

4. The literature on the Rule is legion. Perhaps the best introduction for the student is two sparkling articles by the late Professor W. Barton Leach: *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938); *Perpetuities: The Nutshell Revisited*, 78 Harv. L. Rev. 973 (1965). (Can you think of a more suitable container?) For a discussion of the Rule in light of modern statutory developments, see R. Lynn, *The Modern Rule Against Perpetuities* (1966).

F. CRIMINAL LAW: THE HAY-LANGBEIN DEBATE

Douglas Hay, "Property, Authority and the Criminal Law"

in *Albion's Fatal Tree* (New York 1975), 17-63

I

The rulers of eighteenth-century England cherished the death sentence. The oratory we remember now is the parliamentary speech, the Roman periods of Fox or Burke, that stirred the gentry and the merchants. But outside Parliament were the labouring poor, and twice a year, in most counties in England, the scarlet-robed judge of assize put the black cap of death on top of his full-bottomed wig to expound the law of the propertied, and to execute their will. 'Methinks I see him,' wrote Martin Madan in 1785,

with a countenance of solemn sorrow, adjusting the cap of judgement on his head . . . His Lordship then, deeply affected by the melancholy part of his office, which he is now about to fulfill, embraces this golden opportunity to do most exemplary good—He addresses, in the most pathetic terms, the consciences of the trembling criminals . . . shows them how just and necessary it is, that there should be laws to remove out of society those, who instead of contributing their honest industry to the public good and welfare, have exerted every art, that the blackest villainy can suggest, to destroy both . . . He then vindicates the *mercy*, as well as the *severity* of the law, in making such examples, as shall not only protect the innocent from outrage and violence, but also deter others from bringing themselves to the same fatal and ignominious end. . . He acquaints them with the certainty of speedy death, and consequently with the necessity of speedy repentance—and on this theme he may so deliver himself, as not only to melt the wretches at the bar into contrition, but the whole auditory into the deepest concern—Tears express their feelings—and many of the most thoughtless among them may, for the rest of their lives, be preserved from thinking lightly of the first steps to vice, which they now see will lead them to destruction. The dreadful sentence is now pronounced—every heart shakes with terror—the almost fainting criminals are taken from the bar—the crowd retires—each to his several home, and carries the mournful story to his friends and neighbours;—the day of execution arrives—the wretches are led forth to suffer, and exhibit a spectacle to the beholders, too awful and solemn for description.¹

This was the climactic moment in a system of criminal law based on terror: 'if we diminish the terror of house-breakers,' wrote Justice Christian of Ely in 1819, 'the terror of the innocent inhabitants must be increased, and the comforts of domestic life must be greatly destroyed'. He himself had dogs, firearms, lights and bells at his own country home, and took a brace of double-barrelled pistols to bed with him every night.² But his peace of mind mostly rested on the knowledge that the death sentence hung over anyone who broke in to steal his silver plate. A regular police force did not exist, and the gentry would not tolerate even the idea of one. They remembered the pretensions of the Stuarts and the days of the Commonwealth, and they saw close at hand how the French monarchy controlled its subjects with spies and informers. In place of police, however, propertied Englishmen had a fat and swelling sheaf of laws which threatened thieves with death. The most recent account suggests that the number of capital statutes grew from about 50 to over 200 between the years 1688 and 1820.³ Almost all of them concerned offences against property.

¹ Martin Madan, *Thoughts on Executive Justice with Respect to our Criminal Laws, particularly on the Circuit*, 1785, pp. 26-30.

² Edward Christian, *Charges delivered to Grand Juries in the Isle of Ely*, 1819, pp. 259, 260n; see below, p. 53, n. 1.

³ Sir Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 4 vols., 1948-68, vol. 1, p. 4.

This flood of legislation is one of the great facts of the eighteenth century, and it occurred in the period when peers and gentry held power with least hindrance from Crown or people. The Glorious Revolution of 1688 established the freedom not of men, but of men of property. Its apologist, John Locke, distorted the oldest arguments of natural law to justify the liberation of wealth from all political or moral controls; he concluded that the unfettered accumulation of money, goods and land was sanctioned by Nature and, implicitly, by God. Henceforth among triumphant Whigs, and indeed all men on the right side of the great gulf between rich and poor, there was little pretence that civil society was concerned primarily with peace or justice or charity. Even interests of state and the Divine Will had disappeared. Property had swallowed them all: 'Government,' declared Locke, 'has no other end but the preservation of property.'⁴ Most later writers accepted the claim uncritically. William Blackstone, the most famous eighteenth-century writer on the law and constitution, declared it self-evident that 'there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'⁵ The common and statute law, it seems, extended throughout not only England but the cosmos. When Christian edited the twelfth edition of Blackstone's *Commentaries on the Laws of England* in 1793, he reduced the claim only a little, to 'that law of property, which nature herself has written upon the hearts of all mankind'.⁶

Once property had been officially deified, it became the measure of all things. Even human life was weighed in the scales of wealth and status: 'the execution of a needy decrepit assassin,' wrote Blackstone, 'is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune.'⁷ Again and again the voices of money and power declared the sacredness of property in terms hitherto reserved for human life. Banks were credited with souls, and the circulation of gold likened to that of blood. Forgers, for example, were almost invariably hanged, and gentlemen knew why: 'Forgery is a stab to commerce, and only to be tolerated in a commercial nation when the foul crime of murder is pardoned.'⁸ In a mood of unrivalled assurance and complacency, Parliament over the century created one of the bloodiest criminal codes in Europe. Few of the new penalties were the product of hysteria, or ferocious reaction; they were part of the conventional wisdom of England's governors. Locke himself defined political power as the right to create the penalty of death, and hence all lesser ones.⁹ And Shaftesbury, the enlightened rationalist who attacked both Hobbes and the Church for making fear the cement of the social order, at the same time accepted that the 'mere Vulgar of Mankind' might perhaps 'often stand in need of such a rectifying Object as *the Gallows* before their Eyes'.¹⁰

Eighteenth-century lawyers were well aware that never before had the legislature passed such a mass of new capital statutes so quickly. They floundered, however, when seeking for explanations. Many men, including learned ones, blamed the ever-increasing depravity of the people. In the 1730s lord chancellor Hardwicke blamed 'the degeneracy of human nature'; almost a century later, Justice Christian indicted 'the wicked inventions, and the licentious practices of modern times'.¹¹ He drew a picture of a besieged government gradually making harsh new penalties as outrages demonstrated the uselessness of the old. But other observers were aware that the larger changes of trade, commerce and manufacturing might have

⁴ *The Second Treatise of Government*, 1690, sections 85 and 94. Locke sometimes defines property to mean 'life and liberty' as well as 'estates', but his argument assumes the paramount importance of landed and other wealth. See C. H. Macpherson, *The Political Theory of Possessive Individualism, Hobbes to Locke*, Oxford, 1962, pp. 199ff.

⁵ William Blackstone, *Commentaries on the Laws of England* (12th edn by Edward Christian), 1793-5, vol. II, p. 2.

⁶ Christian's note, *Commentaries*, vol. II, p. 7.

⁷ *ibid.*, vol. IV, p. 13.

⁸ John Holliday, *The Life of Lord Mansfield*, 1797, p. 149.

⁹ *The Second Treatise of Government*, section 3.

¹⁰ *Works* (1727 edn), vol. I, p. 127; quoted in Basil Willey, *The Eighteenth-Century Background*, 1972, p. 77.

¹¹ Brit. Mus. Add. MSS, 36,115, fos. 75-88; Christian, *Charges*, pp. 233ff.

something to do with the increasing weight of the statute book. Justice Daines Barrington cited ‘the interest of trade’: the great circulation of new and valuable commodities made any comparison of England’s laws with those of other states unsound, for ‘till a country can be found, which contains equal property and riches, the conclusion cannot be a just one’.¹² In similar vein, the editor of the sixth edition of Hawkins’s *Pleas of the Crown* wrote in 1788 that ‘the increase of commerce, opulence, and luxury’ since the first edition of 1715 ‘has introduced a variety of temptations to fraud and rapine, which the legislature has been forced to repel, by a multiplicity of occasional statutes, creating new offences and afflicting additional punishments’.¹³

Undoubtedly this is a more persuasive explanation than ‘degeneracy’. The constant extension of inland and foreign trade from the late seventeenth century, the exploitation of new mines, the wealth of London and the spas and the growth of population all increased the opportunities for theft. The relationship of each of these factors to the level of crime is still uncertain; indeed, whether there was any increase in the amount of theft *per capita* is the subject of current research. What is certain is that Parliament did not often enact the new capital statutes as a matter of conscious public policy. Usually there was no debate, and most of the changes were related to specific, limited property interests, hitherto unprotected for one reason or another. Often they were the personal interest of a few members, and the Lords and Commons enacted them for the mere asking.

Three bills from mid-century illustrate the process. An act of 1753 prescribing hanging for stealing shipwrecked goods was brought in on behalf of the ‘Merchants, Traders and Insurers of the City of London’ whose profits were being diminished by the activities of wreckers; the existing laws were declared to be too gentle.¹⁴ In 1764 Parliament decreed that the death penalty would apply to those who broke into buildings to steal or destroy linen, or the tools to make it, or to cut it in bleaching grounds. But the penalties were contained in an incidental clause in an act passed to incorporate the English Linen Company, whose proprietors included Lord Verney and the Right Honourable Charles Townshend; the death penalty was routinely added to protect their investments.¹⁵ Finally, a law of 1769 suggests how the class that controlled Parliament was using the criminal sanction to enforce two of the radical redefinitions of property which gentlemen were making in their own interests during the eighteenth century. The food riot was an organized and often highly disciplined popular protest against the growing national and international market in foodstuffs, a market which alarmed the poor by moving grain from their parishes when it could compel a higher price elsewhere, and which depended on a growing corps of middlemen whom the rioters knew were breaking Tudor and Stuart legislation by wholesale trading in food. Country gentlemen often tolerated such a ‘riot’, or at least handled it sensibly, but Parliament was not prepared to let property suffer.¹⁶ Some mills had been torn down in the nation-wide riots of 1766 and 1767, and the 1769 act plugged a gap in the law by making such destruction a capital offence. If death for food rioters was an excellent idea, so was transportation for enclosure rioters. Within three days the bill was enlarged so that gentlemen busy on the expropriation of common lands by Act of Parliament were as well protected as the millers. By the time the bill became law two weeks later, it had also become a transportable offence to meddle with the bridge and steam-engines used in the mines which were bringing ever-increasing revenues to the gentry and aristocracy.¹⁷ As the decades passed, the maturing trade, commerce and industry of England spawned more laws to protect particular kinds of property. Perhaps the most dramatic change in the organizational structure of British capital was the growth of promissory notes on banks as a medium of exchange, and the increase in negotiable paper of all kinds. This new creation was exposed to fraud in many ways never foreseen by the

¹² Daines Barrington, *Observations on the More Ancient Statutes*, 4th edn, 1775, pp. 482–8, 479.

¹³ William Hawkins, *A Treatise of the Pleas of the Crown* (6th edn, 1788), preface.

¹⁴ 26 Geo. II c. 19; *CJ*, 23 January to 15 May 1753.

¹⁵ 4 Geo. III c. 37.

¹⁶ E.P. Thompson, ‘The Moral Economy of the English Crowd in the Eighteenth Century’, *Past and Present*, no. 50, February 1971, pp.76–136.

¹⁷ 9 Geo. III c. 29; *CJ*, 12 April to 1 May 1760.

ancient criminal law. The result was a rash of capital statutes against forgeries and frauds of all kinds, laws which multiplied towards the end of the century.

These, then, were the legal instruments which enforced the division of property by terror. They were not the largest parts of the law—much more dealt with land, ‘with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrant’, and commerce, for which the eighteenth-century judges at last created a coherent framework.¹⁸ The financial details of the marriage settlement, so often the sacrament by which land allied itself with trade, provided the best lawyers with a good part of their fees. But if most of the law and the lawyers were concerned with the civil dealings which propertied men had with one another, most men, the unpropertied labouring poor, met the law as criminal sanction: the threat or the reality of whipping, transportation and hanging. Death had long been a punishment for theft in England, and several of the most important statutes were passed in Tudor times. But the gentry and merchants and peers who sat in Parliament in the eighteenth century set new standards of legislative industry, as they passed act after act to keep the capital sanction up to date, to protect every conceivable kind of property from theft or malicious damage.¹⁹

Yet two great questions hang over this remarkable code. The first concerns the actual number of executions. The available evidence suggests that, compared to some earlier periods, the eighteenth-century criminal law claimed few lives. At the beginning of the seventeenth century, for example, it appears that London and Middlesex saw four times as many executions as 150 years later.²⁰ Equally interesting is the fact that in spite of the growth in trade and population, the increasing number of convictions for theft, and the continual creation of new capital statutes throughout the eighteenth century, the number of executions for offences against property remained relatively stable, especially after 1750. The numbers of executions did not increase to match the number of convictions because of the increasing use of the royal pardon, by which transportation could be substituted for hanging, on the recommendation of the judges. Sir Leon Radzinowicz, in the most complete study of the subject, has shown that in London and Middlesex the proportion of death sentences commuted increased as the century progressed. He has argued that Parliament intended their legislation to be strictly enforced, and that the judges increasingly vitiated that intention by extending pardons freely.²¹ But this is an unsatisfactory conclusion. A conflict of such magnitude between Parliament and the judiciary would have disrupted eighteenth-century politics, and nothing of the sort happened. With few exceptions, gentlemen congratulated themselves on living in a century when the bench was wise and incorruptible, one of the glories of the constitution. Secondly, we shall see that the men who controlled Parliament were precisely those who usually brought their influence to bear in requesting pardons for condemned convicts from the judges and the king. We have yet to explain the coexistence of bloodier laws and increased convictions with a declining proportion of death sentences that were actually carried out.

¹⁸ Blackstone, *Commentaries*, vol. I, p. 6.

¹⁹ The extension of benefit of clergy (the right to a lesser sentence of transportation on first conviction for the capital crime of grand larceny) made it increasingly possible to avoid the gallows. The development of clergy since the sixteenth century was countered in the eighteenth-century statutes removing it from particular kinds of larceny. Other capital statutes at the same time extended the death penalty to offences never punished so severely before.

²⁰ The figures are inexact and inconsistent but it appears that the average number of executions per year was 140 in London and Middlesex in the years 1607–16, and 33 per year for the period 1749–99. The eighteenth-century figures vary from a low decadal average of 21 (1790–99) to a maximum of 53 (1780–99); Kantorowicz, vol. I, pp. 141, 147, citing Jefferson and the *Report* from the Select Committee on Criminal Laws, 1819. The numbers of executions in Devon between 1598 and 1639 were also as high as 74 a year; J. S. Cockburn, *A History of English Assizes, 1558–1714*, Cambridge, 1972, pp. 94–6.

²¹ Radzinowicz vol.1, pp. 151–9, 163–4. The 1819 figures on which Radzinowicz bases his argument, do not in fact reveal a *constantly* increasing divergence between the number executed and the number sentenced. Assuming the comparability of London figures with those from London and Middlesex combined, the proportion of executions to death sentences fluctuates from about 35 per cent in 1710–14 to about 60 per cent in the 1750s, before gradually declining. Nor do Home Circuit figures show a gradual divergence. The change from 55 per cent at the beginning of the century to 35 per cent had largely occurred by mid-century; thereafter it remained steady, barring a few exceptional years; see my forthcoming article on the figures.

This first problem is related to a second one. Most historians and many contemporaries argued that the policy of terror was not working. More of those sentenced to death were pardoned than were hanged; thieves often escaped punishment through the absence of a police force, the leniency of prosecutors and juries, and the technicalities of the law; transported convicts were so little afraid that they often returned to England to pick pockets on hanging days; riot was endemic. The critics of the law argued that the gibbets and corpses paradoxically weakened the enforcement of the law: rather than terrifying criminals, the death penalty terrified prosecutors and juries, who feared committing judicial murder on the capital statutes. Sir Samuel Romilly and other reformers led a long and intelligent campaign for the repeal of some laws, arguing from statistics that convictions would become more numerous once that fear was removed. The reformers also used the arguments of Beccaria, who suggested in 1764 that gross and capricious terror should be replaced by a fixed and graduated scale of more lenient but more certain punishments. His ideas were widely canvassed in England, as well as on the continent. Even Blackstone, the high priest of the English legal system, looked forward to changes along these lines. Yet parliament resisted all reform. Not one capital statute was repealed until 1808, and real progress had to wait until the 1820s and 1830s.

Why the contradiction? If property was so important and reform of the criminal law would help to protect it why did gentlemen not embrace reform? Given the apparently fierce intentions of the legislature, why was the law not changed to make enforcement more certain? Historians searching for the roots of the modern criminal law and the modern police usually devote most of their attention to the triumph of reform in the nineteenth century. But the victors in the eighteenth century were the conservatives, the hangers and gibbeters, and they resolutely ignored over fifty years of cogent criticism. Two immediate explanations are commonly given. The gentry undoubtedly refused to create a regular police force, a necessary part of the Beccarian plan. Moreover, the lack of secondary punishments, and the unsatisfactory nature of those in use, such as transportation, made it remarkable to keep the death penalty for the incorrigible rogue. Neither fact, however, explains why there was such unbending opposition to the repeal of even those capital statutes that were seldom used. The determination of Parliament to retain all the capital statutes, even when obsolete, and to continue to create new ones, even when they were stillborn, suggests that the explanation for the failure of reform lies deeper in the mental and social structure of eighteenth-century England. A few historians have attempted explanations, but they are usually vague or tautological: that the industrial revolution, as a time of social change, induced conservatism; that the French Revolution did the same; that legal reform in England is always, and inevitably, slow.²² These explanations ignore the underlying assumptions of the governors of England, and do not show how the old criminal law matched that mental world. For it is difficult to believe that Parliament would have been so complacently conservative about the unreformed law unless they were convinced that it was serving their interests. And here the testimony of conservatives is more helpful than the claims of the reformers.²³

Timothy Nourse antedated Beccaria and Romilly by a good half-century, but he expressed an enduring belief of the gentry when he declared that many of the common were ‘very rough and savage in their Dispositions, being of levelling principles, and refractory to Government, insolent and tumultuous.’ Civility only made them saucy.

