and the squirearchy. Fielding helped establish the magistrate’s discretion, asserting control of the trial process—in the same way, significantly, that he shaped the emerging genre of the novel.

A. The Magistrate as Narrator

Before Fielding, the English criminal trial was less than the adversarial proceeding that it is today. It relied on confrontation: produce the accused, produce the evidence, let the accused answer, assess his or her reaction. In the magistrate’s courtroom, proceedings were even less developed. The JP had little discretion in deciding whether to release or to hold the prisoners brought before him: the view prevailing, as late as 1746, was that he should commit to jail any prisoner against whom a complaint had been sworn out. Fielding himself outlined this view:

[B]y the law of England as it now stands, if a larceny be absolutely committed, however slight the suspicion be against the accused, the justice . . . is obliged in strictness to commit the party, especially if he has not sureties for his appearance. . . . Nor will the trifling value of the thing stolen, nor any circumstances of mitigation justify his discharging the prisoner. Nay, Mr. Dalton says, that when the felony is proved to have been done, should the party appear to demonstration innocent, the justice . . . must commit or bail.

Under this system, there was no need for a hearing, no judicial examination of the facts alleged. Minimizing the JP’s role, this system also ignored the possibility that the accused’s side of the story was worth hearing. Fielding condemned such suppositions with one word: “absurd.”

Fielding’s celebrated cross-examinations proved innocence as well as

43. In some ways this honor must be qualified. When party loyalty was tested, Fielding could be as partisan as any other political hack. In the contested Westminster election of 1749, when brawls disrupted the campaign, he readily bailed out those who had fought for his side’s candidate. When a hawker sold a pamphlet criticizing such actions, he jailed her and had the offending text burned. Fielding was also fortunate in that he dealt almost exclusively with the timeless problems of street crime, without having to confront the labor strife which the Industrial Revolution was beginning to bring, and in which law served as the instrument of the propertied classes. One labor case in which he did take action came in 1751. Following a royal order, he moved to end a simmering dispute between master tailors and their employees (which had featured shop-closings and threatening letters) by sentencing several journeymen tailors to a month’s hard labor. On how the law changed to accommodate employers’ interests, see Craig Becker, Property in the Workplace: Labor, Capital, and Crime in the Eighteenth-Century British Woolen and Worsted Industry, 69 VA. L. REV. 1487 (1983).


46. Id.
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guilt. In one early case, two accusers brought before him a Mrs. Molloy. They had charged her with stealing six guineas,

but after a long Examination, which lasted several Hours, the principal Witness having contradicted himself in many Instances, and a great Number of creditable and substantial People appearing on the Behalf of Mrs. Molloy, who all concurred in giving her the best of Characters, the Justice was at last pleased to admit her to Bail.47

Herein lay the greatest importance of Fielding's self-assertion—which made him, as Langbein has noted, the forerunner of both Scotland Yard's Criminal Investigation Division, charged with gathering evidence for trial, and the magistrate of the century to come, charged with "sifting and discharging cases."48

If discretion was to be real, it had to respond to facts educed at a hearing. Educing those facts meant testing the complainant's evidence and allowing the accused to participate in the trial process. Moreover, testing required that standards, rules, and practices govern the hearing. Broadening the JP's discretion was thus inextricably bound up with the development of hearing procedures and the expansion of defendants' rights.49

Both as a novelist and a magistrate, Fielding advertised his role. Just as his newspaper stories highlighted his presence on the bench, so the mannered irony of his prose pointed up his controlling authorial presence. In Tom Jones this became overt. Fielding reserved the first chapter of each book as a preface. In these prefaces he addressed his readers, commenting on the unfolding story or explaining his control of the narrative:

My reader then is not to be surprised if, in the course of this work, he shall find some chapters very short, and others altogether as long; some that contain only the time of a single day, and others that comprise years; in a word, if my history sometimes seems to stand still, and sometimes to fly. For all which I shall not look on myself as accountable to any court of critical jurisdiction whatsoever: for as I am, in reality, the founder of a new province of writing, so I am at liberty to make what laws I please herein. And these laws, my readers, whom I consider as my subjects, are bound to obey. . . .50

