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BOOK REVIEW

*Alfred L. Brophy**

Bound for America: The Transportation of British Convicts to the Colonies 1718-1775. A. Roger Ekirch. Oxford University Press, 1987, revised edition 1990. \$44.95 cloth; \$19.95 paperback.

But a few years experience having shown, that this universal lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these offenses, yet no punishment at all (or next to none, as branding or whipping) was as much too gentle, it was enacted . . . that when any persons shall be convicted of any larciny, either grand or petit, and shall be entitled to benefit of clergy, or liable only to the penalties of burning in the hand or whipping, the court in their discretion . . . may direct such offenders to be transported to America for seven years.

Sir William Blackstone,
*Commentaries on the Laws of England*¹

Between 1718 and the American Revolution, more than one-quarter of the white immigrants to the English colonies came by force; they were banished to America as punishment for their crimes.² Roger Ekirch's *Bound for America* is an excellent study of all facets of the transportation of criminals to the American colonies, which placed 50,000 British emigrants on American shores. Beginning with his introductory chapter on English criminal justice, Ekirch casts his net widely. As he details the operation of the institution, with illuminating discussions of the "whos and whys" of transportation, he places the transportation scheme into a transatlantic context. Ekirch completes the story by showing what happened to the convicts while they were serving in America. *Bound for America* is a fully satisfying account of an important part of the English criminal justice system. It is also a fine contribution to Anglo-American legal history, because it links a learned study of the formal law with a detailed description of how the law affected individuals.

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I also wish to thank the Chester County Archives and the Chester County Historical Society for giving me access to the manuscripts cited in part III.

1. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *363-64.

2. A. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775, 27 (1990).

I. Convict Servants and English Criminal Law

Ekirch opens with a discussion of criminal justice in England in the seventeenth and early eighteenth centuries. He relies upon recent studies and generally takes a middle ground between them, which lends a particularly judicious tone to his entire work. The first question Ekirch addresses is, why transportation? What specific motives did the English Parliament have when it adopted the comprehensive Act for the "more effectual transportation of felons" to the Colonies in 1718?³

According to Ekirch, the immediate causes of the transportation act were the twin goals of ridding the homeland of undesirables and searching for a form of punishment that did not imprison Englishmen. In emphasizing Parliament's desire to avoid imprisonment and thereby avoid the appearance of enslaving Englishmen, Ekirch follows a series of influential historians who have focused on the importance of constitutional ideals in shaping English law.⁴

Ekirch's work has implications for the recent debate over the fairness of the English criminal law in the seventeenth and eighteenth centuries. Douglas Hay's 1975 essay *Property, Authority, and the Criminal Law*⁵ has proved particularly influential in establishing the proposition that

3. See "An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons . . ." 4 Geo. II, chap. 11 (1718).

The origins of the Act go back decades to a time when exile was a standard punishment. Such practices, running from time immemorial, placed transportation within Parliament's vision as a possible punishment. See JOHN BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800, 470-83* (1986) (discussing use of transportation before 1718 law).

4. The importance of the concept of English freedom in shaping English political theory and actions pursuant to that theory is a common theme among historians. See, e.g., BERNARD BAILYN, *VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION* 293 (1986). Professor Pocock is prominent among those who have explored the origins of the idea of English freedom. See J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957) (discussing influence of English legal thought on political philosophy). And it is frequently invoked as an explanatory construct for actions related to slavery from the seventeenth century through English abolition. See, e.g., DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION* 469-522 (1975) (discussing *Somerset's* freeing of slaves because English law will not tolerate servitude on English soil); EDMUND S. MORGAN, *AMERICAN SLAVERY—AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975) (ideology of freedom made stronger by presence of slaves, which impressed upon Virginians the danger of enslavement).

It remains unclear, however, what role the belief in English freedom played in the origins of slavery. How, for instance, did the English concept that setting foot on English soil ended slavery develop simultaneously with slavery in America? See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968) (discussing common law writers who held that slavery could not exist in England). And, related to Ekirch's topic, how did the ideology of freedom relate to servitude in America? Ekirch answers that mere physical distance made the concept palatable. EKIRCH, *supra* note 2, at 20-21. But was there something more than the distance?

5. Douglas Hay, *Property, Authority, and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17-63 (Douglas Hay ed. 1975).

the criminal law was class-based and had the result—if not the specific design—of discriminating against the poor. Hay established his position by focusing on the narrow contention that the ruling elite in Parliament refused to pass comprehensive reforms to eliminate discretion in capital punishment. Discretion encouraged the common folk to show deference to the elite and this maintained the elite's authority.