The best way therefore will be to bridle them, and to make them feel the spur too, when they begin to play their Tricks, and kick. The Saying of an *English* gentleman was much to the purpose, That three things ought always to be kept under our Mastiff-Dog, a Stone-Horse and the Clown: And really I think a snarling, cross-grained Clown to be the most unlucky beast of the three. Such Men then are to be look’d upon as trashy Weeds or Nettles, growing usually upon Dunghills, which if touch’d gently will sting, but being squeeze’d hard will never hurt us.

²² See Radzinowicz, vol. 1, pp. 40, 351–4, for a summary.

²³ Historians have accepted the assumptions of the reformers, which are also those of modern criminology; that the criminal law and the police are no more and no less than a set of instruments to manage something called crime. Effective detection, certain prosecution and enlightened rehabilitation will accomplish this practical task. (Radzinowicz, *Ideology and Crime*, 1966.) Criminology has been disinfested of grand purpose and class purpose. Much of it has thereby become ideology.

The instruments to deal with such ‘stubborn, cross-grain’d rogues’ were at hand: *Beadles, Catchpoles, Gaolers, Hangmen*, . . . such like Engines of Humanity are the fittest Tools in the World for a Magistrate to work with in the Reformation of an obdurate Rogue, all which, I say, may be so used and managed by him as not to endanger his own Fingers, or discompose his thoughts.’²⁴ This is language far removed from Romilly’s cool calculation of rates of conviction, or even Justice Christian’s hysterical talk of alarms, watch-dogs and double-barrelled pistols. Nourse knew instinctively that the criminal law is as much concerned with authority as he is with property. For wealth does not exist outside a social context, theft is given definition only within a set of social relations, and the connections between property, power and authority are close and crucial. The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests.

But terror alone could never have accomplished those ends. It was that raw material of authority, but class interest and the structure of the law itself shaped it into a much more effective instrument of power. Almost a century after Nourse, another defender of the unreformed system described the other side of authority: ‘Could we view our own species from a distance>, or regard mankind with the same sort of observation with which we read the natural history, or remark the *manners*, of any other animal,’ he wrote in 1785,

there is nothing in the human character which would more surprise us, than the almost universal subjugation of strength to weakness—than to we many millions of robust men, in the complete use and exercise of their faculties, and without any defect of courage, waiting upon the will of a child, a woman, a driveller or a lunatic . . . And although . . . we suppose an extreme case; yet in all cases, even in the most popular forms of civil government *physical strength lies in the governed*. In what manner opinion thus prevails over strength, or how power, which naturally belongs to superior force, is maintained in opposition to it; in other words, by what motives the many are induced to submit to the few, becomes an inquiry which lies at the root of almost every political speculation . . . Let civil governors learn hence to respect their subjects; let them be admonished, that the physical strength resides in the governed; that this strength wants only to be felt and roused, to lay prostrate the most ancient and confirmed dominion; that civil authority is founded in opinion; that general opinion therefore ought always to be treated with deference, and managed with delicacy and circumspection.²⁵

These are the words of Archdeacon Paley, and they were published a few years after the Gordon Riots. Paley is not usually quoted as an exponent of ‘delicacy and circumspection’, but as the most eloquent defender of the old criminal law as a system of selective terror. He was cited by almost every subsequent opponent of reform, and has often been considered by later writers as little more than an ingenious apologist or uncritical conservative. But he was in fact an acute observer of the bases of power in eighteenth-century England, and although he did not make the connection explicit, the criminal law was extremely important in ensuring, in his words, that ‘opinion’ prevailed over ‘physical strength’. The opinion was that of the ruling class; the law was one of their chief ideological instruments.²⁶ It combined the terror worshipped by Nourse with the discretion stressed by Paley, and used both to mould the consciousness by which the many submitted to the few. Moreover, its effectiveness in doing so depended in large part on the very weaknesses and inconsistencies condemned by reformers and liberal historians. In considering the criminal law as an ideological system, we must look at how it combined imagery and force, ideals and practice, and to see how it manifested itself to the mass of unpropertied Englishmen. We can distinguish three aspects of the law as

²⁴ Timothy Nourse, *Campania Foelix* (2d edn, 1706), pp. 15–16, 273–4.

²⁵ William Paley, *Principles of Moral and Political Philosophy*, 1785, Book VI, ch. 2.

²⁶ By ideology I mean ‘a specific set of ideas designed to vindicate or disguise class interest . . .’; A. Gerschenkron, *Continuity in History and other Essays*, Cambridge, Mass., 1968, p. 65.

ideology: majesty, justice and mercy. Understanding them will help us to explain the divergence between bloody legislation and declining executions, and the resistance to reform of any kind.

II

Majesty

If we are to believe an undated couplet from Staffordshire, at first sight the majesty of the law did not always impress:²⁷

COUNTRYMAN: What mummery is this, 'tis fit only for guisers!

TOWNSMAN: No mummery Sir, 'tis the Stafford Assizes,

for coupled with wealth, a considered use of imagery, eloquent speech, and the power of death, the antics surrounding the twice-yearly visits of the high-court judges had considerable psychic force. They were accorded far greater importance by contemporaries than by most historians, who have been concerned more with county government, particularly at Quarter Sessions, than with the majesty of the law. The assizes were a formidable spectacle in a country town, the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence of a regiment. The town was crowded, not only with barristers and jurors, but with the cream of county society, attending the assize ball and county meetings, which were often held in the same week. tradesmen and labourers journeyed in to enjoy the spectacle, meet friends, attend the court and watch the executions. And the court arrived in town with traditional, and calculated, panoply: 'The judges,' wrote a French observer,

upon their approach are received by the sheriff, and often by a great part of the wealthiest inhabitants of the county; the latter come in person to meet them, or send their carriages, with their richest liveries, to serve as an escort, and increase the splendour of the occasion.

They enter the town with bells ringing and trumpets playing, preceded by the sheriff's men, to the number of twelve or twenty, in full dress, armed with javelins. The trumpeters and javelin-men remain in attendance on them during the time of their stay, and escort them every day to the assize-hall, and back again to their apartments.²⁸

In the court room the judges' every action was governed by the importance of spectacle. Blackstone asserted that 'the novelty and very parade of . . . [their] appearance have no small influence upon the multitude':²⁹ scarlet robes lined with ermine and full-bottomed wigs in the seventeenth-century style, which evoked scorn from Hogarth but awe from ordinary men. The powers of light and darkness were summoned into the court with the black cap which was donned to pronounce sentence of death, and the spotless white glove worn at the end of a 'maiden assize' when no prisoners were to be left for execution.

Within this elaborate ritual of the irrational, judge and counsel displayed their learning with an eloquence that often rivalled that of leading statesmen. There was an acute consciousness that the courts were platforms for addressing 'the multitude'. Two stages in the proceedings especially were tests of the rhetorical power of the bench. The first, the charge to the grand jury, was ostensibly directed to the country gentry. Judges gave close attention to content and to delivery. Frequently charges were a statement of central policy, as well as a summary of the state of the law and the duties of gentlemen. Earlier in the century they castigated Jacobitism; and in the 1720's the judges used them to denounce 'unfounded and seditious' criticisms of government policy on the South Sea Bubble. Tone was important: before he went on circuit in 1754, Sir Dudley Ryder reminded himself, 'When I would speak to [the] Grand Jury I should mean to persuade them to do their duty, I should therefore speak to them as I would to a number of my tenants whom I would instruct and persuade, and therefore make them fully acquainted with everything necessary to that end, or as

²⁷ Dudley Wilks, *Fragments of Stafford's Past*, Stafford, 1932, p. 32.

²⁸ Charles Cottu, *The Administration of Criminal Justice in England*, 1822, p. 43. Cottu, a judge, came to England on behalf of the French government to study the English system, with a view to suggesting reforms for France.

²⁹ Blackstone, *Commentaries*, vol. III, p.356.

I would to my son.’³⁰ The flavour of paternalism was important, for usually the charge was also directed at the wider audience in the courtroom. It was often a secular sermon on the goodness of whichever Hanoverian chanced to be on the throne, the virtues of authority and obedience, the fitness of the social order:

It is the king’s earnest Desire, as well as his truest Intent, that all his subjects be easy and happy. In this he places his greatest Security & Glory; and in the preservation of the Laws of the Kingdom, & of ye liberties of his People, the Chief support of his title & Government. . . Without order [continued Hardwicke in this charge to Somerset Assizes], how miserable must be the condition of the People? Instead of a regular observance and a due execution of the laws, every man’s lust, his avarice, his revenge, or his ambition would become a law to himself, and the rule of his dealing with his neighbour.³¹

The second rhetorical test for the judge demanded not the accents of paternalism, but the power and passion of righteous vengeance. The death sentence, we have suggested, was the climactic emotional point of the criminal law—the moment of terror around which the system revolved. As the cases came before judge and jury at assizes, the convicted were remanded for sentencing on the last day; and on that day the judgements were given in ascending order of severity, reserving the most awful for the last. Before passing sentence of death, the judge spoke about the crimes and the criminals. ‘A wise and conscientious judge’, wrote Thomas Gisborne,

will never neglect so favourable an occasion of inculcating the enormity of vice, and the fatal consequences to which it leads. He will point out to his hearers the several causes, when they are sufficiently marked to admit of description and application, which have conducted step by step the wretched object before them through the several shades and degrees of guilt to a transgression unpardonable on earth. He will dwell with peculiar force on such of those causes as appear to him the most likely, either from the general principles of human nature, or from local circumstances, to exert their contagious influence on the persons whom he addresses.³²

Most published sentences come up to Gisborne’s standard.³³ The aim was to move the court, to impress the onlookers by word and gesture, to fuse terror and argument into the amalgam of legitimate power in their minds. For execution was a fate decreed not by men, but by God and Justice. The judge might deepen the effect when visibly moved himself. In 1754 at Chelmsford the Chief Justice condemned a girl to hanging and dissection for murdering her baby. He had pressured the jury to bring in a simple verdict of guilty (at first they found her insane); but having exacted justice, he then expressed the helplessness of men before it: ‘before I pronounced the sentence,’ he confided to his diary, ‘I made a very proper speech extempore and pronounced it with dignity, in which I was so affected that the tears were gushing out several times against my will. It was discerned by all the company—which was large—and a lady gave me her handkerchief dipped in lavender water to help me.’³⁴

In its ritual, its judgements and its channelling of emotion the criminal law echoed many of the most powerful psychic components of religion. The judge might, as at Chelmsford, emulate the priest in his role of human agent, helpless but submissive before the demands of his deity. But the judge could play the role of deity as well, both the god of wrath and the merciful arbiter of men’s fates. For the righteous accents of the death sentence were made even more impressive by the contrast with the treatment of the accused up to

³⁰ Harrowby MSS, vol.430, S/H, doc. 27, part 4b, p. 61.

³¹ Brit. Mus. Add. MSS, 36, 115, fos. 75–88.

³² Thomas Gisborne, *An Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain*, 1794 p. 270.

³³ Even Madan, who thought the ideal sentence too seldom achieved, admired the speech of the judge at Surrey Summer Assizes in the year of his pamphlet. ‘I felt ready to sink with horror,’ he was pleased to report. Fifteen capital convicts were condemned with ‘solemnity, and heart-felt awe . . .’ (*Thoughts on Executive Justice*, p. 88.)

³⁴ Harrowby MSS, vol. 1129, doc. 19(f), p. 5.

the moment of conviction. The judges' paternal concern for their prisoners was remarked upon by foreign visitors, and deepened the analogy with the Christian God of justice and mercy. Moreover, there is some reason to believe that the secular sermons of the criminal law had become more important than those of the Church by the eighteenth century. Too many Englishmen had forgotten the smell of brimstone, and the clergy—lazy, absentee and dominated by material ambition—were not the men to remind them. The diminished effectiveness of damnation to compel obedience was accentuated by the decline of the ecclesiastical courts since early Stuart times to mere arbiters of wills and marriages and occasional cases of slander.³⁵ In sharp contrast, the sanctions of the criminal law had not lost their bite: 'The government has wisely provided corporal and pecuniary punishments, and Ministers of Justice for the execution of them,' Sir James Astry told his juries; 'for the punishment of the Pocket, or a sound Whipping to some, is more effectual Rhetorick, than the preaching of Divine vengeance from the Pulpit; for such lewd Wretches has a so did notion, that Preaching is only a Trade, and to the ministers of gospel, Godliness is great gain . . .'³⁶ Timothy Nourse was more succinct: 'a good strong pair of Stocks, and a Whipping-post, will work a greater Reformation than Forty Doctrines and Uses.'³⁷ Religion still had a place within the ritual of the law: a clergyman gave the assize sermon, and others attended the condemned men on the scaffold. But we suspect that the men of God derived more prestige from the occasion than they conferred upon it. A suggestion of this can be seen in an evangelical pamphlet published in 1795. In the metaphors of power, judges usually had been likened to God, deriving their authority from divine authority, mediated through the Crown. But the author reversed the metaphor in his attempt to resurrect religion: he likened the deity to an English high court justice, and called the Day of Judgement the 'Grand Assizes, or General Gaol Delivery'.³⁸ The secular mysteries of the courts had burned deep into the popular consciousness, and perhaps the labouring poor knew more of the terrors of the law than those of religion. When they did hear of hell, it was often from a judge. Sentencing a murderer at Gloucester in 1772, Justice Nares reminded him that his gibbeted bones would never enjoy Christian burial, but would hang 'as a dreadful spectacle of horror and detestation, to caution and deter the rest of mankind'. But he reminded him that he also had an immortal soul, and exhorted him to seek salvation: 'Then, although your sins are as scarlet, they may be white as snow,—'tho they be as crimson, they shall be as wool.'

The assizes were staged twice a year in most counties. Quarter Sessions, held twice as often, could not match them as spectacles, but as courts of law they derived some of their impressiveness by association. The magistrates on the county bench had visited and dined with the circuit judges a few months before; the wealthier J.P.s had entertained their lordships at their homes, spoken familiarly with them in court. Indeed, their wives and daughters sometimes turned the assizes to their own purposes, giving a competitive display of charm before the assize ball: 'By a condescension sufficiently extraordinary,' wrote a bemused Frenchman, 'the judge permits his Bench to be invaded by a throng of spectators, and thus finds himself surrounded by the prettiest women of the county—the sisters, wives or daughters of grand jurors. . . They are attired in the most elegant *négligé*; and it is a spectacle not a little curious to see the judge's venerable head, loaded with a large wig, peering among the youthful female heads.'³⁹ To most of those in the courtroom, the spectacle was less amusing and more serious than the foreign barrister found it: it was a reminder of the close relationship between law, property and power.

For certain offences, the full majesty of the criminal law could be summoned outside assize times, and when Quarter Sessions were not sitting. The court of King's Bench would allow prosecution by information for serious misdemeanours, including riot, aggravated assaults and some game offences. The offender was

³⁵ The strength of Church discipline as coercion under the early Stuarts was weak, but its ideological importance was undoubtedly greater than in the eighteenth century; see R. A. Marchant, *The Church under the Law*, Cambridge, 169, p. 228.

³⁶ James Astry, *A General Charge to All Grand Juries, and Other Juries* (2nd edn, 1725), p. 40.

³⁷ Nourse, *op. cit.*, p. 102.

³⁸ *The Grand Assizes; or General Gaol Delivery* (Cheap Repository, n.d.).

³⁹ Cottu, *op. cit.*, pp. 103–4; Nares's sentence in *Aris's Birmingham Gazette*, 30 March 1772.

usually tried at the next assizes, but he could be compelled to appear at Westminster, tried in the most awesome surroundings, and pilloried or whipped among the crowds of the metropolis. It was said to be a popular belief that one could be 'put into the Crown Office' for any offence, at any time. It happened just often enough to give colour to the story. Finally, on a great many occasions throughout the century the full panoply of the law was sent into the counties in the form of a Special Commission to a particular, dangerous offence. The Special Commission was used when exemplary hangings or at least exemplary trials were deemed necessary for the public peace. Gentlemen often petitioned for them when riot in their counties was becoming too serious, or when the violence associated with popular crimes (such as smuggling) verged on insurrection against their authority. The assize judge descended from London, the sermon was preached in the nearest cathedral, and the breach in the social and moral order was healed with the rituals of justice speeches, fear and the sacrifice of lives on the gallows. As at the regular assizes, at least in the provinces, those executed at Special Commissions were mostly local men, with neighbours, parents, brothers and sisters in the watching crowd.