This self-aware leaping and lingering, this announcement that the narrative will proceed at the author's discretion, highlights the role and pres-

48. Langbein, Shaping the Eighteenth-Century Criminal Trial, supra note 44, at 65. As Langbein notes, sometimes Fielding skirted the issue of his own authority by forcing the prosecutor to withdraw the charges.
49. Hence the decline of irregular or oppressive popular justice. Every case dismissed by a magistrate diminished the grand jury's power to indict or free and the petit jury's right of nullification.
50. Fielding, supra note 30, at 88.
ence of the narrator. As Gérard Genette has noted, this shift of tempo characterizes the traditional novel, accelerating action and heightening drama. And not only does this exertion of control create a novel, a well-made novel in the traditional sense; it also creates the persona of the novelist.

The control which Fielding exerted from the bench helped to transform the nature of the trial. To describe the trial as an altercation (a word then in use) evokes what it had been, before Fielding: a cacophony of voices clamoring against the accused. Now, however, as defendants gained rights at trial, and lawyers appeared to enforce and finesse those rights, the trial became a study in "managed narrative." The attorneys were the narrators. Witness testimony, once paramount and unmediated, became merely an element of the case—brought in by one lawyer to establish facts, tested by the other lawyer on cross-examination. As the lawyers thus gained control, circumstantial evidence gained acceptance. It lacked the authenticating directness of witness testimony, but it fit the new-model criminal trial. Unlike testimonial evidence, the evidence of circumstances was hard, mute fact—ideal material to work with, as a lawyer fitted it carefully into place, anchored his case upon it, and skillfully defined its meaning.

The parallel between the development of the trial and the development of the novel has drawn notice. Alexander Welsh has written,

[p]recisely in the decades in which the "probative force" of circumstantial evidence was most seriously sought after by theorists and practitioners of the law, the attitude of English novelists toward fictionality itself underwent a change. Before the nineteenth century, novels were typically surrounded by a false frame of pretended documentation—letters, memoirs, lost papers, and so forth, that purported to account for the real-life existence of the narrative they contained. But increasingly, through the conscious practice of Fielding and others, the claim to represent reality in novels was expressed by their internal connectedness of circumstances. . . . It became the professional thing to let the completeness and closure, the probing of the states of mind of the actors themselves, present their own claim to the truth.53

51. Before Marcel Proust re-envisioned the novel, the contrast of tempo between detailed scene and summary almost always reflected a contrast of content between dramatic and non-dramatic, the strong periods of the action coinciding with the most intense moments of the narrative while the weak periods were summed up with large strokes and as if from a great distance, according to the principle that we have seen set forth by Fielding.


52. See Langbein, The Criminal Trial Before the Lawyers, supra note 44, at 123 (citing Thomas Smith, De Republica Anglorum 100 (L. Aiston ed. 1906) (1565)).

In the same way, the story told at trial by lawyers came to overshadow the discrete facts of the evidentiary record.

**B. The Novel in Society**

The unsystematic nature of popular justice was reflected in the crime literature of Fielding's day: the Newgate Calendars. Popular throughout the eighteenth century, these irregular volumes collected stories of how crimes were committed and their perpetrators brought to justice. The very name, suggesting a random sampling of criminals passing through London's best-known prison, points up the grab-bag nature of these compendia. In these artifacts of an implicitly collectivist age, one finds no heroic protagonist, no unified central viewpoint, and no omniscient narrator.

The Newgate Calendars portrayed crime as random, malevolent disruptions of an organic society, which was an "integral and at root a healthy body." Stephen Knight persuasively argues that, consistent with this outlook, there was no perceived need to single out the forces which might resolve the problem of crime. "Some men" or "a gentleman" would always seize the perpetrator.

Society, the stories imply, can deal with its own aberrances without mediation, without specialists. The watch will arrest an identified criminal and the courts will pass sentence, but no skilled agent is needed to detect the criminal. The processes of the law are in the background and its officers serve society only in established, invariable ways; they are not independent agents acting upon society. 54

Over the course of the eighteenth and nineteenth centuries, however, the liberal values of personal autonomy and individual identity came into prominence. The novel form reflected this development.

The novel reached its apogee in the same age in which Conan Doyle created fiction's most confidently rational detective—the epoch of Victorian resolution.