John Langbein has challenged Hay's position in a series of essays.⁶ Langbein argues that the law gave juries considerable discretion, which helped to mitigate the law's apparent harshness. He also argues that the affluent were not the typical prosecutors of the lower classes. Langbein's position shows how people of low social status used the law to prosecute others of low social status.

Although Ekirch relies upon Hay and Langbein and does not explicitly discuss the dispute, he takes a middle position, close to that mapped out by Peter King and John Beattie.⁷ King views the English criminal law as adapting to changing societal needs and enabling people of all social and economic levels to mold the law to their current needs. Thus, King adopts the phrase that the criminal law was a "multi-use right available to most Englishmen."⁸

In some respects Ekirch, nevertheless, vindicates Hay's depiction of law as class-based. Convicts with money, we learn, could buy their freedom once they were transported to America. The shipmasters who transported the convicts could sell the convicts for terms of seven years and could keep the proceeds from the sales. Convicts with sufficient funds could purchase their freedom, or a portion of it. Although they were prevented by law from returning immediately to England, they avoided harsh servitude.⁹

Ekirch adopts Langbein's interpretation of prosecution and its emphasis on the discretion inherent in English criminal law. A good deal of discretion rested with the victims of the crime, who were primarily responsible for the prosecution of the defendants. Ekirch observes that prosecutors often reduced charges and sentenced defendants to

6. See John H. Langbein, *Albion's Fatal Flaws*, 98 *PAST AND PRESENT* 96-120 (1983); John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 *U. CHI. L. REV.* 1-136 (1983) [hereinafter *Eighteenth-Century Criminal Trial*]; John Langbein, *The Criminal Trial Before the Lawyer*, 45 *U. CHI. L. REV.* 263 (1978).

Stephen Landsman, who draws upon the same sources as Langbein, provides an excellent discussion of the formalization of the adversarial process over the course of the eighteenth century. The effect of this formalization remains unclear, although it appears that Landsman believes that the process aided the criminal defendants. See Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-Century England*, 75 *CORNELL L. REV.* 497 (1990).

7. See BEATTIE, *supra* note 3; Peter King, *Decisions and Decision-Makers*, 28 *HIST. J.* 25 (1983).

8. King, *supra* note 7, at 26 (quoting *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 20 [John Brewer & John Styles eds., 1980]).

9. EKIRCH, *supra* note 2, at 119.

transportation, rather than death. Both scholars interpret this discretion as indicative of the law's compassion.¹⁰ In some ways the existence of discretion furthers Hay's position, however, because those with money might pay off their prosecutors. The world Daniel Defoe describes in *Moll Flanders*, where paying bribes—either to stop criminal prosecutions or to obtain freedom once convicted—was common, shows that discretion led in directions other than compassion.¹¹

Ekirch demonstrates that transportation effectively incapacitated criminals. A central question must be, for what offenses were people sentenced to transportation and thus incapacitated? Most people sentenced to transportation had committed crimes against property. For example, in Surry County records reveal that most people who committed non-capital crimes against property were sentenced to transportation.¹² A record that details the crimes for which 990 Irish criminals were transported reports that more than half were listed as vagabonds; the remainder were felons, predominantly grand larcenists. Of convicts from England, the majority were grand larcenists.¹³

One wonders what factors elicited clemency. That would, indeed, tell a great deal about the fairness of criminal law in the eighteenth century. Criminals convicted of minor felonies and first-time offenders would likely be fortunate enough to obtain transportation instead of the death penalty.¹⁴ Ekirch begins the complicated task of identifying factors likely to result in clemency. Important factors included the offenders' gender, whether they were first offenders or recidivists, and character testimony.¹⁵

Despite Langbein's well-documented critique, Hay's construct remains useful in showing how law may have been used to maintain discipline. Hay argues that the English criminal law was designed to pro-

10. EKIRCH, *supra* note 2, at 30. See Langbein, *Albion's Fatal Flaws*, *supra* note 6, at 102-03.

11. See DANIEL DEFOE, *THE FORTUNES AND MISFORTUNES OF THE FAMOUS MOLL FLANDERS & C. . .* 240 (Signet Classics ed. 1981) (Flanders' matron offers £100 to Flanders' accusers not to prosecute.) [hereinafter *MOLL FLANDERS*]; *id.* at 272 (Seaman tells Flanders, in response to her statement that her matron would have paid £100 to free her, that he could have helped her escape for £50.).