Justice

'Justice' was an evocative word in the eighteenth century, and with good reason. The constitutional struggles of the seventeenth had helped to establish the principles of the rule of law: that offences should be fixed, not indeterminate; that rules of evidence should be carefully observed; that the law should be administered by a bench that was both learned and honest. These achievements were essential for the protection of the gentry from royal greed and royal tyranny, and for the regulation, in the civil side of the courts, of the details of conveyancing, entailing, contracting, devising, suing and releasing. Since the same judges administered the criminal law at its highest levels, on the same principles, even the poorest man was guaranteed justice in the high courts. Visitors remarked on the extreme solicitude of judges for the rights of the accused, a sharp distinction from the usual practice of continental benches. It was considered to be good grounds for requesting a royal pardon if the judge 'did (contrary to the usual custom) lean against the prisoner'.⁴⁰ The assize judge's attention to the rights of the prisoner did much to mitigate the prohibition against legal counsel in felonies. It was a tradition which permeated the courts, and it was sustained too by the public nature of trials. Sir John Hawkins, chairman of Middlesex Quarter Sessions, complained,

. . . in courts of justice, the regard shown offenders falls little short of respect . . . Those whose duty it is to conduct the evidence, fearing the censure that others have incurred by a contrary treatment of prisoners, are restrained from enforcing it; and, as it is an exercise of compassion that costs nothing, and is sure to gain the applause of vulgar hearers, every one interests himself on the side of the prisoner, and hopes, by his zeal in his behalf to be distinguished as a man of more than ordinary humanity.⁴¹

Equally important were the strict procedural rules which were enforced in the high courts and at assizes, especially in capital cases. Moreover, most penal statutes were interpreted by the judges in an extremely narrow and formalistic fashion. In part this was based on seventeenth-century practice, but as more capital statutes were passed in the eighteenth century the bench reacted with an increasingly narrow interpretation.⁴² Many prosecutions founded on excellent evidence and conducted at considerable expense failed on minor errors of form in the indictment, the written charge. If a name or date was incorrect, or if the accused was described as a 'farmer' rather than the approved term 'yeoman' the prosecution could fail. The courts held that such defects were conclusive, and gentlemen attending trials as spectators sometimes stood up in court and brought errors to the attention of the judge. These formalisms in the criminal law seemed ridiculous to contemporary critics, and to many later historians. Their argument was (and is) that the criminal law, to be effective, must be known and determinate, instead of capricious and obscure. Prosecutors resented the waste of their time and money lost on a technicality; thieves were said to mock courts which allowed them to

⁴⁰ Sir Cecil Wray in behalf of Edward Cooper, PRO, HO 42/11, fo. 43; cf. Cottu, *op. cit.*, pp. 90–91, 103.

⁴¹ John Hawkins, *Life of Samuel Johnson*, 1787, p. 522.

⁴² Radzinowicz, vol. I, pp. 25–8, 83–91, 97–103.

escape through so many verbal loopholes. But it seems likely that the mass of Englishmen drew other conclusions from the practice. The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of the ruling class—it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, of course, the law was The Law. The fact that they reified it, that they shut their eyes to its daily enactment in Parliament by men of their own class, heightened the illusion. When the ruling class acquitted men on technicalities they helped instil a belief in the disembodied justice of the law in the minds of all who watched. In short, its very inefficiency, its absurd formalism, was part of its strength as ideology.

‘Equality before the law’ also implied that no man was exempt from it. It was part of the lore of politics that in England social class did not preserve a man even from the extreme sanction of death. This was not of course, true. But the impression made by the execution of a man of property or position was very deep. As executions for forgery became increasingly common throughout the century, more such reputable villains went to the gallows. The crime was punished with unremitting severity even though it was often committed by impecunious lawyers of good family. This rigour was distressing to many middling men: the agitation led by Johnson against the execution of the Reverend Dr. Dodd, a former Royal Chaplain and Lord Chesterfield’s old tutor, was enormous.⁴³ Dodd died at Tyburn in 1777 but he lived in popular culture for a long time, his case was persuasive evidence that the law treated rich and poor alike. The occasional sentence of transportation or death passed on gentlemen with unusual sexual tastes or guilty of homicide, cases widely reported in the *Newgate Calendar* and other versions, similarly served to justify the law. Undoubtedly the most useful victim in this respect was Lawrence Shirley, Lord Farrers, who killed his steward, was captured by his tenantry, tried in the House of Lords, sentenced to death, executed at Tyburn, and dissected ‘like a common criminal’ as the publicists never tired of repeating. He was hanged in his silver brocade wedding suit, on a scaffold equipped with black silk cushions for the mourners. But hanging is hanging, the defenders of the law repeated enthusiastically. An enormous literature surrounded his execution in 1760, much of it devoted to celebrating the law. Later in the century the event was often recalled as an irrefutable proof of the justice of English society. An anti-Jacobin in the 1790’s advised his ‘brother artificers’:

We have long enjoyed the Liberty and Equality which the French have been struggling for, in England, ALL MEN ARE EQUAL; all who commit the same offences are liable to the same punishment. If the *very poorest and meanest man* commits murder, he is hanged with hempen halter, and his body dissected. If the *Richest Nobleman* commits murder, *he* is hanged with a hempen halter, and his body dissected—all are equal here.⁴⁴

Hannah More used the same argument in her anti-Jacobin pamphlets for the poor; Ferrers became one of the best-known villains of the century. In some counties the story of the wicked aristocrat who met his end on the scaffold was told at popular festivities until well into the 1800s.

In the parlour of the Justice of the Peace, *stare decisis* and due process were not always so much in evidence as in the high courts. Many justices convicted on flimsy evidence, particularly when they were subservient to a local magnate, and when they were enforcing the game laws. It was perfectly possible to combine arbitrary power with an obeisance to the rules, however, and it appears that most J.P.s made an effort to appear, at least, to be acting legally. Moreover, even at the level of the judge the rules of law could be used effectively on behalf of a labouring man. It is not unknown for labourers caught deer-stealing to make an ingenious use of the contradictory statutes protecting informers to escape punishment.⁴⁵ The occasional success of such ruses, and the attempts to use them, probably helped sustain the belief that the integrity of the law was a reality and not merely the rhetoric of judges and gentlemen. Perhaps even more

⁴³ Gerald Howson, *The Macaroni Parson*, 1973.

⁴⁴ *Job Nott’s Advice*, Staffs. RO, D1778, bdl. 57.

⁴⁵ See below, Chapter 5, ‘Poaching and the Game Laws on Cannock Chase’, p. 198.

important in this respect were the frequent prosecutions brought by common informers, where the poor could go before a JP and use the law in their own interest. Prosecutions under the excise, game and turnpike acts—often against farmers and tradesmen who on most other occasions were those who used the courts—occasionally allowed the powerless to make the law their servant, whether for personal revenge or the sake of the reward. Moreover, Justices of the Peace sometimes intervened in the administration of the poor laws, prosecuting callous overseers who forced paupers to marry to remove them from the rates, or who dumped them over parish boundaries to die at the expense of their neighbours. Every county saw trials for such cruelties every few years, and the gentlemen who brought them clothed the issue in the language of constitutionalism. An extremely pervasive rhetorical tradition, with deep historical roots, was invoked and strengthened on all such occasions. The law was held to be the guardian Englishmen, of all Englishmen. Gentlemen held this as an unquestionable belief: that belief, too, gave the ideology of justice an integrity which no self-conscious manipulation could alone sustain. The real guarantees of the law were, moreover, confirmed in several celebrated political trials: Lord Mansfield's finding against general warrants in 1765, the Middlesex jury's acquittal of the leaders of the London Corresponding Society in 1794. In the latter case the striking contrast with the Scottish trials under Braxfield the next year was treated as an object lesson in the superiority of the English courts and bench.

Yet the idea of justice was always dangerous, straining the narrow definition of the lawyers and the judges. It was easy to claim equal justice for murderers of all classes, where a universal moral sanction was more likely to be found, or in political cases, the necessary price of a constitution ruled by law. The trick was to extend that communal sanction to a criminal law that was nine-tenths concerned with upholding a radical division of property. Though Justice seemed impartial in crimes against the person, wrote Mandeville,

Yet, it was thought, the sword she bore
Check'd but the Desp'rate and the Poor;
That, urged by mere Necessity,
Were tied up to the wretched Tree
for Crimes, which not deserv'd that Fate
But to secure the Rich and Great.⁴⁶

In times of dearth, when the rulers of England were faced with food riots by men desperate with hunger and convinced of the rights of their case, the contradiction would become acute. At such times two conceptions of justice stood in sharp opposition: an older Christian version of natural justice which guaranteed even the poorest man at least life; and the justice of the law of property, sanctioned by the settlements of the seventeenth century. Keith Thomas has suggested that the erosion of the moral sanctions surrounding charity, and the ambiguity accompanying the birth of a more rationalized and less indulgent attitude to poverty, produced strong conflicts of guilt and blame, with seventeenth-century witch trials as their partial expression.⁴⁷ A century later, the ambiguities had still not been altogether resolved in the law, which in its ideological role had to reconcile popular ideas of justice with the absolute claims of property from time to time writers in jurisprudence took up with distaste the ancient civil doctrine that a starving man had the right to steal enough food to keep himself for a week Hale had written in the seventeenth century that the rule had long been disused in England Blackstone argued that in this, as in all things, English law was founded on the highest reason, 'for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others; of which wants no man can possibly be an adequate judge, but the party himself who pleads them.'⁴⁸ The judges agreed, for it was impossible to admit poverty as a legal

⁴⁶ *The Fable of the Bees*, 1705.

⁴⁷ Keith Thomas, *Religion and the Decline of Magic*, 1971, p. 561.

⁴⁸ Blackstone, *Commentaries*, vol. IV, pp. 31–2. Perhaps Blackstone sensed that the claims of poverty were not extinguished, for he resorted to chauvinist humbug. Theft might be justified on the continent, 'where the parsimonious industry of the natives orders everyone to work or starve', but it had no place in England, 'where charity is reduced to a system, and interwoven in our very constitution'. Many other writers also wrestled with the problem.

defence without wholly eroding the property statute. Rather than acknowledge an archaic, alien and dangerous legal doctrine, the bench stressed their deep concern for the little personal property that the ordinary Englishman did have. From time to time they passed harsh sentences for certain crimes, such as the theft of clothes, which they proclaimed in court to be particular misfortunes of the poor. A great many words were lavished also on particular statutes for the same reason. An act of 1713 punished with death any housebreaker who stole goods worth forty shillings or more. Opposing repeal in a major debate in 1811, Lord Eldon declared 'that the property of the industrious cottager should be protected, who is often obliged to leave his cottage, and his little hoard of perhaps not more than 40s. deposited in a tin-box in a corner of a room.'⁴⁹

It is difficult to assess the weight such arguments had with the mass of Englishmen. Eldon's was jejune. Few cottagers had savings of {{pound-sterling sign}}2, the wages of a month or more, in the harsh year 1811. Equally few cottagers could afford to go to law to recover stolen goods. Ideologies do not rest on realities, however, but on appearances, and there were enough prosecutions on behalf of poor men to give colour to the Lord Chancellor's claims. Usually such cases were begun or paid for by employers, landlords or local associations for the prosecution of felons. The motives for men of property to assist the poor to prosecute were a tangle of self-interest and paternalism. Some gentlemen simply believed that the law was the birthright of every Englishman, and most were anxious to convict a thief who might prey on them as well. The consequence was that more poor men were able to use the law than the system of legal fees would otherwise have allowed. The poor suffer from theft as well as the rich, and in eighteenth-century England probably far more poor men lost goods to thieves, if only because the rich were few and their property more secure. In recognizing that fact, and extending its protection, however imperfectly, to ordinary men, the criminal law did much to justify itself and the gentlemen who administered it. Defending the constitution in the 1790's, Hannah More's ploughman sings,

British laws for my guard,
My cottage is barr'd,
'Tis safe in the light or the dark, Sir;
If the Squire should oppress,
I get instant redress
My orchard's as safe as his park, Sir.⁵⁰

The justice of English law was thus a powerful ideological weapon in the arsenal of conservatives during the French Revolution. Wicked Lord Ferrers, juries and *habeas corpus* were leading themes in anti-Jacobin popular literature. They were usually contrasted with tyrannical French aristocrats, the inquisitorial system of law and *lettres de cachet*. In countering the influence of Tom Paine, the conservatives repeatedly emphasized the central place of law in the English constitution. Gillray caught the spirit of the argument perfectly in a print of 1801 he drew two trees. One, the blasted and rotten stump of Opposition, was surmounted by a French cap of Liberty, and on its few remaining branches hung the withered fruits of Blasphemy, Seditious Anarchy, Democracy. The other tree, nourishing and green, he gave roots of Kings, Lords and Commons, sweet apples of Peace, happiness and prosperity, and he labelled its massive trunk JUSTICE.⁵¹ It is important, however, to distinguish the argument against Paine from the wider ideological use of justice throughout the century. The author of *The Rights of Man* was in a peculiar position with respect to the law as one of 'the middling sort' he was a man of moderate property, and he thought like one. He was not a critic of the institutions of the law. Indeed, Paine claimed that Quarter Sessions and assizes, as bodies of local administration, were two of the few organs of proper self-government. Nor did he criticize

⁴⁹ Quoted in Christian, *Charges*, p. 308. The Statute (12 Anne c. 7) was passed to punish thieving servants, and was usually used for that purpose. The judges agreed; see Radzinowicz, vol I, p. 117.

⁵⁰ Hannah More, *Works*, 11 vols., (1830, vol. II, p. 76).

⁵¹ 'The Tree of Liberty, with the Devil tempting John Bull', no. 9214, *Catalogue of Political and Personal Satires*, ed. M. D. George, British Museum, Department of Prints and Drawings, 1942, vol. VII, p. 449.

the law's tenderness for property.⁵² The only effective answer to the Tory position would have been a thoroughly egalitarian critique and this Paine was unwilling to begin. An egalitarian on the subject of hereditary monarchy and corrupt aristocracy and landed wealth, he was no leveller of all property distinctions. Hence he had to suffer the conservatives' encomiums of justice in silence.⁵³

Although Paine never lent his pen to the task, the institutions of the law were in fact exceedingly open to radical criticism. The conservatives based their defence on comparisons with French tyranny, the occasional punishment of a great man, the limited protection the law gave to the poor. They did not dare to attempt a reasoned examination of the whole legal system for the edification of the mob. All men of property knew that judges, justices and juries had to be chosen from their own ranks. The jury, the supposed guarantee that an Englishman would be tried by his equals, had a sharp property qualification. The reason, simply put, was that the common Englishman could not be trusted to share in the operation of the law. A panel of the poor would not convict a labourer who stole wood from a lord's part, a sheep from a farmer's fold, or corn from a merchant's yard. As Gisborne pointed out, even as witnesses 'many of the common people are found to make use of a very blameable latitude in their interpretation of the ninth commandment; and think that they are guilty of no breach of it in deviating, though upon oath, from strict truth, *in favour* of the party accused.⁵⁴ The cottager who appeared in court charged with theft had no illusions about being tried by 'his equals and neighbours', whatever the writers of law books claimed.⁵⁵ The twelve men sitting opposite him were employers, overseers of the poor, propertied men. In most cases they were the equals and neighbours of the prosecutor, not the accused, and this was especially true in cases of theft. The point is not that such juries convicted against the evidence, but rather that a more democratic jury might not have convicted at all. In the constitutional struggles of the seventeenth century, 'middling men' of moderate property had wanted the widest possible extension of trial by jury; the Crown had tried to restrict it because juries shielded sedition. There was another small group, however, who had also wanted to control juries Winstanley and the Diggers repudiated them as protectors of property against the rights of the poor. There were no Diggers in the eighteenth century, but cottagers and labourers were undoubtedly aware that English justice was still the creature of judges and juries.⁵⁶

Eighteenth-century 'justice' was not, however, a nonsense. It remained a powerful and evocative word, even if it bore a much more limited meaning than a twentieth-century (or seventeenth-century) egalitarian would give it. In a society radically divided between rich and poor, the powerful and the powerless, the occasional victory of a cottager in the courts or the spectacle of a titled villain on the gallows made a sharp impression. Moreover, it would be wrong to suggest that the law had to be wholly consistent to persuade men of its legitimacy. 'Justice', in the sense of rational, bureaucratic decisions made in the common interest, is a peculiarly modern conception. It was gaining ground in the eighteenth century. Most reformers wanted to bring about such law, and of all such schemes Jeremy Bentham's was the logical conclusion. Yet his plan for a criminal code that was precise, consistent and wholly enforced was alien to the thought of most

⁵² Paine saw nothing objectionable in hanging men for forgery and counterfeiting, and his criticisms of the game and excise laws were the received wisdom of all men of his class. His only other comments on the substantive law were to the effect that the statutes were disordered and vague and sometimes tyrannical, but he never made more than passing reference to the subject.

⁵³ The one exception is his trenchant criticism of special juries. By an act of 1729, civil suits and misdemeanours could be tried by a jury with a special property qualification; it ensured that gentry and aristocracy could always pack a jury with friends and neighbours if the occasion required. Paine reflected acidly, in print, on the advantages of special juries to the Government when it prosecuted *The Rights of Man* as seditious libel. But this is virtually his only criticism of criminal procedure; he accepts the property qualification for ordinary juries as a matter of course.

⁵⁴ Gisborne, *op. cit.*, p. 284 note b.

⁵⁵ Blackstone, *Commentaries*, vol. IV, p. 350.

⁵⁶ The class function of juries was also reflected in the fact that two important kinds of offences were removed from their jurisdiction. In neither game cases nor excise prosecutions could juries of 'middling men' be trusted to convict. (On poaching and juries, see below, p. 211; on smuggling, p. 138.) They felt the law to be unjust, a denial of the rights of property. Hence both offences were punishable on summary conviction by justices and excise commissioners acting without a jury. For all other property offenses, tradesmen and farmers would not decide against the evidence.

eighteenth-century Englishmen They tended to think of justice in personal terms, and were more struck by understanding of individual cases than by the delights of abstract schema. Where authority is embodied in direct personal relationships, men will often accept power, even enormous, despotic power, when it comes from the 'good King', the father of his people, who tempers justice with mercy. A form of this powerful psychic configuration was one of the most distinctive aspects of the unreformed criminal law. Bentham could not understand it, but it was the law's greatest strength as an ideological system, especially among the poor, and in the country-side.