The climax of the novel form is in the work of Austen, Eliot, and James: the subtly developed, perfectly controlled response of one pair of authorial eyes and ears creates the myth, so important, that a single individual, if clever and patient enough, can unravel the world of experience. The system of knowledge (an epistemology)—watching, listening, and thinking—reveals subjective, humanly controlled motives for events, and so validates an idea of being (an ontology) in

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which the individual can believe that he or she is truly "real," and can exist alone. The self is known against society, not in it. The structure of the plot—carefully linked, leading up to a climax of action which is also a crucial revelation of the gathered meaning of the novel—provides the model of order, esthetic and moral, which the individualist consciousness feels it can derive from the raw material of experience.\footnote{55. Id. at 282-83. Arguments have been made, similarly, that the novel is bound up with the rise of the modern police state—that the novel is the product and emblem of a regime of social discipline: Throughout the nineteenth century, discipline, on the plan of hierarchical surveillance, normalization, and the development of a subjectivity supportive of both, progressively "reformed" the major institutions of society: prison, school, factory, barracks, hospital.

And the novel? May we not pose the question of the novel . . . in the context of the age of discipline? D. A. MILLER, THE NOVEL AND THE POLICE 18 (1988) (drawing heavily on the philosophe M—F——t, who, having been too frequently quoted already, shall not be further identified here).}

So understood, Fielding belongs not to Georgian England, but to a rather more familiar setting. The metropolis he departed in 1754, on that trip to Lisbon from which he never returned, a dark cityscape where one lonely intelligence fathomed and thwarted the forces of disorder, would become the murky London of Sherlock Holmes.

Fielding the magistrate reshaped the law as thoroughly as Fielding the novelist reorganized fiction. His social pamphlets presented crime as an issue of specific problems. If such problems were specific, this meant that they could be solved—by society, by one individual acting upon society. The changes he helped establish in pre-trial proceedings and the policing system marked early victories for law reform—that is, for rationalism. Amid the socio-philosophical change which Knight addresses, the shift from a collectivist to an individualist age, Fielding's career as magistrate wrote out in real life the first detective story.

How firmly Fielding himself drew such connections remains unknown. It is certain, however, that even before assuming the magistracy he had thought along these lines. In March 1745, Robert Walpole died, partly from illness and partly from the cures his doctors practiced. Three months later Fielding authored a pamphlet called The Charge to the Jury, a satire imagining Walpole's physicians put on trial. This was a slight and topical item, but it bade farewell to his favorite target, and Fielding may have known it would be his last pamphlet satire. It may matter, then, that Fielding chose, in this burlesque, to call his prosecuting attorney Sergeant John Narrative. He may have chosen this surname with care—may have meant to make, lightly, a major point.\footnote{56. See further R.C. Jarvis, The Death of Walpole: Henry Fielding and a Forgotten Cause Célebre, 41 MOD. LANG. REV. 113 (1946).} He had an inkling of the role his work might play.
VI. CONCLUSION

It is a history we are reading, and not a system, when we read a life of Fielding. This means that it will not be accurately described by mapping only two of its salient characteristics. With this record before us, we must now consider Fielding’s magisterial control of his fiction in the same light as we consider his role as an active justice of the peace. But to write about Fielding’s career as a writer and his career in the law says nothing about the strong women characters in his fiction, who make their own independent ways across his books, and how these women draw on his grandmother Gould and his sister Sarah, and how Sarah was a novelist and forceful essayist, someone to be reckoned with in her own right. It leaves out the Fielding family’s links with Ireland and how this connection found its way into Fielding’s writing. It leaves out how Benjamin Franklin became a minor character in Joseph Andrews. It leaves out Fielding’s classical training and his translations of Molière and Ovid. It leaves out the list of Fielding’s children who died young, his fondness for his first wife, how his second wife had been his kitchen-maid, and how they were married in November 1747 and had a son born in February 1748. It leaves out how he staged his own puppet-show and how one year “he did to the confusion of all his brother Beaus open the first Ball at Bath with a minuet.”

These things are not in this review. They are, however, in Battestin’s book.

57. Battestin, supra note 3, at 358.