Ekirch believes, in apparent contradiction of Defoe's account, that the rich and powerful were unable to wield much influence once they had been convicted. EKIRCH, *supra* note 2, at 37. In few cases, he reports, were the wealthy any more likely to obtain a royal pardon than were others. *Id.* Ekirch's data do not speak to the more seamy dealings involving bribes described by Defoe.

12. EKIRCH, *supra* note 2, at 22.

13. EKIRCH, *supra* note 2, at 43. Here John Langbein's detailed work reconstructing the trials at the Old Bailey, London's criminal court, is illuminating. Langbein found that of 120 criminal defendants convicted between 1754 and 1756, 85 were sentenced to transportation, 20 were sentenced to death, four to branding, and 11 to various lesser penalties. See Langbein, *Eighteenth-Century Criminal Trial*, *supra* note 6, at 43.

14. EKIRCH, *supra* note 2, at 43-44.

15. *Id.* at 39-41. See King, *supra* note 7, at 34-42 (discussing offenders' crimes and characteristics).

fect property. The law developed, according to Hay, as English society emerged from feudalism and sought to protect social stability. Although few people doubt that societies will search for ways to prevent upheaval, it is interesting to contemplate how different societies try to prevent upheaval. The antebellum American South, one might argue, sought stability in the suppression of discussion of slavery and in the entrenchment of slavery.¹⁶ The institution itself provided security against upheaval. Eighteenth-century England apparently sought stability in the exclusion of deviants from society.

II. The Whos and Whys of Convict Servitude

Ekirch next examines the characteristics of the convicts who were transported. The principal candidates for transportation were young men¹⁷ who had committed felonies other than murder.¹⁸ Most were unskilled.¹⁹ Ekirch's findings substantially confirm those of Professor Galenson, whose influential 1981 study dealt with indentured servants as opposed to convicts. Galenson found that most indentured servants were young unskilled males, although some also had trades.²⁰ The similarities lend credence to Ekirch's conclusion that convicts were drawn from much the same elements of society as were indentured servants, and that many servants who emigrated voluntarily would have turned to crime had they stayed in England.²¹

After showing the whos and whys, Ekirch describes the process of the "rough trade." He uses an impressive array of primary sources for a detailed description of the ways the English government provided for the transportation of convicts. He paints a wonderfully vivid portrait of the lives of convicts awaiting transportation. One smells the stinking dungeons in the Old Bailey, where as many as one-quarter of all convicts were imprisoned while awaiting transportation, and sees the convict gangs, taunted and pelted as they were led through London streets, chained hand and foot, to ships waiting to take them on the six-week voyage to America.

Ekirch offers quantitative evidence to back up his portrait of the dismal conditions of convicts. For example, he shows that as many as ten

16. See, e.g., DREW FAUST, *THE CREATION OF CONFEDERATE NATIONALISM* (1987); JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* (1990) (discussing Southern belief—and reality—that slavery was cornerstone of antebellum Southern society).

17. EKIRCH, *supra* note 2, at 48-51.

18. *Id.* at 35.

19. *Id.* at 54.

20. See DAVID GALENSON, *INDENTURED WHITE SERVITUDE IN COLONIAL AMERICA: A QUANTITATIVE AND ECONOMIC ANALYSIS* (1981). See also BAILYN, *supra* note 4, at 295 (arguing that some convicts had status similar to indentured servants). Professor Bailyn notes that convicts posed more problems than indentured servants and that colonists turned to convicts only when indentured servants were unavailable. *Id.* at 260-63.

21. EKIRCH, *supra* note 2, at 58.

percent died crossing the Atlantic in the early years of transportation.²² He also provides sound evidence to show the profitability of the convict trade. In the early years, the English government paid £4 per convict. Shippers supplemented this with proceeds of sales of the convicts' time in America. In some cases, convicts could not obtain passage unless they pre-paid their transportation costs. Those unlucky convicts, whom shippers would not accept without prepayment, languished in jail.²³ One shipping company realized an average profit of twenty-six percent.²⁴

Aboard ships, shippers did not treat convict passengers well, though the lot of convicts was better than that of slaves. Providing characteristic detail, Ekirch computes that ships packed in an average of sixty convicts for every 100 tons burden. By contrast, there were 181 slaves and forty-three servants for every 100 tons burden.²⁵ Ekirch continues the comparison down to the number of calories that convicts received on the crossing and demonstrates that convicts consumed more than slaves but less than indentured servants.²⁶

Of particular interest is Ekirch's analysis of the reasons that the majority of convicts ended up in Virginia and Maryland. Other destinies were certainly possible. Because of their infernal climate and consequentially high death rate, the West Indies might have been a desirable