Mercy

The prerogative of mercy ran throughout the administration of the criminal law, from the lowest to the highest level. At the top sat the high court judges, and their free use of the royal pardon became a crucial argument in the arsenal of conservatives opposing reform. At the lowest jurisdiction, that of the Justice of the Peace, the same discretion allowed the magistrate to make decisions that sometimes escaped legal categories altogether. Although he frequently made obeisance to the rules when convicting, as we have seen, he could dispense with them when pardoning, and the absence of a jury made it even easier for him to do so. Latitude in the direction of mercy caused some critics to complain that many justices, partly from laziness or carelessness 'but frequently from benevolent views improperly indulged', judged cases 'partly or entirely by their own unauthorized ideas of equity'.⁵⁷ This element of discretion impressed Weber when he examined the office of J.P. Weber compared it to Arabic 'khadi justice'—a formalistic administration of law that was nevertheless based on ethical or practical judgements rather than on a fixed, 'rational' set of rules. It could combine rigid tradition with 'a sphere of free discretion and grace of the ruler'.⁵⁸ Thus it allowed the paternalist J.P. to compose quarrels, intervene with prosecutors on behalf of culprits, and in the final instance to dismiss a case entirely. The right of the pardon was not limited, however, to high court judges and Justices of the Peace. The mode of prosecution, the manner of trial and the treatment of condemned convicts gave some of the same power to all men of property. 'Irrationality', in the sense used by Weber, and the 'grace of the ruler' which grew from it pervaded the entire administration of the law.

Almost all prosecutions were initiated by private persons, at their discretion, and conducted in accordance with their wishes. Accustomed to organized state police and rigorous state prosecution, French visitors were inclined to marvel at this peculiar English institution. Charles Cottu, a French judge who toured the Northern Circuit in the early nineteenth century, exclaimed,

The English [that is, state officials] appear to attach no importance to a discovery of the causes which may have induced the prisoner to commit the crime they scarcely even affix any to the establishment of his guilt I am ignorant whether this temper of mind arises from their fear of augmenting the already excessive number of public offenders, or whether it proceeds from their natural humanity; it is however an undoubted fact, that they make no effort to obtain proofs of the crime, confiding its punishment entirely to the hatred or resentment of the injured party; careless too, about the conviction of the accused, whether her his victim shall yield to feelings of compassion or give way to indolence.⁵⁹

Cottu did not appear to have heard, or understood, the traditional arguments of English gentlemen against a constabulary and state prosecution: that it could lead to despotism, a political police serving the Crown. He did understand, however, the consequences of private prosecution. The victim of the crime could decide himself upon the severity of the prosecution, either enforcing the letter of the law, or reducing the charge. He could even pardon the offence completely by not going to court. The reformers' objections to this system are

⁵⁷ Gisborne, *op. cit.*, p. 28.

⁵⁸ *From Max Weber*, ed. H. H. Gerth and C. Wright Mills, 1970, pp. 216–21. Brougham anticipated Weber in 1828, declaring 'there is not a worse-constituted tribunal on the face of the earth, not even that of the Turkish Cadi, than that at which summary convictions on the Game laws constantly take place; I mean a bench or a brace of sporting justices': see J. L. and Barbara Hammond, *The Village Labourer* (1911), 1966, p. 188.

⁵⁹ Cottu, *op. cit.*, p. 37.

well known. Private prosecution was capricious and uncertain, and too often rogues escaped due to the distaste, compassion or fear of their victims. But reformers failed to acknowledge the great power this conferred on the prosecutor to make the law serve his own purposes. In Cottu's words, the accuser became 'the arbitrator of the culprit's fate', and the law became an expression of his will. In short, it was in the hands of the gentleman who went to law to evoke gratitude as well as fear in the maintenance of deference

In a rural parish with a relatively settled population there were many alternatives to a rigorous prosecution. The accused man could be made to post a bond not to offend again, or be given the choice of leaving the neighbourhood. The threat of prosecution could be held over his head to ensure his future good behaviour. He might also be allowed to escape the law by making compensation for his crime, and the negotiations between Richard Ainsworth and his master Nicholas Blundell in 1709 were repeated in all parts of England, throughout the century Ainsworth was caught stealing, begged Blundell repeatedly not to prosecute, and entered into negotiations to work on one of his master's houses in return for forgiveness.⁶⁰ Other accused men simply appealed to the merciful feelings of the man who held them in his power. The wretched thief begging on his knees for forgiveness is not a literary conceit, but a reality described in many legal depositions. Critics of the law objected, however, that many prosecutions were dropped through fear as well as compassion. Certainly it is true that feeling against some prosecutors ran so high that they went in fear of their lives from popular opinion, or felt obliged to defend their actions in the press. Yet where certainty of enforcement had to be sacrificed to public opinion, even then graciously granted mercy could produce gratifying deference. Especially where the prosecutor was a landed gentleman, acts of mercy helped create the mental structure of paternalism. The papers of any large landed proprietor are peppered with appeals for pardons, and earnest thanks for them—pardons for poachers, for stealers of holly, for embezzlers of coal. 'I hope his lordship will not insist upon your acquainting my Master of it,' wrote one poacher to a steward, 'as it would be productive of very great injury to me we are afraid the crime is so great that it will not admit of any excuse and therefore all we can say is that our future good behaviour shall be such that his Lordship will not repent of his Lenity and goodness in forgiving us.'⁶¹ The phrases of benevolence constantly recur on the other side 'it may so happen that my Good Lord Stafford may be inclined (as he generally is) to pardon the offenders . . .'⁶² Such acts were personal ties, not the distant decisions of bureaucracies. They also bridged great vertical distance in the social order: in this case, between some day labourers caught pilfering, and the Lord Lieutenant of the county. We cannot, of course, infer gratitude from begging letters, but there is enough evidence to suggest that much of it was genuine. Many prosecutors, peers included, made the most of their mercy by requiring the pardoned man to sign a letter of apology and gratitude, which was printed in the county newspaper.

The nature of the criminal trial gave enormous discretion to men of property other than the prosecutor. Because the law did not allow those accused of felony to employ an attorney to address the jury, a poor man's defence was often a halting, confused statement. If he had a clear alibi he was lucky to establish innocence in more complicated cases might be very difficult, even when the judge was sympathetic. Character witnesses were thus extremely important, and very frequently used. It was not uncommon for a man accused of sheep-stealing, a capital offence, to bring a dozen acquaintances to court to testify to his honesty. If the jury did convict, such favourable testimony might still induce the judge to pass a lesser sentence, or recommend a pardon. Yet in character testimony too, the word of a man of property had the greatest weight. Judges respected the evidence of employers, respectable farmers and neighbouring gentlemen, not mere neighbours and friends. A labourer accused of a serious crime learned again his enormous dependence on the power of property to help him, or abandon him, as it chose 'I am now going to take a dreadful tryal and god nose but my poor l ife may l ay at 'Stake,' William Sheffield wrote to his masters a month before the assizes,

⁶⁰ Nicholas Blundell, *Blundell's Diary and Letter Book*, 1702–1728, ed. Margaret Blundell, Liverpool, 1952, pp. 109–11.

⁶¹ Staffs. RO, D593/L/1/15/10, Worsey to Howard, 15 October 1780.

⁶² Staffs. RO, D593/M/2/1/8, letter of Thomas Heath, 5 November 1798.

therefore I hope Both of you will stand my friend this time jest to Come and give me a Careckter for the time that I Lived with you and I hope you will do that for me the judg I am told will Look Upon that as a great thing in my Behalf . . . So pray my dear mastters Consider my Unhappy state this time for gods sake and stand my friend and if plees god it should Ever Laye in my power I will neaver think nothing two much to make you amends Eaver to l lay my selfe at your feet if I can be of haney serviss to you for your passt goodness to me in so doing . . .⁶³

If respectable character witnesses did not succeed in convincing the jury to acquit, their support was the first step in influencing the judge to consider a pardon. A free or conditional pardon from the king was the hope of almost every capital convict in the eighteenth century, and many men under lighter sentences also struggled to obtain it. For the historian it epitomizes the discretionary element of the law, and the use of mercy in justifying the social order.

Pardons were very common. Roughly half of those condemned to death during the eighteenth century did not go to the gallows, but were transported to the colonies or imprisoned. In many cases the judge made the decision before he left the assize town, but if he did not intend to recommend mercy, it was still possible to petition the king, through the Secretary of State, up to the moment of execution. The grounds for mercy were ostensibly that the offence was minor, or that the convict was of good character, or that the crime he had committed was not common enough in that county to require an exemplary hanging. The judges also used the pardon when necessary to meet the requests of local gentry or to propitiate popular feelings of justice. The bench could ultimately decide whom to recommend for mercy and whom to leave to hang, but they were not usually willing to antagonize a body of respectable feeling. Justice Ashurst, asked to endorse a pardon for a horse-stealer from Cambridge, reported to the king, 'I had whilst on Circuit received such favourable Accounts of him as induced me to reprieve him & had those accounts remain'd uncontradicted I should have thought there could be no objection for a free Pardon. But I have this day received a letter from some Gentlemen of the University desiring to retract their former applications for mercy.'⁶⁴ The judges were well aware that the gentry of the county were charged with government and criminal justice between assize times, and hence usually gave their opinions a serious hearing. The pardon could be used, however, to show mercy when the death penalty seemed too severe, and this discretion became part of the explicit justification of the law to the poor. In passing sentence of death on a prosperous sheepstealer in 1787, Sir Beaumont Hotham argued that the law understood the trials of the poor and properly held the rich rogue to stricter account. He noted the difference between a poor wretch in distress committing such a crime, and a man of seeming reputation;—that the latter, under the mask of a fair and upright character, was enabled to make depredations on his neighbours and the public, without being suspected, therefore was not to be guarded against, and consequently, in his eye, was much more culpable than the poor man, who commits such acts from real want.'⁶⁵ Since most death sentences were pronounced for theft, the most recent historian of the pardon concludes that it moderated the barbarity of the criminal law in the interests of humanity. It was erratic and capricious, but a useful palliative until Parliament reformed the law in the nineteenth century.⁶⁶

Such an analysis stresses the narrowly legal use of the pardon, but ignores its social significance, the crucial point that interests us here. As in so many other areas of the law, custom and procedure allowed wholly extrajudicial considerations great influence. The pardon allowed the bench to recognize poverty, when necessary, as an excuse, even though the law itself did not. But the manner in which a pardon was obtained made it an important element in eighteenth-century social relations in three other ways. In the first place, the claims of class saved far more men who had been left to hang by the assize judge than did the claims of humanity. Again and again in petitions the magic words recur 'his parents are respectable persons

⁶³ William Sheffield to Evans, Hinds and Best, *re* his trial at Aylesbury, Lent 1787; PRO, HO 47/6. Sheffield's employers found it inconvenient to attend; he was condemned, although Beat wrote on his behalf.

⁶⁴ Report of Justice Ashurst, 10 April 1787, *re* John Higgins; PRO, HO 47/6.

⁶⁵ *An Account of the Life, Trial, and Behaviour of William Bagnall* (WSL, Broadsheets 2).

⁶⁶ Radzinowicz, vol. I, pp. 116, 137.

in Denbighshire'; his father is 'a respectable farmer'; his brother is 'a builder of character and eminence in London.'⁶⁷ There are very few petitions that plead what one in 1787 called 'the common excuse for larceny, poverty and distress'.⁶⁸ It may have been the common excuse, but those requesting pardons knew it held little weight—only two of the hundreds of petitions that year bothered to mention it. In contrast, the excuse of respectability was pleaded *in extenso*. Even need, rarely admitted as a legitimate excuse for a poor man, could become a compelling reason to forgive a richer one. When an officer returned from India was caught stealing silver from inns as he travelled by sedan chair through Oxfordshire, Lord McCartney testified to his valour in imperial wars, and urged that he must have been distressed. This evidence and the support of a 'very reputable' family procured a full pardon.⁶⁹ Similar considerations that would never have saved a labourer from the gallows worked in favour of the respectable. When the son of a secretary of the London Foundling Hospital was condemned for a serious burglary, he was saved from execution out of consideration for his mother, and 'Seven unmarried sisters and a brother' who would 'unavoidably Share the Ignominy due only to his Crimes'.⁷⁰ John Say's case was similar he came from 'an exceedingly Worthy & respectable family who will feel the disgrace of a Public Execution beyond expression, his Young Sister also now at Boarding School will be irreparably Injured by a disgrace which no time can Obliterate and which will greatly affect her future Interests thro' Life.'⁷¹ The future interests of the sisters of condemned labourers were never mentioned in petitions, because they had no prospects. When the families of poor convicts were taken into consideration, it was usually through fear that execution would create too many orphans to be supported on the parish rates.

The pardon thus served to save a good many respectable villains. It was all very well to hang Dr Dodd and Lord Ferrers, but to hang every errant son of the rich who tried his hand at highway robbery to pay gambling debts would have made too great a carnage in the better circles. Pardons also favoured those with connections for another reason: mercy was part of the currency of patronage. Petitions were most effective from great men, and the common course was for a plea to be passed up through increasingly higher levels of the social scale, between men bound together by the links of patronage and obligation. The bald language of place-seekers recurs here too; trading in life and death became part of the game of interest. 'If anything can be done in consequence of the inclosed letter,' wrote Lord Viscount Hinchinbrooke, 'I shall be very thankful for it—as the writer of it is a particular friend of mine in the county of Huntingdon.'⁷² Sir George Yonge forwarded another application for mercy from 'Sir John Pole, a Neighbour of mine and a gentleman of Family and considerable Property in Devonshire and Dorsetshire—If there is occasion for it, Humanity as well as regard to the application in such a respectable Quarter make me wish to interfere with success.'⁷³ Often a long chain of interest and connection had to rattle before the judges and the king listened. In one case, not untypical, the condemned man pleaded with the gaoler and chaplain, the chaplain wrote to a more important London cleric, the latter appealed to William Wilberforce, and the evangelical M P asked the Home Secretary to consider the case. This pressure, plus the active intervention of Lord Ludlow, finally resulted in a pardon.⁷⁴ It was the greatest good fortune to get the attention of a sympathetic peer. In a system

⁶⁷ Justice Perryn's report, 3 December 1787, on John Knott, and letter of the Bishop of Salisbury (n.d.), re Joseph Moreland, PRO, HO 47/6. Moreland's petition is endorsed, family and connection respectable'. Cf. Justice Cardil's recommendation of mercy for John Jepson, a highway robber: he was young, and I find that his Mother and Relations live very reputably, *which are Considerations that will have their due weight with your Majesty in favour of this unhappy young man*'. (Emphasis in original; PRO, SP 36/111 fos. 46–7.)

⁶⁸ John Eden on behalf of Smith, PRO, HO 42/12 fo. 157 (1787).

⁶⁹ Report of Burton and letter of lord Macartney *re* William Ludlane, PRO, HO 47/6.

⁷⁰ John Jones, alias Collingwood, tried Essex Lent Assizes 1787 and transported for life on application of the Duke of Leeds, without further report (letter of his father, affidavit of father's position, report of Justice Thomson, 31 March 1787, PRO, HO 47/6).

⁷¹ Letter of Philip Slater, PRO, HO 42/11 fo. 39.

⁷² Hinchinbrooke to Townsend, 31 October 1787, PRO, HO 42/12.

⁷³ Yonge to Nepean, 24 October 1787, PRO, HO 42/12 fo. 130.

⁷⁴ Report of Justice Ashurst, 22 March 1792, Ludlow to Grenville, Tattershall to Coke and to Grenville, Wilberforce to Dundas in the case of Philip Huckle; PRO, HO 44/14.

which gave greatest weight to those with most power, their influence was naturally greatest. Even the domestic politics of a great house could count for more than the organized pressure of a whole county of lesser men. Lord Montagu asked the Secretary of State to pardon the man who stole his curtains rather than leave him to be hanged, for ‘if he is I had as good be hanged with him, for the Ladys of my family give me as little rest to save him from being hanged as I do you . . .’⁷⁵ In petty cases a peer’s word was law, and judges would agree to cut sentences and even advise the king to grant free pardons at a mere request. In very outrageous cases, when property had been so abused that only extraordinary influence could prevail, there was often a conscious weighing up of the *avoirdufois* of class. After an attorney had been condemned for forgery at Oxford, the Lord Chancellor forwarded to the Secretary of State a plea for mercy from the Bishop of Oxford: ‘I apprehend that the King had rejected the Duke of Marlborough’s application, which was made by the Duke of Bedford; and if the affair is quite over I have nothing to say. If it is not quite over the Bishop’s letter may be thrown into the scale.’⁷⁶ The ability to obtain a pardon was recognized as a work of importance among the great and the powerful. A landowner who could not obtain one in a reasonable case was well aware that his prestige could suffer—and this fact itself was advanced sometimes as a good reason for granting the boon.

Beyond class favouritism and games of influence, the pardon had an equally important role to play in the ideology of mercy. The poor did not see the elaborate ramifications of interest and connection. Although the convolutions of the patronage system at the lowest level were known to every man who wished to become a tidewaiteer, the law was set apart, and no gentleman wished to admit too openly too openly that justice itself was but another part of the system. Moreover, pardon-dealing went on at the highest levels only, well concealed from the eyes of the poor. Therefore the royal prerogative of mercy could be presented as something altogether more mysterious, more sacred and more absolute in its determinations. Pardons were presented as acts of grace rather than as favours to interests. At the lower levels, within the immediate experience of the poor, pardons were indeed part of the tissue of paternalism, expressed in the most personal terms. The great majority of petitions for mercy were written by gentlemen on behalf of labourers. It was an important self-justification of the ruling class that once the poor had been chastised sufficiently to protect property, it was the duty of a gentleman to protect ‘his’ people. Thus William Trumbull of Berkshire struggled to save a youth from the gallows when he discovered that the boy’s father had in a servant to his own father, the Secretary of State, many years before.⁷⁷ A Norfolk gentleman asked for mercy on the grounds that ‘all this man’s family live in the neighbourhood near Norwich and are employed occasionally by me.’⁷⁸ And the Duke of Richmond obtained a pardon for a man who claimed to have once saved the life of the Duke’s father.⁷⁹ Men facing imminent death tried to exploit some improbably remote connections. The son of Lord Courtenay’s former butler applied to Sir George Yonge on behalf of another relative, on the grounds that Yonge had known the butler years before: ‘for Sir George it is in your power to save him from death if Sir George you will be so kind . . .’⁸⁰ These were not empty or exaggerated words. Influence in pardons, though rarely the only factor considered, was extremely important. A convicted labourer, even in a rural parish, was likely to know only a few men of property well enough to ask for their help, and if they were feeling more vengeful than merciful death was a pretty sure thing. John Wilkes of Staffordshire had a sister who worked for the Reverend John Fletcher, the saintly Vicar of Madeley, and she tried to get the cleric to help save her condemned brother. Fletcher wrote Wilkes that his crimes were too serious, and that he suspected him of robbing one of Fletcher’s own houses ‘If you committed that robbery, I desire you to

⁷⁵ PRO, SP 36/5 fo. 218 (1728).

⁷⁶ Brit. Mus. Add. MSS, 32,719 fo. 50.

⁷⁷ Brit. Mus. Add. MSS, 32,732 fo. 479 (1753).

⁷⁸ PRO, HO 42/12 fo. 137.

⁷⁹ Brit. Mus. Add. MSS, 33,732, Richmond to Newcastle, Strasbourg, 21 October 1753.

⁸⁰ PRO, HO 32/12 fo. 88 (1787). John Dennis demanded that the Pelhams should help him ‘and never be ashamed to hear yourselves named to a free and accepted Mason’. Brit. Mus. Add. MSS, 32,734 fo. 182 (1754).

confess it before you leave this world ,’ he wrote him, and rather than write a petition prepared Wilkes a prayer. It ended, ‘Let the hands of human justice push me into the arms of divine mercy.’⁸¹

Petitions for pardons were occasionally opposed, but usually by determined prosecutors. Where a prosecutor had second thoughts or wished to indulge his humanity after exacting terror and recovering his property, he sometimes was the first to add his name to a plea for mercy—and thereby gave it greater weight. Most successful petitions, however, were begun by other men of respectable position, with good connections, and their activity on behalf of the condemned could only enhance their reputations as men of compassion and magnanimity. To the poor, the intercession of a local gentleman was proof of his power to approach the throne. He took no blame if the petition failed, for an unanswered plea was attributed to the determination of the king, who was popularly believed to sign all death warrants. A successful outcome was attributed to mercy at the same exalted height—and Blackstone argued that ‘these repeated acts of goodness coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince’.⁸² And all the chaplains, country gentlemen and peers who had helped to obtain a pardon shared somewhat in the reflected glory of the merciful ruler.

The pardon is important because it often put the principal instrument of legal terror—the gallows—directly in the hands of those who held power. In this it was simply the clearest example of the prevailing custom at all levels of criminal justice. Here was the peculiar genius of the law. 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. Their political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighbourhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity. It encouraged loyalty to the king and the state:

And Earthly Power doth then show likest God’s
When mercy seasons justice

And in the countryside the power of gentlemen and 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. But consent, in Archdeacon Paley’s phrase, must be managed ‘with delicacy and circumspection’. To understand fully the social functions of the eighteenth-century criminal law, we must understand how it embodied those virtues too.

Delicacy and Circumspection

Deference in eighteenth-century England, although pervasive, was not complete. The gentry managed to maintain order without anything resembling the political police used by the French, but it was order that often seemed to rest on precarious foundations. The common Englishman was renowned for his riots, and also for his dislike of standing armies. Although the ideology of justice could be used by gentlemen to quiet a mob, and with success, words sometimes lost their magic. Then the discretion embodied in the law allowed the authorities to use terror with great flexibility. Examples of this delicate adjustment of state power are legion, especially in decisions about executions, the most emotive act in civil government. In

⁸¹ Fletcher himself sought more worldly profit by publishing a pamphlet, from which this account is taken. *The Penitent Thief or a narrative of two women fearing God, who visited in prison a highway-man, executed at Stafford, April the 3d, 1773, with a Letter to a condemned malefactor: and a penitential office for either a true churchman or a dying criminal. By a country clergyman* (2d edn, 1773).

⁸² Blackstone, *Commentaries*, vol IV, p. 397. Blackstone explicitly repudiates Beccaria on this crucial question.

1756 Justice Willes was holding the Warwick Assizes when food riots broke out in the county. He announced his intention of trying and executing immediately all rioters brought before him, adjourning the court from week to week until order had been restored. Within days he convicted four,

And, when I passed Sentence upon Them, I said a good deal to show the heinous nature of their crime, and the great folly of the attempt And I ordered the captain and another notorious offender to be executed on Wednesday next; and told the others that I would adjourn 'till Monday s'en night, and that then, if the insurrection was quite at end, I would apply to his Majesty to pardon them; but if not, I would immediately execute the two other persons that were convicted.

No one thought it strange to hang some men for crimes committed by others. The Secretary of State wrote to Wilkes to congratulate him and expressed the hope that other judges would follow his example in similar cases. The King, the Duke, the whole court, are full of Commendation, & the general voice is, that these Insolent Rioters wuld not have fallen into better Hands.⁸³

Gentlemen were very sensitive to opinion in their neighbourhoods, for there might be serious consequences if the show of force was either not quite impressive enough, or so brutal that it outraged men and destroyed the mystique of justice. Lord Hardwicke, when Chief Justice, ordered a Cornish rioter's body to hang in chains, a refinement of capital punishment that added infamy to death. He agreed to respite that part of the sentence, however, when the local gentry informed him that

in the present cicumstances of affairs it would be more advisable not to do it, for tho' his crimes, as your Lordship says, demand the most terrifying Example yet there must be the greatest regard had for the Peace our Country, which we were apprehensive might be again disturbed if that measure was pursued. It is undoubtedly in theory right and would be extremely necessary in most parts of the Kingdom, but in this there has been such an unaccountable run in his favour, that if any of his particular friends should cut Him down, which would be a fresh insult upon Authority, The Rabble would call it the last blow, and the spirit might revive . . . We are in hopes that the examples are carried far enough to work upon the fears of his friends, without giving them the opportunity of any new triumph.⁸⁴

Edmund Burke used the same argument a half-century later in the case of the Gordon rioters. A week of looting, arson and unchecked defiance of authority severely shook the foundations of order. Burke therefore advised the government to limit the number of executions in spite of the gravity of the offence: 'If I understand the temper of the publick at this moment, a very great part of the lower and some of the middling people of this city, are in a very critical disposition, and such as ought to be managed with *firmness* and *delicacy*.' He continued, 'In general they rather approve than blame the principles of the rioters . . . This keeps their minds in a suspended and anxious state, which may very easily be exasperated, by an injudicious severity, into desperate resolutions; or be weak measures, on the part of the Government, it may be encouraged to the pursuit of courses, which may be of the most dangerous consequences to the public . . .' His recommendation was for six executions with maximum publicity, a calculated blend of terror and mercy under the strict rule of law.⁸⁵

The rulers of eighteenth-century England spent much time gauging opinion in this way. The façade of power had to be kept undamaged. The gentry were acutely aware that their security depended on *belief*—belief in the justice of their rule, and in its adamant strength. Hence, punishment at times had to be waived or mitigated to meet popular ideas of justice, and to prevent popular outrage going too far and thereby realizing its own strength. The aim above all was to avoid exposing the law and authority either to ridicule or to too close scrutiny. Contempt of court was therefore punished severely; the convict who heard the death sentence with no sign of repentance, and who instead damned the judge, could hope for no pardon.

⁸³ Brit. Mus. Add. MSS, 32,867 fos. 3–4, 8–11, 94.

⁸⁴ Brit. Mus. Add. MSS, 35,585 fos. 299–303.

⁸⁵ 'Some Thoughts on the Approaching Executions', *Works*, 1812, vol. IX, pp. 268–71. My emphasis.

It was also important for those administering and using the law to be circumspect, discreet—to leave unsaid anything that might mar the illusion of power. Hence a gentleman who trifled with the mob or called into question the ultimate justice of the law was execrated by his fellows as a knave and a fool. Lord George Gordon did both. The impotence of England's governance in the face of disorder, and the measure of their contempt for class traitors, was epitomized by a curious scene in the House of Commons in June 1780. As Gordon's supporters raged outside and threatened to break in upon the Honourable Members, several M Ps followed him about the House with their hands on their swords, vowing to run him through if the mob broke in. When Gordon continued his wayward career a few years later by publishing a protest of the convicts of Newgate against capital punishment for theft, he was committed to prison as a libeller of justice. Most gentlemen thought him mad.

Discretion was necessary in thousands of small things, too. It permeated the operations of the law. No decisions that moved the levers of fear and mercy were decisions of propertied men, and they made them privately, among themselves. At the most informal level, before Justices of the Peace—country gentlemen—the operation of the law was often the result of an agreement on tactics between the JP and the prosecutor, especially when the latter was a friend or powerful neighbor. At the level of prosecution, the gentry particularly were likely to allow the offender to escape if they were not completely sure of a conviction: it was better to feign mercy rather than reveal impotence. Since the legal process was largely a secret between landowner and magistrate, nothing was easier to arrange. Where a JP wished to chastise, but found to his chagrin that the legislature had somehow failed to pass the right law, he was advised to use others:

Complaints are made to magistrates, with respect to a thousand immoral and wicked actions, over which they have no jurisdiction whatever. In such cases, *it will be prudence to conceal the infirmity of their authority*: but they will frequently find that [the statute against swearing] has been violated by one or both parties. I should then recommend, that they should exert their full authority in the punishment of *this* offence; and to dismiss the parties, wit an admonition or a reprimand, where the law has given them no power to act.⁸⁶

The opacity of the law also made it possible for the rulers of England to act in concert in managing hangings, arranging backstage the precise moment of the emotional climax. This was crucial not only at times of disorder; it was part of the routine administration of the law. The Hanoverians themselves sometimes took seriously their legal prerogatives in this respect. Shortly after he came to the throne, George III agreed to the routine mitigation of the death sentence to one of transportation in the case of a highway robber. He gave instructions, however, that

as his Majesty hopes so to terrify this unhappy Man, on the present occasion that he may not hereafter be guilty of the like offense; it is the King's intention that *he should not be acquainted of his Majesty's having extended his royal mercy towards him, 'till he comes to the place of execution*. It will be proper therefore, that you give orders to the sheriffs, for this purpose, so that he be carried with the others, who are to suffer; to the place of execution, and that he be informed, then, and not before then, of the reprieve . . .⁸⁷

'Circumspection' is a euphemism in such circumstances. The private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy, in the most exact meaning of the word. The king, judges, magistrates and gentry used private, extra-legal dealings among themselves to bend the statute and common law to their own purposes. The legal definition of conspiracy does not require explicit agreement; those party to it need not even all know one another, provided they are working together for the

⁸⁶ Christian, *Charges*, p. 291 (my emphasis followed by Christian's).

⁸⁷ C. Jenkinson to Recorder of London, 22 May 1761; PRO, SP 44/87, fos 19 and 20 (my emphasis).

same ends. In this case, the common assumptions of the conspirators lay so deep that they were never questioned, and rarely made explicit.⁸⁸

It is important to recognize this fact, for it raises some important methodological questions for the student of authority and the law. There is a danger, which perhaps this essay has not avoided, of giving the impression that a system of authority is *something*, rather than the actions of living men. The invisible hand of Adam Smith's political economy was metaphor, shorthand for an effect rather than a cause; it was a description of recurrent patterns of useful behaviour forged out of the energy, conflicts and greed of thousands of individuals in a capitalist market. In a somewhat similar way, much of the ideological structure surrounding the criminal law was the product of countless short-term decisions. It was often a question of intuition, and of trial and error. In handling a mob it was useful to appeal to ideals of English justice: but that was a lesson that was slowly learned over many generations, and rarely raised to the level of theory. The necessity of gauging reactions to executions was an immediate problem of public order, not a plot worked out by eighteenth-century experts in public relations for a fee. The difficulty for the historian of the law is twofold. He must make explicit convictions that were often unspoken, for if left unspoken we cannot understand the actions of the men who held them.⁸⁹ Yet in describing how convictions and actions moulded the administration of justice, he must never forget that history is made by men, not by the Cunning of Reason or the Cunning of System. The course of history is the result of a complex of human actions—purposive, accidental, sometimes determined—and it cannot be reduced to one transcendent purpose. The cunning of a ruling class is a more substantial concept, however, for such a group of men is agreed on ultimate ends. However much they believed in justice (and they did); however sacred they held property (and they worshipped it); however merciful they were to the poor (and many were); the gentlemen of England knew that their duty was, above all, to rule. On that depended everything. They acted accordingly.

Seen in this light, much of the historical literature on the eighteenth-century ruling class seems misconceived. Their attitudes to the law are often made a test of their moral worth. Romilly and the other reformers usually have received alphas, as the forerunners of the armies of liberal enlightenment and humanitarianism, and as the 'winners'. But in praising the reformers we caricature the conservatives. Descriptions of a ruling class in terms of abstract moral judgement have contradictory results, because they are profoundly unhistorical. The substantial literature on the county magistrate is another case in point. Historians have reached divergent conclusions, although the present consensus seems to be that their rule was 'in general upright and humane.'⁹⁰ Still, pessimists (to borrow the terms of another moral debate) can find evidence that many JPs were 'pretty great tyrants', and at least one optimistic historian has hailed them as the finest governors the world has ever known. These peculiarly idealist explanations, which count or weigh the number of good acts against the number of bad, then judge whether or not to admit the eighteenth-century ruling class into the heavenly kingdom of twentieth century respectability, hinder rather than aid understanding. Nor does it help to take a relativist moral tack, and assert that the rulers of England were about as humane as the society that they lived in, some a bit better, some a bit worse. Humanity and inhumanity are real dispositions, rooted in individuals, and more or less general, perhaps, in groups of men with similar experiences. But conscious dispositions can be shaped by much deeper social imperatives, justifications are not always the same as motives, and even the sincerest convictions and most authentic

⁸⁸ The legal definition requires that the purpose should be unlawful, not simply 'extra-legal'. But here the law falls into a 'vagueness [which] renders it possible for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be "unlawful"'. (*Kenny's Outlines of Criminal Law*, 19th edn, 1966, p. 430). Many eighteenth-century Englishmen would have found private agreements by the powerful to manipulate the law not only distasteful but deceitful and dangerous. But only judges and legislators can make matters of taste also matters of law.

⁸⁹ Those who describe beliefs that are widely held but seldom expressed are often unrepresentative figures. Nourse was an Anglican cleric who converted to Roman Catholicism and literature, Madan was another eccentric clergyman whose call for more hangings was repudiated by the judge. The Evangelicals (More, Gisborne) were often embarrassingly direct in their social prescription, Cottu was a foreigner, and Christian was a long-winded, egotistical bore. For these reasons they sometimes raised in argument points that more conventional men thought banal or indiscreet, or did not think consciously of at all.

⁹⁰ G. E. Mingay, *English Landed Society in the Eighteenth Century*, 1963, p 119.

emotional responses may be called forth, or subdued, or even at times reversed, by the patterns of power within a culture or a class. Men were merciful and merciless in the eighteenth century the historian's task is to answer the questions when, and why it is not something we can judge in the light of eternity. Rather, we should be content to know why Lord Montagu was able to please his ladies by saving a man's life, and why a Midlands cleric was prepared to use the gallows to help his parishioner find God.

The second question raised by a discussion of the law as ideology is evidential how can we prove that it worked? Much of the evidence cited here comes from the avowed intentions and observations of the rulers, not the ruled. Perhaps much of what the gentry interpreted as the deference and gratitude of the poor was in fact conscious deception. Perhaps the ordinary Englishman played the role assigned to him, but was never convinced by the play. The eighteenth century produced much genteel cant about justice, but it also produced a large popular literature marked by cynicism and disrespect for the law. And there were many more forceful demonstrations of incredulity, including riots at executions, and rogues who mocked their judges.

Much research remains to be done before we can give confident answers to some of these questions. But two general points may be made. In the first place, most of the evidence that we have of loud popular disrespect for the law comes from London, and London differed in important ways from the rest of eighteenth-century English society. It had a highly transient population, and a large body of disorderly and parasitic poor, living on the gathered wealth of commerce, the port and the disorderly and parasitic rich. In sharp contrast to the provinces, the men hanged at Tyburn were mostly born in distant places. They had come to London from the country, and in doing so left behind the close and persisting personal relationships that still characterized much of English society. And it was in such intimate dealings of fear and gratitude that much of the ideology of justice was realized. Some historians have suggested that 'urban alienation' accounts for London disorder and crime in the eighteenth century. It may be more correct to say that the instruments of control there were weaker, in part because the class relationships that fostered deference were. Resistance to the law, disrespect for its majesty, scorn for its justice were greater. Equally, judicial mercy in London was more often a bureaucratic lottery than a convincing expression of paternalism.

The provinces too erupted in disorder: food riots, militia riots, excise riots, turnpike riots, gang poaching, endemic and often violent smuggling. The hegemony of the law was never complete and unbroken, even in the most deeply rural, most traditional counties. The fabric of authority was torn and reknit constantly. The important fact remains, however, that it was reknit readily. The closer mesh of economic and social ties in rural society, the public nature of those relationships compared to the complexity and obscurity of much of metropolitan life, allowed the creation of an ideology that was much more pervasive than in London. When it was momentarily challenged in a county riot or by a defiant labourer, no serious harm resulted; the prevailing code was, in fact, usually strengthened. An ideology endures not by being wholly enforced and rigidly defined. Its effectiveness lies first in its very elasticity, the fact that men are not required to make it a credo, that it seems to them the product of their own minds and their own experience. And the law did not enforce uniform obedience, did not seek total control; indeed, it sacrificed punishment when necessary to preserve the belief in justice. The courts dealt in terror, pain and death, but also in moral ideals, control of arbitrary power, mercy for the weak. In doing so they made it possible to disguise much of the class interest of the law. The second strength of an ideology is its generality. Provided that its depths are not explored too often or by too many, it remains a reservoir of belief throughout the society and flows into the gaps made by individual acts of protest. Therefore, those using it are concerned above all with surface appearances. Undoubtedly the gentleman accepting an apology from the man in his power, the thief or the rioter would have been gratified to know that the contrition was absolute, from the soul. But provided that the act of contrition was public and convincing, that it served to sustain general belief in the justice of the social order, it sufficed. It became part of the untested general idea, the ideology which made it possible to stigmatize dissent as acts of individuals, of rogues and criminals and madmen.