22. *Id.* at 105. In a study of German immigration to Pennsylvania, Farley Grubb concluded that immigrants fared relatively well. He found a mortality rate of approximately two percent for German immigrants from the 1780s through 1804, which suggests that convicts in the early years suffered harsher conditions than servants and free immigrants after the Revolution. See Farley W. Grubb, *The Market Structure of Shipping German Immigrants to Colonial America*, 111 PA. MAG. HIST. & BIO. 27 (1987); Farley W. Grubb, *German Immigration to Pennsylvania 1709 to 1820*, 20 J. INTERDISCIPLINARY HIST. 417 (1990). Conditions of convicts improved over the course of the eighteenth century; their mortality rate declined to approximately two percent by the 1770s. EKIRCH, *supra* note 2, at 105.

Despite Grubb's seemingly irrefutable evidence, presented in *Market Structure of Shipping German Immigrants, supra*, that the market for shipping German immigrants was not monopolized, several alternative hypotheses must be explored. First, the market may have been effectively monopolized at the time of embarkation for German immigrants; although several ships sailed from Rotterdam over the course of the year, there may have been few at any one time. Secondly, his data are inadequate to measure the extent of collusive practices among the shippers. Third, the immigrants may have had insufficient information on differences among the shippers. Fourth, once on board a ship, the immigrants had little in the way of control over the shippers. While the bald numbers are extremely useful, crucial evidence on the actual practices remains to be presented.

Others have expressed some reservations about the potential for competition of the kind Grubb has described to benefit servants. See, e.g., Marianne S. Wokeck, *Promoters and Passengers: The German Immigrant Trade, 1683-1775*, in THE WORLD OF WILLIAM PENN 259, 266-73 (Richard S. Dunn & Mary Maples Dunn eds., 1986) (presenting balanced account of quality of life of immigrants, which emphasizes hardships as well as benefits).

23. EKIRCH, *supra* note 2, at 88.

24. *Id.* at 77.

25. *Id.* at 100.

26. *Id.* at 100-01.

spot to dump the convicts for punishment. Many would have died before finishing their terms, but those who survived would have returned to England.²⁷ The West Indies had once relied heavily upon indentured servant and convict labor, but had abandoned servitude when black slaves proved cheaper and hardier than English servants. The shippers' needs, however, dictated another destination; trade patterns allowed shippers to bring convicts to Virginia and Maryland, economies that easily absorbed the convict labor, and then return with a full cargo of tobacco and grain.²⁸

Once they arrived in America, the sales took place and convicts began their redemption through labor. Depending upon their crimes, convicts were banished for seven or fourteen years.²⁹ Terms of servitude usually equaled terms of banishment, but those with money could reduce or eliminate their terms of service by paying their transporter part or all of the sum for which they would be sold.³⁰

The lives of convicts were varied. Drawing upon an exhaustive analysis of colonial archives and newspapers, Ekirch is able to show that much of their work was in the fields. The picture Ekirch's extensive data paint is one of harsh working conditions, in some cases approximating a chain gang. A surprisingly large number of Maryland masters owned many servants. This supports the inference that servants had to work in gangs, removed from their owners.³¹

27. See RICHARD S. DUNN, *SUGAR AND SLAVES: THE RISE OF THE PLANTER CLASS IN BARBADOS, 1682-1736*, 110-11 (1972) (discussing migration of ex-servants from West Indies back to England and to mainland America).

28. EKIRCH, *supra* note 2, at 117. A related question is why so many convicts were sent to Maryland and Virginia as opposed to Pennsylvania. Part of the reason is that Maryland and Virginia purchased more unfree labor than did Pennsylvania. See BAILYN, *supra* note 4, at 206-08 (table).

29. See 4 Geo. II, chap. 11; 4 BLACKSTONE, *supra* note 1, at *363-64 (discussing crimes for which transportation was a punishment). See also DANIEL DEFOE, *THE HISTORY AND REMARKABLE LIFE OF THE TRULY HONORABLE COL. JACQUE COMMONLY CALL'D COL. JACK . . .* 119 (London 1722) (Samuel Holt Monk ed., 1965) [hereinafter COL. JACK] (Jack's master bought an unspecified number of convict servants, eight for the time specified in their warrant for transportation; some for greater terms and some for lesser terms).

30. EKIRCH, *supra* note 2, at 119-20.

31. *Id.* at 130, 161. In discussing servants' lives, Ekirch makes innovative use of a variety of sources, from advertisements for servants who had run away, to court records, to popular literature discussing servitude. *Bound for America* thus belongs to a growing body of literature that has reconstructed in impressive detail the lives of thousands of workers who had previously been almost invisible. For another example of such literature, reconstructing the lives of seamen (and particularly pirates) in perhaps even more impressive detail, see MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: THE WORLD OF MERCHANT SEAMEN, 1700-1750* (1987) (relying largely upon Admiralty Court records).

III. Convict Servitude in America

A. Convict Servants and Indentured Servitude

Ekirch's portrait of convicts makes possible an illuminating comparison to the lives of indentured servants in Pennsylvania. Pennsylvania, which borders Maryland, also had a substantial servant population in the middle of the eighteenth century. Historians have split on their assessment of the nature of servitude in the seventeenth and eighteenth centuries. Social historians generally portray life as harsh for servants and emphasize their exploitation.³² Ekirch's balanced work suggests life was particularly harsh for convict laborers.

Several broad differences appear between Virginia and Maryland servants and those of Pennsylvania. Unlike many convicts who spent their days toiling in agricultural work gangs and who may have had infrequent contact with their masters, Pennsylvania servants had close relations with their masters. Almost no Pennsylvania master owned more than one servant.³³ Significant numbers of Pennsylvania servants were free from agricultural labor. Of 620 servants who entered Pennsylvania from October 1745 to October 1746, twenty-three percent were bound to masters in urban Philadelphia. Approximately one third were bound to masters with specific trades, which suggests that they worked in vocations other than agriculture.³⁴

Nonetheless, the majority of Pennsylvania servants worked in agricultural vocations. Some of them petitioned the courts to be relieved of agricultural work, but Pennsylvania farmers did not use work gangs nor did they grow much of the labor-intensive tobacco that occupied Maryland and Virginia servants.

Life was hard for Pennsylvania servants for other reasons as well. Masters treated some servants harshly. One servant, who served a Chester County, Pennsylvania, master for seven years but was not released from servitude at the end of his term, had to petition the Quarter Sessions Court for his freedom dues. His prayer for relief testifies to the isolation and despair of servants in the colonies: "Your petitioner

32. See, e.g., MORGAN, *supra* note 4; RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* (1946); ABBOTT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776* (1947).

Economic historians, focusing on the market for servants, have characterized servitude as flexible and adapting to both changing market conditions and the needs of servants and masters. See, e.g., Farley Ward Grubb, *Immigration and Servitude in Pennsylvania: A Quantitative and Economic Analysis* (1984) (Ph.D. dissertation, University of Chicago).

33. The vast majority of Pennsylvania masters owned only one servant at a time. See Alfred L. Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 94 & n.91 (1991).

34. See Historical Society of Pennsylvania, *Record of Servants and Apprentices Bound and Assigned Before Mayor James Hamilton, 1745-1746*, AM 3061, reprinted in 30 PA. MAG. HIST. & BIO. 348-52, 427-36 (George W. Neible ed., 1906); 31 PA. MAG. HIST. & BIO. 83-102, 195-206, 351-67, 461-73 (1907); 32 PA. MAG. HIST. & BIO. 88-103, 237-49, 351-70 (1908). See also Brophy, *supra* note 33, at 123-24 (listing corrections to printed version of the manuscript).

most humbly prays that your honors will be so good as to see that Justice is dun me for I have no other Fathers in this strange land but your Honors: too whome [to] look for relief[,] and your care at this time of trouble will oblige me . . . to [you]."³⁵

Women servants were particularly vulnerable to abuse. If a female servant became pregnant, her master could extend the time she was required to serve. For example, one Chester County servant became pregnant while confined in prison.³⁶

In some settings, such as iron furnaces, convicts in Maryland and servants in Pennsylvania did the same work. Furnaces employed large numbers of convicts and servants in the arduous and dangerous occupations of colliers (charcoal makers), wood cutters, and miners.³⁷

Given the breadth of experiences of servants in all three colonies, it is difficult to make firm comparisons. Nevertheless, Maryland and Virginia convicts seem to have had a generally worse lot than Pennsylvania servants. It remains for further research to determine whether convict servants had substantially different lives from indentured servants in Maryland.

B. Convicts' Crimes in America

In a provocative section, Ekirch argues that convicts committed few crimes once in America. Knowing just how much crime they committed is central to understanding how successful transportation was at rehabilitating criminals. In short, recidivism is the key to transportation. Did convicts reform in America? If so, transportation was an amazing success. If not, one wonders whether England's use of America as a dumping ground for convicts may be blamed for lingering problems in American violence.