The hypothesis presented here is that the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army the ideology

of the law was crucial in sustaining the hegemony of the English ruling class. This argument, if sound, helps us to explain their resistance to suggestions for drastic legal reform. It also casts some light on the membership of that ruling class, and the character of their society.

III

The long resistance to reform of the criminal law has perplexed later writers. The conservatives who opposed reform have been generally criticized, but historians have failed adequately to explain the growth in numbers of capital statutes and the simultaneous extension of the pardon. When the criminal law is seen not simply as a coercive instrument to punish crime, however, both problems seem largely resolved.

The post-revolution Parliaments passed more and more capital statutes in order to make every kind of theft, malicious damage or rebellion an act punishable by death. Although most executions took place under Tudor statutes rather than these fresh-minted ones, the new legislation gave the power to make terrible examples when necessary. Sometimes the new laws merely re-created the death penalty for offences which had been affected by the development of benefit of clergy; more often they added it to newly defined offences, including some not foreseen by the lawmakers of Elizabeth's time, such as the forging of banknotes. But if gentlemen in Parliament were willing to hang a proportion of offenders every year in order to stage the moral drama of the gallows, it is extremely doubtful that they ever believed that the capital statutes should be strictly enforced.⁹¹ The impact of sentencing and hanging could only be diminished if it became too common. 'It is certain,' wrote Burke, 'that a great havock among criminals hardens, rather than subdues, the minds of people inclined to the same crimes; and therefore fails of answering its purpose as an example.'⁹² Equally important, a return to the severities of the Tudors and early Stuarts probably would not have been tolerated by the people. At that period and earlier the gentry and the great houses usually had small armies of their own with which local disaffection could be crushed when necessary. But from the later seventeenth century the importance of managing opinion had made nuance, discretion and less obvious coercion a necessary part of the art of ruling. If London rioted at Tyburn, how much worse would disorder be if the executions were four times as numerous? In the counties, three or six hangings in each, twice a year, afforded splendid occasion for lessons in justice and power; but scores of victims would have revolted the people. Although some gentlemen in Parliament did pen bloody new laws in the heat of anger and an uncompromising spirit of revenge, they saw the wisdom of pardons when confronted with long gaol calendars and the spectre of county towns festooned with corpses.

Considerations such as these probably influenced the judges most in determining their general policy over the century. For although it is asserted that after 1750 a constantly declining proportion of death sentences was actually carried out, this is only true in London. In the home counties the proportion of condemned who were executed remained fairly steady over the same period.⁹³ But the common element in both jurisdictions was the effect of the differing policies on the absolute numbers hanged. In both cases, the number of the condemned who actually died on the gallows was relatively constant over much of the century. The law made enough examples to inculcate fear, but not so many as to harden or repel a populace that had to assent, in some measure at least, to the rule of property.

The second great paradox about the old criminal law, the delay in reform long after a good case had been made that capital statutes allowed theft to increase by making prosecutions uncertain, may also be resolved. Romilly and Eden and the other reformers proposed to replace capital punishment with lesser penalties, and the model which they followed implicitly and sometimes used publicly was that of Beccaria: 'a fixed code of

⁹¹ This is Paley's doctrine, embraced by every subsequent conservative apologist. Radzinowicz explicitly rejects it on the grounds that the divergence between the law and its administration was increasing (Radzinowicz, vol I, p. 164, n. 59). His argument ignores the probability that Parliament passed many laws in part *because* they knew that they would not be rigorously enforced; that is, that they legislated on the basis of their experience. On the evidence for divergence, see above, p. 23, n. 1.

⁹² 'Some Thoughts on the Approaching Executions', *Works*, vol. IX, p. 270.

⁹³ See above p. 23, n. 1.

laws, which must be observed to the letter.⁹⁴ But Beccaria's plan made no provision for the needs of government. The conservative gentlemen of England balked not only at the 'unconstitutional' police that such plans required: they instinctively rejected rational plans as pernicious. A complete rationalization of the criminal law would remove those very elements of discretion, such as the pardon, which contributed so much to the maintenance of order and deference. Beccaria's thought, as Venturi has printed out, was no mere melange of humanitarianism and reason. His machine-like system of judgement and punishment would work only where differences of power between men did not exist, where the 'perhaps unnecessary right of property' had disappeared. His principal European opponents seized on this fact: his ideas, they claimed, spelt the end of all authority.⁹⁵

In England the opposition was muffled, since the rhetoric of Whiggism denied that arbitrary measures existed and claimed that the criminal law was already fixed and determinate. Most of the opponents of reform therefore argued only that it was impossible to create a schedule of crimes and punishments complete enough to do 'justice' to the subtle differences between cases. But there were hints even in England of the deeper fears for authority. In 1817 Christian, always a frank defender of the unreformed law, recalled Livy's description of the fixed laws enacted after the expulsion of the Roman kings:

The King was a man from whom you might obtain by petition, what was right, and even what was wrong: with him there was room for favour and for kindness: he had the power of showing his displeasure, and of granting a pardon; he knew how to discriminate between a friend and an enemy. The laws were a thing deaf and inexorable, more favourable and advantageous to the weak than to the powerful: they admitted of no relaxation or indulgence, if you exceeded their limits.

'He knew how to discriminate between a friend and an enemy'—no criminal code could do that, in Christian's opinion. And had not the French Revolution shown that rigid laws could favour the poor rather than the propertied? With such reforms, the judge concluded, 'we should all be involved in republican gloom, melancholy, and sadness'.⁹⁶

Throughout the period we have been considering, the importance of the law as an instrument of authority and a breeder of values remained paramount. The English ruling class entered the eighteenth century with some of its strongest ideological weapons greatly weakened. The Divine Right of Kings had been jettisoned in the interests of gentry power, but the monarchy lost as a consequence much of its potency as a source of authority, and so too did religion. At the same time control had flowed away from the executive in the extreme decentralization of government which characterized the century. With Stuarts plotting in Europe, Jacobitism suspected everywhere at home, and a lumpily unattractive German prince on the throne, English justice became a more important focus of beliefs about the nation and the social order. Perhaps some of the tension abated after the last Jacobite attempt in 1745, which may help to account for Blackstone's relatively favourable attitude to reform in mid-century. But within a few decades renewed assaults on the structure of authority—the riots of 1766 and 1780, Wilkes and the French Revolution—determined the English ruling class to repel any attacks on the mystery and majesty of the law.

In doing so they apparently sacrificed some security of property. Romilly and the rest of the reformers were undoubtedly right that convictions in the courts were uncertain, and that the occasional terror of the gallows would always be less effective than sure detection of crime and moderate punishments. Yet the argument had little weight with the gentry and aristocracy. In the first place they had large numbers of personal servants to guard their plate and their wives. Their problem was not attack from without but disloyalty within their houses. No code of laws or police force would protect them there. Their own judgement of character and the fair treatment of servants within the family were the only real guarantees

⁹⁴ Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci, New York, 1963, ch. 4, p. 16.

⁹⁵ Franco Venturi, *Utopia and Reform in the Enlightenment*, Cambridge, 1971, p. 101, quoting Beccaria, ch. 30. On this statement compare Paolucci on Beccaria, *op. cit.*, p. 74, n. 39.

⁹⁶ Christian, *Charges*, pp. 278–9.

they could have. Nor did the technicalities of the law bother country gentlemen when they did come to try pilferers of their woods and gardens. For as M Ps they passed a mass of legislation that allowed them, as J Ps, to convict offenders without the trouble of legalistic indictments or tenderminded juries. In cases involving grain, wood, trees, garden produce, fruit, turnips, dogs, cattle, horses, the hedges of parks and game, summary proceedings usually yielded a speedy and simple conviction.⁹⁷ The other crime from which the gentry commonly suffered was sabotage: arson, cattle-maiming, the destruction of trees. Although all these offences were punished by death, few offenders were ever caught. Here too gentlemen knew that a reform of the capital statutes would not increase the certainty of a conviction. Moreover, sabotage was primarily an attack on their authority rather than their property. Their greatest protection against such assaults was acquiescence in their right to rule: the belief in their neighbourhoods that they were kind and just landlords and magistrates. In one area alone were they exposed to the danger of great financial loss from theft. Their largest possession was land. The only way it could be taken from them illegally was by forgery—and it is significant that forgery was punished with unmitigated severity throughout the century, by death.⁹⁸

Lower down the social scale, the property of men in trade and manufacturing and farming was much less secure. In the eighteenth century very few of the offences from which such men suffered were punishable on summary conviction. Instead, to recover embezzled banknotes or shoplifted calico or stolen sheep, it was necessary to go to the expense and trouble of a full criminal trial. Its outcome was always uncertain: the technicalities of indictment or the misplaced sympathies of juries allowed many thieves to escape. After the trial came the misplaced sympathies of petitioners for pardons. Martin Madan, anxious to see property secured by a more rigorous execution of the laws, argued that ‘the outside influences of great supporters’ had too great effect on the prerogative of mercy. The result was that the great indulged their humanity at the expense of lesser men’s property.⁹⁹

There was, therefore, a division of interest among propertied Englishmen about the purpose of the criminal law. The reformers’ campaign spoke to humanitarians of all classes, men revolted by the public agonies of the condemned at the gallows. But their argument that capital punishment should be replaced by a more certain protection of property appealed mostly to that great body of ‘middling men’, almost half the nation, who earned from £25 to £150 a year at mid-century, and created more than half England’s wealth.¹⁰⁰ Although they could use the discretionary elements of the law to a limited degree, their property was the prey of thieves undeterred by terror. Their complaints did not impress a tiny but powerful ruling class, whose immense personal property in land was secure, who could afford to protect their other goods without public support, and who in any case were most concerned with the law as an instrument of authority.

It is in such terms that we must work toward a definition of the ruling class of eighteenth-century England. Far from being the property of Marxist or *marxisant* historians, the term is a leitmotiv in studies of the period.¹⁰¹ Partly this is due to the testimony of the sources: gentry and aristocracy claimed the title with

⁹⁷ The growth of this body of legislation was remarked by lawyers, who sometimes argued that it threatened trial by jury; its expansion paralleled the growth in capital statutes.

⁹⁸ ‘Forgery is also punished capitally, and nobody complains that this punishment is too severe, because when contracts sustain action property can never be secure unless the forging of false ones be restrained.’ Adam Smith, *Lectures on Justice, Police, Revenue and Arms* (1763), ed. Edwin Cannan, 1896, p. 150.

⁹⁹ Madan, *op. cit.*, pp. 55ff.

¹⁰⁰ Derived from the estimates of Joseph Massie in 1760, the figures can be trusted only as general estimates (Peter Mathias, ‘The Social Structure in the Eighteenth Century: A Calculation by Joseph Massie’, *Economic History Review*, 2nd ser, X, 1957, pp. 30–45). According to Massie, families with this range of income accounted for 48 per cent of the population and 57 per cent of the total of all families’ ‘annual income and expenses’. Above them, with incomes of more than £200 were the landed gentry, great merchants and aristocracy. The merchants, 1.6 per cent of the population, accounted for another 8.9 per cent of total income, and the landed classes (1.2 per cent of the population) over 14 per cent.

¹⁰¹ Max Beloff, *Public Order and Popular Disturbances 1660–1714*, 1938, p. 154, discussed the ‘social thinking’ of the Restoration ruling class; David Mathew in *The Social Structure in Caroline England*, Oxford, 1948, p. 8, asserted that ‘within the general social structure the diverse elements were being moulded which would in time form themselves into a ruling class’; W. R.

complete assurance. Its historical usage, however, remains imprecise. Usually it has been defined in terms of income or status: the rents of the great landed estate, or the exact meaning contemporaries gave to the word 'gentleman'. Class, however, is a social relationship, not simply an aggregate of individuals. As a relationship based upon differences of power and wealth, it must be sought in the life of the institutions that men create and within which they meet. The law defined and maintained the bounds of power and wealth, and when we ask who controlled the criminal law, we see a familiar constellation: monarchy, aristocracy, gentry and, to a lesser extent, the great merchants. In numbers they were no more than 3 per cent of the population. But their discretionary use of the law maintained their rule and moulded social consciousness. An operational definition of the ruling class—asking who controlled a critical institution like the law, and how they manipulated it—is a more useful approach than drawing horizontal lines in Blackstone's list of forty status levels. For it is necessary to define in detail what it means to rule.

Many historians, confronted with the hegemony of the eighteenth-century ruling class, have described it in terms of absolute control and paternal benevolence. Max Beloff argued that after the Restoration they enjoyed an unparalleled sense of security which explained 'the leniency with which isolated disturbances were on the whole treated, when compared with the ferocity shown by the same class towards their social inferiors in the times of the Tudors and early Stuarts'.¹⁰² It seems more likely that the relative insecurity of England's governors, their crucial dependence on the deference of the governed, compelled them to moderate that ferocity. More recent writing has stressed the importance of patronage; Harold Perkin has argued that this was the central bond of eighteenth-century society. Patronage created vertical chains of loyalty; it was, in fact, 'the module of which the social structure was built'. Powerful men bound less powerful ones to them through paternalism controlling the income, even the 'life-chances' of the dependent client or tenant or labourer. Such ties, repeated endlessly, formed a 'mesh of vertical loyalties'. Social control in the eighteenth century seems a gentle yoke from this perspective: a spontaneous, uncalculated and peaceful relationship of gratitude and gifts. The system is ultimately a self-adjusting one of shared moral values, values which are not contrived but autonomous. At one point the author concedes that insubordination was 'ruthlessly suppressed'. But mostly social solidarity grew quietly: 'those who lived within its embrace . . . [called it] friendship.'¹⁰³ Coercion was an exceptional act, to handle exceptional deviance.

Yet it is difficult to understand how those loyalties endured when patronage was uneven, interrupted, often capricious. Many contemporaries testified to the fickleness of wealth: disappointed office-seekers, unemployed labourers or weavers, paupers dumped over parish boundaries. Riot was a commonplace; so too were hangings. Benevolence, in short, was not a simple positive act: it contained within it the ever-present threat of malice. In economic relations a landlord keeping his rents low was benevolent because he could, with impunity, raise them. A justice giving charity to a wandering beggar was benevolent because he could whip him instead. Benevolence, all patronage, was given meaning by its contingency. It was the obverse of coercion, terror's conspiracy of silence. When patronage failed, force could be invoked; but when coercion inflamed men's minds, at the crucial moment mercy could calm them.

Brock wrote that country life taught 'a code of behaviour and first lessons in public life' to the eighteenth-century ruling class (*New Cambridge Modern History*, vol VII, 1957, p. 243); Esther Moir referred to the landowners a 'the backbone of the traditional ruling class' in *The Justice of the Peace*, Harmondsworth, 1969. Latterly a certain embarrassment occasionally has attached to the term. Peter Laslett, in *The World We Have Lost*, 1965, discussed at length why the governors of eighteenth-century England constituted the only class, but avoided joining the evocative words: England had one class, but they were a 'ruling segment'. Harold Perkin, however, with a similar interpretation of the dynamics of the society, readmitted the term. *The Origin of Modern English Society*, 1969, p 56.

¹⁰² Beloff, op. cit., p. 154.

¹⁰³ Perkin, op. cit., pp. 32–49, a sustained historical use of the idea of 'social control' currently orthodox in the sociological literature. The origins of the concept lie at least as far back at Durkheim's 'social conscience', and it has a marked ideological history of its own. Its increasingly common usage in historical writing, often with little critical examination, therefore bears watching. Its assumption of the relative autonomy of normative sanctions seems dubious, particularly in descriptions of the power of the state.

A ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not grow simply in complex societies: they are twisted, invoked and often consciously created. Eighteenth-century England was not a free market of patronage relations. It was a society with a bloody penal code, an astute ruling class who manipulated it to their advantage, and a people schooled in the lessons of Justice, Terror and Mercy. The benevolence of rich men to poor, and all the ramifications of patronage, were upheld by the sanction of the gallows and the rhetoric of the death sentence.

John H. Langbein,[†]

“Albion’s Fatal Flaws”^{*}

Douglas Hay’s essay, “Property, Authority and the Criminal Law,” which sounds the opening shot for the collection titled *Albion’s Fatal Tree*,¹ has attracted a huge following, especially outside specialist legal history circles. Hay’s main thesis is that some of the most characteristic features of eighteenth-century English criminal procedure for cases of serious crime require to be understood as “a ruling-class conspiracy”² against the lower orders. In the present paper I shall show that when tested against detailed evidence of the work of the felony courts, Hay’s thesis appears fundamentally mistaken. (I shall not be discussing the other essays in the *Albion* volume.)

Although the Hay essay has several strands, in its most important dimension it purports to explain a celebrated peculiarity of the criminal justice system of the eighteenth century, namely, the large number of offenses punishable by death. The list of offenses nominally capital grew throughout the century; various authors reckon it at upwards of 200 by the early nineteenth century,³ although that figure is bloated in ways that I shall discuss later. In the actual administration of the criminal law, however, capital punishment had been on the wane since the sixteenth century, in the sense that a declining proportion of persons convicted of felony were executed. The puzzle is, why did the “penal death rate”⁴ decline while the legislature was threatening ever more capital punishment?