Ekirch has a difficult task to prove that convicts reformed their ways. American colonists believed that convicts were more rebellious than

35. Petition of George Braynen, Chester County Quarter Sessions Court, February 1748, Servant Cases folio 219, Chester County Archives, Pennsylvania (copy on file at *Cornell Int'l L.J.*).

For further discussion of the exploitative aspects of servitude, see SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682-1800 (1987) [hereinafter *TO SERVE WELL*]; Sharon V. Salinger, "Send No More Women": Female Servants in Eighteenth Century Philadelphia, 107 *PA. MAG. HIST. & BIO.* 29 (1983) (focusing on exploitation of female servants); Brophy, *supra* note 33, at 103-06 (discussing servants' complaints against their masters in colonial courts).

36. Petition of Mary Sullivan, Chester County Quarter Sessions Court, May 1750, Chester County Archives, Pennsylvania (copy on file at *Cornell Int'l Law Journal*).

37. On servitude at iron furnaces, see ARTHUR C. BINING, *THE PENNSYLVANIA IRON FURNACE* (1938); Charles G. Steffan, *The Pre-Industrial Iron Worker: The Northampton Iron Works, 1780-1820*, 20 *LAB. HIST.* 89 (1979). It is particularly interesting to contemplate the development of labor-management relations at the iron furnaces compared to agricultural settings and to note that in the emerging industrial work sites that the lives of servants and convicts were probably equally harsh. It is also interesting to contemplate the importance of furnaces as a testing ground for the organizational and consequently legal strategies surrounding industrialization.

other members of colonial society. Benjamin Franklin declaimed, "[w]hen we see our papers filled so often with accounts of the most audacious Robberies, the most cruel Murders, and infinite other Villanies perpetrated by Convicts transported from Europe, what terrible reflections it must occasion!"³⁸ Major secondary works also maintain that convicts contributed to crime.³⁹

Ekirch hypothesizes several reasons why convicts might have reformed when they came to America. First is his belief that economics motivated much of the convicts' crime in England. Once in the land of plenty, convicts supposedly no longer had a need to steal. Also important was the changed social environment from England to America. In sparsely settled America, masters could watch their convicts closely, so convicts had little opportunity to steal.⁴⁰ Moreover, the Virginia and Maryland parishes could keep close watch on convicts who had received their freedom. In this regard, Ekirch does follow well-accepted historical wisdom. Edmund Morgan has noted the importance of Virginia's sparse population and high demand for labor in allowing Virginia to control convicts better than the overpopulated parishes in England, where authorities could neither keep close watch over criminals nor keep them employed.⁴¹ Evidence from runaways lends credence to the common sense notion that sparsely populated areas bred less crime than relatively heavily populated urban areas. In Pennsylvania, Philadelphia servants ran away more frequently than did servants from rural areas.⁴²

Other factors tended to lessen social control over the servants. The scarcity of women in early America and the consequential lack of familial relations in the colonies contributed to servant rebellion, because there were "few familial or institutional mechanisms whereby the swarms of incoming young laborers could be socialized into docility."⁴³

When Ekirch draws upon data from the colonial courts to support his hypothesis, however, his argument begins to have trouble. His argument rests primarily on analysis of criminal court records in Kent County, Maryland, between 1736 and 1746. He found that convicts composed only 6.8% of defendants in criminal cases and concludes that they were, therefore, responsible for only a small percentage of crime. Surprisingly, given his otherwise impeccable methodology, Ekirch slips into generalization based on the small absolute numbers of crimes com-

38. See Americanus [Benjamin Franklin], *Pennsylvania Gazette*, May 9, 1751 (referring to article appearing in *Pennsylvania Gazette*, April 11, 1751), reprinted in 4 PAPERS OF BENJAMIN FRANKLIN 131-33 (Leonard W. Labaree ed., 1961).

39. See MORRIS, *supra* note 32, at 329, 468-69; SMITH, *supra* note 32, at 129.

40. EKIRCH, *supra* note 2, at 177-79.

41. See MORGAN, *supra* note 4, at 339.

42. See Brophy, *supra* note 33, at 109 (larger percentage of Philadelphia servants than of rural servants absconded). But see SALINGER, TO SERVE WELL, *supra* note 35, at 105 (arguing that rural servants were more rebellious than urban servants).

43. Richard S. Dunn, *Servants and Slaves: The Recruitment and Employment of Labor*, in COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA 157, 163 (Jack P. Greene & J. R. Pole eds., 1984).

mitted by convicts. He fails to focus on the number of convicts in Kent County over the same time and therefore fails to realize that convicts committed slightly more crimes than one would expect given their prevalence in the population. When one realizes that convicts accounted for approximately 4.5% of the Kent County residents, then it appears that convicts were *over*-represented as criminals in Kent County.⁴⁴ Moreover, Ekirch's data do not show how many convicts committed crimes after their servitude ended.