The conventional account of this paradox is Radzinowicz’s.⁵ I have always found it fundamentally persuasive. I still do, and I shall return to it at the end of this paper. Hay offers quite a different explanation. The widening gap between the expanding threats of death on one hand and relatively infrequent imposition of the death penalty on the other hand enhanced the discretion of the elite to decide whom to execute and whom to spare. It was “a ruling-class conspiracy” to use the criminal law in order to extract deference from the lower orders. Hay detects this self-serving discretion throughout the main phases of the criminal process—prosecution, trial, sentencing, and executive clemency.⁶

[†] Max Pam Professor of American and Foreign Law, University of Chicago. An earlier version of this paper was presented to the October 1981 meeting of the American Society for Legal History. Suggestions and references from John Beattie, J.S. Cockburn, G.R. Elton, Lawrence Friedman, Charles Gray, Thomas Green, Douglas Hay, R.H. Helmholz, Dennis Hutchinson, Mark Kishlansky, David Langum, Norval Morris, A.W.B. Simpson, Lawrence Stone, and John Styles are gratefully acknowledged. [The piece was subsequently published in *Past and Present* 98 (1983) 96–120. CD]

^{*} Copyright (c) John H. Langbein, 1982. All rights reserved.

¹ Douglas Hay, “Property, Authority and the Criminal Law,” in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17 (D. Hay *et al.* eds., London 1975) (hereafter cited as Hay).

² *Id.* at 52.

³ For various counts see 1 Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*. at 3–4 (London 1948) but see *infra* text at note 63.

⁴ The famous phrase of 3 J.C. Jeffreson, *Middlesex County Records* xx (London 1888).

⁵ Discussed *infra* text at notes 55–58.

⁶ *Prosecution*: “it was in the hands of the gentleman who went to law to evoke gratitude as well as fear in the maintenance of deference.” Hay 41. *Trial*: “The nature of gratitude of the criminal trial gave enormous discretion to men of property (in addition to) the prosecutor.” *Id.* at 42. *Sentencing*: character evidence from “employers, respectable farmers and neighbouring gentlemen” might “induce the judge to pass a lesser sentence, or recommend a pardon.” *Id.* at 43. *Clemency*: the pardon process “epitomizes the discretionary element of the law . . .” *Id.*

Hay does not seriously claim to have identified a conspiracy in the conventional sense of the term, that is, an agreement to promote unlawful or wicked ends. Rather, he says, the plot was one in which “the common assumptions of the conspirators lay so deep that they were never questioned, and rarely made explicit.”⁷ This way of speaking directs attention away from the mechanism of class concert, which the essay hardly clarifies, and toward the supposed object, emphasized incessantly, of class domination and oppression (“the law . . . allowed the rulers of England to make the courts a selective instrument of class justice. . . .”⁸).

I think that a critic interested in broad questions of Marxist historical method might take a stern view of so ambiguous a notion of conspiracy, but that is not my mission. Still less do I wish to bring the general tenets of Marxist theory into questions. It is true that I am criticizing a Marxist work, and that my own predilections are non-Marxist, but my critique would be largely unaffected if I were to assume that Marx and his followers have correctly characterized the main movements in Western social and political history. Even the most dedicated Marxist would concede that there are a variety of subjects on which Marxist historical method does not throw much light—the history of climatic changes, the invention of the flush toilet, or what have you. In this paper I shall be saying that the aspects of eighteenth-century English criminal procedure emphasized in the Hay essay belong on that list of subjects. The criminal law and its procedures existed to serve and protect the interests of the people who suffered as victims of crime, and they were overwhelmingly nonelite.

I. Sources

I shall develop this view by drawing on data from a group of 177 cases conducted at four sessions of the Old Bailey during the years from 1754 to 1755. The data comes from a study⁹ being published elsewhere, which is devoted to reconstructing and establishing the reliability of a pair of independent sources that supply narrative accounts of what was happening at these criminal trials. One of the sources is a set of judge’s notes—that is, courtroom minutes of evidence and jury instructions—taken down by Sir Dudley Ryder, chief justice of King’s Bench, who sat at the Old Bailey for these four sessions and actually presided over the trial of 44 of the 177 cases. Like his brethren on the common law bench, Ryder served intermittently as a trial judge at the Old Bailey. His notes are exceptionally detailed by comparison with others that I have examined, for the simple reason that Ryder knew shorthand. As a youth he had mastered one of the standard shorthand systems of the day. His Old Bailey notes, as well as a diary of his assize notes that Hay used in his essay¹⁰ and which I shall also draw upon, have been transcribed into typescript by a cipher expert.

The four Old Bailey sessions at which Ryder sat during his brief judicial career were also the subject of a series of contemporary pamphlet reports, called the Old Bailey Sessions Papers. The pamphlets were prepared for a lay readership and sold on the streets of London immediately after the trials. I have written about their origins and characteristics in an article published a few years ago.¹¹ The pamphlets continue to be my main source for the detail of the criminal trials that I shall be discussing for the Ryder years. I have used the Ryder notes both to confirm the reliability of what the pamphlets report, and to restore some of the legal detail that the pamphlets bleached out.

⁷ Id. at 52.

⁸ Id. at 48.

⁹ John H. Langbein, *The Judge’s Notes of Sir Dudley Ryder 1754–1756: A New Window on the History of the Criminal Trial*, 49 *University of Chicago Law Review* (1982) (forthcoming). Ryder’s Old Bailey notes appear as Document No. 14 of the transcribed notebooks, which I shall hereafter cite as *Ryder Old Bailey Notes*. The manuscript and a copy of the transcript are deposited in Lincoln’s Inn. The diary, hereafter cited as *Ryder Assize Diary*, is transcribed as Document No. 19(f), Volume 1129 of the Harrowby Manuscripts, Sandon Hall. Copies of both transcripts have also been deposited at the University of Chicago Law School Library.

¹⁰ Hay 28–29.

¹¹ John H. Langbein, *The Criminal Trial before the Lawyers*, 45 *University of Chicago Law Review* 263, 267–72 (1978). For further discussion see Langbein, *supra* note 9.

In emphasizing a two-year period from mid-century I run the usual risk of sampling error, and I shall be unable to correct adequately for developments later in the century. (The Hay essay also relies heavily but not entirely on mid-century sources.) The main objection to basing a critique of Hay's essay on Old Bailey sources is that London was uniquely urban, whereas Hay's essay blends provincial and London sources. To be sure, we do see less sheeptheft and more shoptheft in London than we would find in Lancashire. Fortunately, when such issues arise in this paper, I shall be able to refer to the findings for provincial Essex contained in a splendid paper by P. J. R. King of Clare Hall, Cambridge.¹²

I should also point out that English criminal procedure was very much a national system. Although a few details of Old Bailey practice were peculiar,¹³ the fundamental principles of English criminal procedure applied equally in the metropolis and in the provinces. However much the clientele differed, the procedural institutions were identical. Not only were the rules the same, so were the judges. The royal judges who took turns staffing the Old Bailey were also taking turns sitting on the assize circuits. Dudley Ryder presided at the Old Bailey in April, on the Home Circuit in August, then back at the Old Bailey in October.

II. Offenses and Offenders

Let me now turn to the task of bringing some of this data to bear on Hay's essay. An itemization of the offenses in my sample for 1754-1756, representing four months' worth of all the cases of serious crime prosecuted in the metropolis, will provide a convenient illustration of the actual business in the court of capital jurisdiction.¹⁴ Prosecutions for felony in the eighteenth century were for offenses that had been felony for centuries before. The law that the courts had occasion to enforce in the eighteenth century was not for the most part the law that the contemporary legislature was enacting:

homicide	3
breaking and entering	6
highway robbery	4
livestock theft	6
pocketpicking	11
shoptheft	19
theft from lodgings, inns, pubs	13
domestic theft	14
thefts from workplaces or employers	13
other thefts, 40s or over	16
other thefts, under 40s	54
receiving stolen goods	11
forging a will	1
aiding a jailbreak	1
assault	2
perjury and abuse of legal process	3

¹² P.J.R. King, "Decision-makers and Decision-making in the 18th Century Criminal Law: The Social Groups Involved in the Punishment of Property Offenders and the Criteria on Which Their Decisions Were Based" (typescript, March 1981). Mr. King's paper, still unpublished, was presented to a conference in April 1981.

¹³ E.g., (1) the Old Bailey sat eight times a year, provincial assizes twice; (2) the Old Bailey had a permanent judge, the Recorder of London, as well as common law judges like Ryder; the recorder pronounced sentence and conveyed recommendations for clemency to the monarch on behalf of the court; (3) the pretrial process that culminated in trial before the Old Bailey was more systematic, on account of the work of the quasi-official "court justice (JP)" for Middlesex and the institution of "the sitting Alderman" in the City. For discussion see the forthcoming paper cited supra note 9.

¹⁴ These are the offenses prosecuted at the Old Bailey in October 1754, April and October 1755, and April 1756, the four sessions at which Dudley Ryder was among the trial commissioners. I have tried to categorize the offenses in lay terms; I have tabulated the offense in each case as charged, regardless of whether the jury returned a lesser offense or acquitted outright; and when a case involved multiple charges I have tabulated only the most serious, in order to avoid double counting.

The prosaic nature of these offenses will come as a surprise to readers who have taken seriously Hay's preoccupation with such legislation as that against food riots and workplace insurrections.¹⁵ In my data we do not see offenses that exemplify the advance of pre-industrial capitalism. Virtually all of the offenses had been felonious back into the Middle Ages, and they would be proscribed under the laws of modern socialist states. The Old Bailey was trying the eighteenth-century counterparts of those small-time cheats who steal towels from the Holiday Inn and perfume from the counter at Woolworths. It is very hard to find figures worthy of romance, even social romance, among the shoplifters, pickpockets, pilfering housemaids, and dishonest apprentices who populated the Old Bailey dock.

To be sure, most of them were poor, as criminals tend to be. Anatole France made the most of that in a famous utterance. "The law (of France)," he said, "in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹⁶ Actually, to the extent that our sources let us see anything about the economic circumstances of the persons accused, we can say that the culprits tried at the Old Bailey are seldom destitute. Some plead hunger or say they are unemployed, but in the main we see employed persons who have yielded to temptation rather than necessity. To turn these little crooks into class warriors, one must wear rose-colored glasses of the deepest hue.

III. Prosecution

If the criminals were often poor, their victims were not much better off—a point that is downplayed in Hay's essay.¹⁷ In the Old Bailey cases we often cross a class line when we move from the offender to his victim, but not a class gulf. The victim is usually more propertied than the person who victimized him, although often only slightly. I have not hit upon a way of quantifying this, in part because information about the social status of the victim is so haphazard in the Old Bailey sources, but I think that anyone who studies a volume of the Old Bailey Sessions Papers will conclude that the prosecutors are not very often drawn from the propertied elite. They are typically small shopkeepers, artisans, lodging-house keepers, innkeepers, and so forth. Included on the list of prosecutors for the first dozen cases in the October 1754 sessions, for example, are a loom maker, a brass founder, a wine merchant, and a pewterer, each prosecuting pilfering employees; a baker's servant and a journeyman tailor prosecuting thieving prostitutes; a lodging housekeeper and a former roommate prosecuting for the theft of furniture and domestic goods from lodgings; a callico printer who was mugged on the street; and a major who prosecuted a stablehand for horsetheft.

Mr. King's data corroborates the Old Bailey sources in a very helpful way. He has worked with Essex quarter sessions records, mostly recognisances, in which descriptions of the victims appear fairly regularly. I stress, as Mr. King does, that there are important differences between cases triable at quarter sessions on the one hand and at assizes or the Old Bailey on the other hand; in particular, the felonies tried at quarter sessions were noncapital, that is, petty larceny. Nevertheless, it is very telling that Mr. King's tabulations of the occupational status of prosecutors for the period 1760–1800 show that "(a)round 90% of these prosecutors came from three groups—the farmers, the tradesmen and artisans, and the labourers."¹⁸ Mr. King further points to the works of Brewer and Styles and of David Philips, both published after the Hay essay, which reach similar conclusions.¹⁹ Prosecution was not a preserve of the ruling class.

¹⁵ See Hay 20–21 ("the class that controlled Parliament was using the criminal sanction to enforce two of the radical redefinitions of property which gentlemen were making in their own interests during the eighteenth century").

¹⁶ Anatole France, *Le Lys Rouge* (1894), quoted in John Bartlett, *Familiar Quotations* 655 (15th ed. 1980).

¹⁷ "The poor suffer from theft as well as the rich, and in eighteenth-century England probably far more poor men lost goods to thieves, if only because the rich were few and their property more secure." Hay 37.

¹⁸ King, *supra* note 12, at 9.

¹⁹ *Id.* at 3, 12, citing John Brewer & John Styles, "Introduction," *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* 18–19 (London 1980); David Philips, *Crime and Authority in Victorian England: The Black Country 1835–1860*, at 123–29 (London 1977).

Indeed, one of the main themes in the history of the administration of the criminal law in the second half of the eighteenth century was the effort to encourage prosecutorial activity by the lower orders. In one sense this is a development that traces back to the 1690s, when Parliament began to enact the statutes that offered rewards for successful prosecution of certain heinous felonies, including highway robbery, burglary, housebreaking, and horsetheft.²⁰ In the 1750s the campaign waged by Henry Fielding to obtain a subsidy for expenses for poor prosecutors and witnesses came to fruition in legislation of 1752 and 1754,²¹ and we know from Dudley Ryder's assize diary that the statutes were being put to use. He tells us that it had become the convention to award five shillings per day in expenses, and in one case he reports that he refused an award to an innkeeper who seemed too prosperous.²²

In disputing Hay's version of the prosecutorial process—that "it was in the hands of the gentleman who went to law to evoke gratitude as well as fear in the maintenance of deference"—I have been arguing that gentlemen prosecutors were few and far between. I want also to take modest exception to the notion that since prosecution was private, a potential prosecutor had the discretion to threaten it in self-serving ways. In fact, various factors worked to circumscribe the prosecutor's discretion.

The most endemic aspect of what one might call prosecutorial discretion is the phenomenon of nonreporting of crime. We are all familiar with the recent discussion about whether increases in reported instances of rape reflect increased incidence of the offense, or lessened aversion to reporting it. When we deal with grand larceny, which in all its forms was the predominant eighteenth-century felony, we can be sure that a victim who chose to forgive an offender by not reporting the crime could seldom be stopped. That is true in today's Anglo-American legal systems, it is true in contemporary socialist legal systems. The victim of a property crime has a practical monopoly over disclosure of the offense. All criminal justice systems depend upon the self-interest of owners for the enforcement of the laws protecting property. This is hardly a peculiarity of eighteenth-century English social structure.

Despite the nominally private character of prosecution in English law, there were forces at work that limited prosecutorial discretion. In homicide, of course, the coroner system largely eliminated it, because the coroner investigated every suspicious death. There was no equally comprehensive approach to larceny. As a matter of statutory design, the pretrial binding-over system administered by the justices of the peace (JPs) purported to limit prosecutorial discretion by requiring the JP to bind over to trial "all as do declare anything material to prove the . . . Felony. . . ."²³ Yet this scheme assumed, in the language of the statute, a victim willing to "bring" the accusation to the attention of the JP. There is good reason to think that many potential prosecutors did not bring charges. In his famous essay of 1751, Henry Fielding, who was campaigning to increase the levels of prosecution, stresses that potential prosecutors were either too forgiving, or else too necessitous, to take the time and incur the expense and nuisance of prosecuting.²⁴ Among his complaints Fielding did not find room for the abuse that Hay treats as central, affluent victims supposedly manipulating the prosecutorial power in a self-serving manner.

There were aspects of the pretrial system that limited the discretion of a victim in not reporting to the JP. Whenever the victim needed the JP to help him recover stolen goods—for example, by issuing search or arrest warrants, or by granting immunity from prosecution in order to obtain accomplice disclosures—the JP had notice and was able to bind over. These pretrial investigative steps are frequently evidenced in the Old

²⁰ See the convenient summary in Patrick Colquhoun, *A Treatise on the Police of the Metropolis* 390–92 (7th ed., London 1806).

²¹ 25 Geo. II c. 36, § 11 (1752); 27 Geo. II c. 3, § 3 (1754).

²² Ryder Assize Diary 7, 13. Beattie reports that his "examination of about ten years in the Surrey and Sussex assizes between the 1750s and 1780s reveals a range of awards from about a pound (though one or two were as little as fifteen shillings) to as much as ten pounds. ["A very large number were between one and two pounds, though most were probably between two and three pounds." John M. Beattie, "Judicial Records and the Measurement of Crime in Eighteenth-Century England," in *Crime and Criminal Justice in Europe and Canada* (Waterloo, Ontario 1980) 127, at 130.

²³ 2 & 3 P. & M. c. 10 (1555).

²⁴ Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers* 106 (London 1751).

Bailey cases in my sample, although of course I have no way of identifying the dark figure of unreported events.

When the JP did bind over, it was usually on pain of a forty-pound fine for the prosecutor's nonappearance. Such recognisances survive for most of the Old Bailey trials. In the London Record Office papers for the April 1754 sessions there is a pitiful deposition from a shopkeeper, Moses Smith, who had been "bound (over) to prosecute and give Evidence" against an accused for feloniously stealing a handkerchief out of Smith's shop. Smith explains "that he was taken ill about a fortnight before the (trial, with) a violent Fever which continued for several weeks." Smith sent two of his sureties to the Lord Mayor's clerk to report the problem; the clerk replied that Smith should have his wife attend the trial in his place. "But," the deposition continues, "the said Smith being then so dangerously ill and keeping no Servant (n)or having any person to attend his Shop but his Wife, . . . she could not leave her husband at that time without subjecting him to great Danger." The document concludes with a recital that Smith "did not neglect attending the Sessions with any design to let the (accused) escape any punishment which might have been inflicted on him had he been prosecuted. . . ." ²⁵ I infer that this deposition was in support of an application to be excused from the forty-pound fine. This picture of a wretched little shopkeeper, too poor to be able to hire someone to relieve him and his wife on the day of the trial, and now terrified of the fine for nonprosecution, contrasts strongly with the notion of unbounded prosecutorial discretion.