It might not be surprising to see former criminals reform and become as productive as former indentured servants, or as affluent as the average Maryland freeman. People who received a sentence of transportation were, after all, often minor criminals. Still, the burden is on Ekirch to support his hypothesis, and other evidence suggests that convicts were more rebellious than indentured servants.

One prime gauge of rebelliousness is the runaway rate. It is possible to approximate the number of runaways because masters whose servants ran away often advertised in newspapers, such as the *Maryland Gazette* and the *Pennsylvania Gazette*, hoping to recapture the servants. Ekirch estimates that nine percent of convict servants in Maryland were advertised as runaways from 1746 to 1775.⁴⁵ By contrast, of the 620 immigrants who entered servitude in Pennsylvania from October 1745 to October 1746, only five percent were advertised as runaways in the *Pennsylvania Gazette*.⁴⁶ Apparently, convicts were more likely to run away

44. It may, nevertheless, be important that the former servants are not further over-represented; within the confines of his limited data, Ekirch has done a credible job of rebutting the conventional wisdom.

I had to estimate the percentage of convicts in the Kent County population. Ekirch reports that Kent County had a population of about 6,000 in the 1730s and that 271 convicts entered Kent County between 1732 and 1739. EKIRCH, *supra* note 2, 171. Assuming that convicts served for seven years, *supra* note 29 and accompanying text, and that the same number of convicts had entered Kent in the 1720s, the convict population of Kent in the 1730s was approximately 271.

Incidentally, Ekirch notes that some servants were charged with more than one crime; he does not, however, provide information on how many other types of offenders were "double counted." Thus, I have assumed that the same percentage of convicts and non-convicts were charged with more than one offense.

Ekirch also reports that convicts accounted for six percent of serious felonies in Richmond County, Virginia. EKIRCH, *supra* note 2, at 175-76. It is difficult to use those data without knowing the proportion of convict servants to free people in Richmond County.

45. EKIRCH, *supra* note 2, at 195.

46. See Brophy, *supra* note 33, at 108. There is a statistically significant difference between Ekirch's estimate of the percentage of Maryland convicts who ran away, based on advertisements in the *Maryland Gazette*, and my estimate of the percentage of Pennsylvania servants who ran away, based on advertisements in the *Pennsylvania Gazette*. $z=3.06$, $P<.005$.

The newspapers do not, of course, provide an exact measure of runaway rate, because not all masters advertised for their errant servants. Nevertheless, based on the slim available evidence, it appears that newspapers provide a relatively good gauge of numbers of runaways. For Chester County, Pennsylvania, which has the most complete records of any colonial Pennsylvania county, we know that between 1745 and 1750, 33 servants were brought to court for having run away. Many of

than people who entered servitude voluntarily.

C. Convicts in Freedom

By way of speculation, one wonders what happened to the convicts who stayed in America at the end of their terms. A distinguished group of historians have found good opportunities for economic advancement in seventeenth-century Maryland, but narrowing opportunities in the eighteenth century.⁴⁷ In contrast to his belief about the crime rate of ex-convicts, Ekirch believes that historians' optimistic assessment of opportunity for advancement does not apply to convict servants;⁴⁸ he is pessimistic about the convicts' opportunity for advancement in America after the completion of their terms. His attempt to trace the convicts in Maryland tax and court records turned up only a tiny number of success stories, which further suggests that convicts had little chance to advance.⁴⁹

Although some people were able to rise from servitude to wealth, the success stories of convicts Moll Flanders and Abel Magwitch and servant Colonel Jack are characteristic of literature rather than history.⁵⁰

those 33 were advertised as runaways in the *Pennsylvania Gazette*; it is, of course, difficult to draw any conclusions from such small numbers. Moreover, some masters extracted punishment from their servants without resorting to courts, but by going to Justices of the Peace instead. Based on the record of one Justice, William Pimm, it appears that some of the servants who appeared before him were neither advertised nor appeared in court records. See Sir William Pim, *His Book for Assignment of Servants*, mss. 13491a (Chester County Historical Society).

The runaway advertisements are useful for the data they provide on the lives of servants, as well as for computing a runaway rate. Ekirch, following the pioneering efforts of Peter Wood and Gerald Mullin, exploits the ads well. See PETER WOOD, *BLACK MAJORITY: BLACKS IN COLONIAL SOUTH CAROLINA BEFORE THE STONO REBELLION* (1974); GERALD W. MULLIN, *FLIGHT AND REBELLION: SLAVE RESISTANCE IN EIGHTEENTH-CENTURY VIRGINIA* (1972). He is able to give physical descriptions of servants, such as the pock-marked Maryland convict with tuberculosis, as well as more ephemeral characteristics, such as a servant's "proud" disposition. EKIRCH, *supra* note 2, 157-65, 239-42.

47. Lois G. Carr and Russel R. Menard, *Immigration and Opportunity: The Freedman in Early Colonial Maryland*, in *THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ON ANGLO-AMERICAN SOCIETY* 206 (1979); Russel R. Menard, *From Servant to Freeholder: Status, Mobility and Property in Seventeenth-Century Maryland*, 30 *WM. & MARY Q.* 37 (1973). Historians have found a similar constriction of opportunities in other colonies. See SALINGER, *TO SERVE WELL*, *supra* note 35, at 115-36. Indentured servants in Pennsylvania in the middle of the eighteenth century—the same time studied by Ekirch—could expect more material advancement than Ekirch found for the Maryland convicts. See *id.* at 119, 121.

48. EKIRCH, *supra* note 2, at 179.

49. *Id.* at 179-82.

50. Benjamin Franklin is the most prominent real person to advance from servitude as an apprentice to wealth, although one may ponder the extent to which his life has taken on mythic proportions and belongs, consequently, more to fiction than fact. See BENJAMIN FRANKLIN, *AUTOBIOGRAPHY* (The Modern Library 1950) (important element of Franklin's apotheosis, which describes his rise to wealth and fame).

Marriage—the road to wealth that Defoe mapped out for Moll Flanders' mother—was a realistic prospect for women servants entering Maryland in the seventeenth and eighteenth centuries. See DEFOE, *MOLL FLANDERS*, *supra* note 11, at 26; Lois G.

And it is important in contemplating Defoe's rosy picture of life in America that one not overlook the extent to which Defoe shaped the success stories of Flanders and Jack to promote servitude and emigration to America.⁵¹

Conclusion

Bound for America offers detailed evidence on a broad range of questions surrounding the transportation of convict servants to America in the eighteenth century. It synthesizes scholarship and brings important new evidence to light on a broad range of topics, from the fairness of English criminal law, to the political philosophy underlying criminal law reform, to the lives of convicts laboring under the sun in Virginia and Maryland. Ekirch adds significantly to our understanding of the impact of the law on individuals. His greatest accomplishment may not be in the questions he answers, but in his demonstration of how men and women long since dead and the world they inhabited can be made to live and breathe once again.

Carr & Lorena S. Walsh, *The Planter's Wife: The Experience of White Women in Seventeenth-Century Maryland*, 34 WM. & MARY Q. 542 (1977), reprinted in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 94 (Stanley N. Katz & John M. Murrin eds., 1983) (describing post-servitude lives of women servants and concluding that some married wealthy male planters, thereby achieving material success themselves).

Nevertheless, the question remains, did convicts have even as much material success as indentured servants? It may someday be possible to answer this question with a detailed study of the post-servitude lives of convicts, as has already been done for servants.

It is also important to avoid the fallacy of judging ex-servants' lives solely on their material success. They might have led much better lives in freedom than they would have had they stayed in England.

51. See DEFOE, MOLL FLANDERS, *supra* note 11 (Moll Flanders); DEFOE, COL. JACK, *supra* note 29 (Colonel Jack); CHARLES DICKENS, GREAT EXPECTATIONS (Oxford Univ. Press 1987) (London 1861) (dealing, of course, with convict servitude in Australia, rather than America). On Defoe's apparent motive to promote colonization, see Samuel Monk, *Introduction*, in DEFOE, COL. JACK, *supra* note 29, at x-xi; PAULA BACKSHEIDER, DANIEL DEFOE: HIS LIFE (1989). Dickens' motive for detailing Magwitch's success in Australia is doubtless different from Defoe's.

For a more sobering account of life in early Maryland, see EBENEZER COOK, THE SOT-WEED FACTOR: OR A VOYAGE TO MARYLAND. A SATYR. (London 1708), reprinted in 2 SHEA'S EARLY SOUTHERN TRACTS (1865) (possibly fictional poem describing a tobacco merchant's life in lawless Maryland). See also WILLIAM MORRALLEY, THE UNFORTUNATE, OR THE LIFE AND ADVENTURES OF WILLIAM MORRALLEY (Newcastle, DE, 1743) (autobiography of former indentured servant, which is critical of servitude).