Finally, I should advert to another dimension of prosecutorial discretion, which concerns the decision not of whether to prosecute, but on what charge. Ordinary grand larceny was subject to benefit of clergy, meaning in practice that first-time offenders would be transported rather than executed. However, many, perhaps most property offenses could be characterized as something more than ordinary grand larceny. A variety of statutes dealing with thefts from the person, from dwelling houses and shops, and on the highway, withdrew benefit of clergy when these larcenies involved goods above particular amounts. The issue that I do not yet understand is how prosecutors arrived at the decision of whether to invoke these special statutes when the facts permitted. In some of the Old Bailey cases it is clear that the indictment itself downvalues the goods, or neglects to charge an aggravating circumstance, for example, that the offense was committed in a dwelling house or a shop. In other cases when such matters are charged, or fully charged, we see juries downvaluing the goods or refusing to find the aggravating circumstance, in order to make the offense clergyable and spare the culprit from the capital sanction. The patterns of indictment downcharging seem sufficiently recurrent that we may doubt whether there was much room for prosecutorial caprice. I suspect that the JPs and the clerks of assize and their Old Bailey counterparts had an important hand in advising prosecutors how to charge, ²⁶ and that they were guided primarily by their sense of what verdicts juries were customarily prepared to return in various circumstances.

I want to concede, although the actual evidence for it is thin, that elite victims must have been treated with greater courtesy, and allowed greater prosecutorial discretion, than victims like Moses Smith who came from lower social orders. Hay points to a single case, evidenced in the diary of a Lancashire squire, in which both the accused thief and the squire-prosecutor behave as though the prosecutor retains a power of nonprosecution, even though the prosecutor had used the JPs of Liverpool to obtain a search warrant and to conduct a pretrial examination of the accused. ²⁷ If we assume that this was not an aberration, it shows us no more than that the prosecutorial system was not an engine of egalitarianism. Of course, the prosecutorial system of an aristocratic society will not be antithetical to the patterns of deference that otherwise pervade the society. What I resist is the idea that such practices justify treating the prosecutorial system as having

²⁵ Corporation of London Record Office, Sessions Papers, April 1754 Sessions, loose document, unnumbered, commencing "Moses Smith of Aldersgate . . ."

²⁶ In the case of Thomas Rolf, discussed *infra* text at notes 42-45, the prosecutrix testified that she thought the money stolen from her amounted to more than eight shillings, but she valued the sum at five shillings on the advice of the court justice, John Fielding, who told her, "Do it rather under than over." Ryder Old Bailey Notes 30.

²⁷ Hay 41 n.2., citing Blundell's Diary and Letter Book: 1702-1728, (M. Blundell, ed., Liverpool 1952)109-11.

been constructed for the purpose of furthering the class interests of the elite. It is one thing to avoid conflict with the privileged orders, another thing to promote class aims.

I think that the whole of the criminal justice system, especially the prosecutorial system, was primarily designed to protect the people, overwhelmingly nonelite, who suffered from crime. One can argue, as I am prepared to, that it was a great error on the part of the English to attempt to perpetuate a system of private prosecution and private policing from a medieval setting, where it may have made sense, to the changed circumstances of a more urban and impersonal eighteenth-century society. That was part of a set of constitutional convictions that contemporaries held deeply, even though in retrospect their concern looks to have been misplaced. Within the confines of a system that lacked professional prosecution, steps were taken to make the system serve the interests of the nonelite prosecutors who predominated. They were aided and afforded by the JPs, and in some cases subsidized and rewarded for prosecutorial efforts. I would venture to predict that when we finally obtain a satisfactory history of the prosecutorial system of the eighteenth-century, self-serving gentlemen will be seen to have played an inconsequential role.

IV. Juries

Whereas Hay has exaggerated the extent of prosecutorial discretion, he has underemphasized the importance of jury discretion. I had occasion above to refer to the role of juries in downvaluing goods or returning what we today call a lesser included offense. I shall follow John Beattie in calling both phenomena by the label of "partial verdict." Acquittals and partial verdicts receive short shrift in Hay's essay. I shall dwell on them because I think that his theory of ruling-class conspiracy is impossible to reconcile with the reality of jury discretion.

Beattie has computed for the period 1736–1753 that about 10 per cent of the bills submitted to the Surrey grand jury in urban cases of capital crime were dismissed.²⁸ I am concerned with the second jury, the trial or petty jury. Beattie has computed that a third of the indictments found by the Surrey grand juries in capital cases led to acquittals by the petty juries, and another thirty per cent resulted in partial verdicts.²⁹ My figures for the Old Bailey are in accord. The 177 cases produced 203 accused, of whom 84 were acquitted. I have not tabulated the frequency with which juries downvalued or convicted of lesser offenses for the whole of my sample; in the October 1754 sessions, for which I do have the figures, of 31 guilty verdicts 14 involved these two types of partial verdict.

Both the acquittals and the partial verdicts follow patterns that are principled and predictable. When our sources give us narrative accounts of the trials we see that acquittals are usually returned in cases in which the evidence falls short of the standard of proof that was understood to be appropriate in criminal cases. Virtually all cases in which there was only a single accusing witness resulted in acquittal, as did cases in which the identification of the accused was put in any serious doubt.

The partial verdicts are especially interesting, because they were in truth sentencing decisions. They usually had the effect of reducing the sentence from death to transportation; in the relatively few cases in which the goods were valued below a shilling, the effect was to reduce the sentence from transportation to whipping. The striking aspect of the partial verdict practice in the cases in my sample is its regularity, hence predictability. In all cases of highway robbery and livestock theft in which juries convicted, they convicted capitally. They returned capital verdicts in most cases of burglary (breaking and entering). Otherwise, juries applied what I would call a strong presumption against capital verdicts, which would be overcome when the circumstances were especially audacious. Old Bailey juries were harsh on professional or gang criminals, which is scarcely surprising in the setting of London's amateurish law enforcement. Capital verdicts for shoptheft and for theft from a dwelling house usually occurred in cases with gang overtones. These cases

²⁸ John M. Beattie, *Crime and the Courts in Surrey 1736–1753*, in *Crime in England 1550–1800* (J. S. Cockburn, ed., Princeton 1977) 155, at 163.

²⁹ *Id.* at 176.

often instanced multiple offenses, and they frequently required the evidence of an accomplice turning crown witness.

If I were going to organize a ruling-class conspiracy to use the criminal law to terrorize the lower orders, I would not interpose autonomous bodies of nonconspirators like the petty juries. If, on the other hand, I were going to reckon the jurors among my conspirators, I would be troubled that they were so predictably humane by the standards of the day.

I find Hay's account of the jury baffling. He wants to make the jurors co-conspirators. He says: "All men of property knew that judges, justices (of the peace) and juries had to be drawn from their own ranks."³⁰ This is not a considered statement, because it assimilates men of great wealth and station to the same "ranks" as those who satisfied the ten-pound-a-year minimum juror qualification.³¹ In his paper on the enforcement of the game laws, Hay points out that the farmers and tradesmen who were the typical jurors had interests different from those of the propertied elite.³² From an Elizabethan sample Joel Samaha has reported finding "ordinary people in the town—petty tradesmen such as alehouse keepers and occasionally even day labourers" sitting on trial juries at Colchester assizes, and he concludes: "To send a suspect to the gallows . . . required the concurrence of every segment in the community, since they were all represented at various stages of the criminal process. . . ."³³ It hardly seems tenable for Hay to align petty jurors with the English social elite.

Hay is also on weak ground when he conjectures: "A panel of the poor would not convict a labourer who stole wood from a lord's park, a sheep from a farmer's fold, or corn from a merchant's yard." Although Hay is careful to say that he does not think that the juries of the day "convicted against the evidence," he speculates that "a more democratic jury might not have convicted at all."³⁴ I have too much respect for the moral integrity of the English poor to believe that they condoned the theft of livestock and victuals. Furthermore, empirical study of twentieth-century juries in the United States squarely contradicts the notion that juries long since democratized and freed of property qualifications are hostile to the law of larceny.³⁵

We may come close to understanding how Hay went astray if we reflect upon a passage such as this, in which Hay takes it for given that the criminal law lacked the adherence of the lower orders. To be sure, there were corners of the criminal law that did not command universal regard. The source of Hay's undoing, I suspect, is that the only part of the substantive criminal law with which he was deeply acquainted when he wrote was the uniquely class-based and arbitrary game law. There certainly was popular dissatisfaction with the game law, but to extrapolate from that bizarre scheme (most of it misdemeanor) to the whole of the law of felony would be a grievous error, just as it would be folly in our own day to equate public attitudes toward marijuana offenses and, say, automobile theft. When Hay speaks indifferently of stealing wood from a lord's park and sheep from a farmer's fold, he is making that sort of error. The property crimes that were of major consequence in the workload of eighteenth-century criminal courts—in particular the theft of livestock, shop goods, and personal and household belongings—were those about whose blameworthiness there was a moral consensus that knew no class lines. That is why men of the nonelite could predominate (as prosecutors and jurors) in convicting persons who committed property crimes.

³⁰ Hay 38.

³¹ The act of 4 & 5 W. & M., c. 24 § 15 (1692), fixed the juror qualification at ten pounds a year for England, six pounds for Wales; §§ 18–19 set the sum for talesmen at five pounds for England and three for Wales. For the city of London the act of 3 Geo. II, c.25 §§ 19–20 (1730), imposed a hundred pound qualification. An act of 4 Geo. II, c.7 § 3 (1731), qualified for jury service in Middlesex men possessed of leaseholds of fifty pounds per year, doubtless in recognition of the prevalence of leasehold conveyancing. These acts are treated as governing in the 1766 edition of Giles Duncomb, *Trials per Pais, or the Law of England Concerning Juries by Nisi Prius*, &c 110, 162–64 (8th ed., London 1766).

³² Douglas Hay, "Poaching and the Game Laws on Cannock Chase," in *Albion's Fatal Tree*, supra note 1, at 189, 211.

³³ Joel B. Samaha, *Hanging for Felony: The Rule of Law in Elizabethan Colchester*, 21 *Historical Journal* 763, 781, 782 (1978).

³⁴ Hay 38, 39.

³⁵ Harry Kalven, Jr. & Hans Zeisel, *The American Jury 76–77* (Boston 1966).

V. Judges

The royal judges who presided at assize and Old Bailey trials for felony were certainly elite figures. The trial judge had a variety of means of influencing the verdict of the jury, especially through his powers to comment on the evidence and to instruct the jurors on the law.³⁶ The limits on judicial influence must, however, be understood. Since there was as yet virtually no diversion of felony cases away from trial by jury,³⁷ most cases that went to trial involved evidence so overwhelming that conviction was a certainty; there was no room for influence. Further, when jurors deferred to judges, it was because jurors understood that judges spoke from wisdom and experience about matters of legal principle. If the jurors had suspected the judges of abusing their authority in order to promote elite interests, jurors would not have been so ready to follow the judges' lead. The history of bitter judge/jury antagonism in the seditious libel cases later in the century seems to me to stand as warning enough against the notion that judges could command jury verdicts by fiat. When the sources for the Old Bailey cases permit us to see what the judges were saying to the juries, it is either heavily doctrinal or else seemingly dictated by the state of the facts.

Hay's boldest theme concerns the supposed discretion of the judges in post-verdict proceedings, that is, sentencing and clemency matters. He commences with a statement that implies, doubtless accidentally, that the judges had direct sentencing discretion to choose between death and transportation.³⁸ In the modern world we are accustomed to judges having a broad sentencing discretion, but that was a nineteenth-century development. In the eighteenth century the English judge had no direct power to choose between death and transportation for felony convicts. The jury, however, did—through the power that it exercised so vigorously of returning a partial verdict that reduced a nonclergyable offense to a clergyable one. At Dudley Ryder's four sessions of the Old Bailey the judges pronounced 20 death sentences and 85 sentences to transportation. In none of these 85 sentences to transportation did the jury verdict permit the judges any discretion to prefer a sentence of death.³⁹

Hay is correct to stress that the trial judge did have considerable influence over the process by which convicts might apply for executive clemency after sentencing. The secretaries of state and the monarch regularly consulted the judges on pardon masters. The pardon process is best understood as an adjunct to the sentencing system, compensating for the lack of direct judicial discretion. Hay thinks that about half the death sentences were commuted, mostly on condition of transportation, and the Old Bailey data is in accord. Of the 20 death sentences in the 177–case sample, nine were certainly carried out; at least seven and probably eight were commuted to transportation; an unconditional pardon issued in one; and in two cases I have been unable to trace post-verdict outcomes.

The crucial question is what factors were motivating the commutations and pardons. Hay notices that “(t)he grounds for mercy were ostensibly that the offence was minor, or that the convict was of good character, or that the crime he had committed was not common enough in that county to require exemplary hanging,”⁴⁰ but Hay makes it clear that he thinks that these grounds formed a mere smokescreen. The judges “were not usually willing to antagonize a body of respectable (local) feeling,” he writes. The pardon system was “capricious;” indeed “the claims of class saved far more men who had been left to hang by the assize judge than did the claims of humanity.”⁴¹ In support of this view Hay offers the evidence of a few cases in

³⁶ Langbein, *supra* note 11, at 284–300.

³⁷ See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 *Law & Society Review* 261 (1979).

³⁸ “The number of convictions because of the increasing use of the royal pardon, by which transportation could be substituted for hanging, on the recommendation of the judges.” Hay 22.

³⁹ The statute of 1717 that had made transportation the regular sanction for clergyable offenses did give the judge the power to impose the lesser sanction of branding, and there are a couple of cases in which that happens in the Old Bailey sources. I should say that I do not understand what conventions may have been prevailing respecting that seldom-used option.

⁴⁰ Hay 43 (emphasis supplied).

⁴¹ *Id.* at 43, 44.

which elite petitioners referred to the previous good character of the accused and the good repute of his family.

Although my main objection to this line of argument is that it is unrepresentative, I want to say in passing that I would not accept the implication that such factors ought to have been extraneous to what were in effect sentencing decisions. In an age before probation and before the legal system had much capacity for imprisonment, the existence of family and employment relationships was highly relevant to the decision whether to release an offender into the community. Likewise, such evidence was relevant to the question of whether to turn an offender loose on the inhabitants of Virginia and Maryland by transporting him. Even today, if a convict can get respectable people to support him, sentencing officers are inclined to give weight to that evidence on the ground that it has predictive value on the question of the likelihood of successful resocialization.

My main grievance with Hay's account of the clemency system is that it highlights a peripheral issue and neglects to explore the factors that were of central importance. The Ryder notebooks give us a good window on this question, and the picture we see bears no resemblance to Hay's. Ryder is preoccupied with the merits in clemency questions, and he resists recommendations that involve only elite connections.

In the Old Bailey notebook there is one striking example, the case of Thomas Rolf, convicted of highway robbery before Ryder at the October 1754 sessions and sentenced to death. The evidence indicated that Rolf, who had been apprehended at the scene, had behaved politely and apologetically to his victim as he robbed her. He told her that destitution led him to his crime: he was unable to find work and his wife was about to deliver their third child.⁴² Ryder records in his notes that he urged the jury to convict, since "compassion could not justify finding contrary to truth," but after they heeded this instruction and found him guilty, the jurors "desired I would intercede for him. I said the Recorder (of London) would have an opportunity of representing it fully to His Majesty. (This is a reference to the recorder's regular report to the monarch after each Old Bailey sessions.) And indeed I never in all my life met with a robbery on the highway so clearly proved to be the effect of mere necessity and committed for want of necessaries to maintain himself, wife big with child, and two infants."⁴³ Ryder made this notation with a view toward advising the recorder, and Rolf thereafter received a free pardon,⁴⁴ that is, one not conditioned on transportation or some other sanction, even though the crown had to pay the prosecutrix the statutory forty-pound reward for apprehending and convicting him.⁴⁵

Ryder's assize diary for the summer 1754 sittings on the Home Circuit contains considerable mention of his practice regarding judicial reprieve, reprieve being the decisive first step towards executive commutation. At Guildford assizes⁴⁶ he noted down his thinking in deciding whether or not to reprieve. He let two burglars hang because "(i)t was a very plain and bad case," but he reprieved a horsethief "because the evidence doubtful," a sheephief "because the evidence not clear," and a pickpocket against whom the evidence amounted in Ryder's view "not quite (to) a clear case."

At the same assizes Ryder resisted elite intervention for clemency in two cases of highway robbery. Richard Gilbert "was recommended to reprieve by Creswick and Andrews his master, being but 20 years old, but being for highway (robbery, and Gilbert having been convicted of two offenses committed the same day, I) did not reprieve him." In the case of Richard Tickner, Ryder refused to reprieve although requested to do so by Arthur Onslow, the Speaker of the House of Commons; Lord Richard Onslow, the lord lieutenant of Surrey; and Henry Talbot, the high sheriff of Surrey. The petitioners went to the king, who sought Ryder's opinion, which Ryder records thus: since "there was no reason to doubt (that Tickner had committed

⁴² Old Bailey Sessions Papers, October 1754, Case No. 504, at 326.

⁴³ Ryder, Old Bailey Notes 21-22.

⁴⁴ Old Bailey Sessions Papers, January 1755, at 80.

⁴⁵ Public Record Office T/53/45, Money Book, at 353.

⁴⁶ Ryder Assize Diary 17-18.

the crime) and there were no circumstances of alleviation, I could not take on myself to say he was an object of mercy . . .”⁴⁷ The king let him hang. At Horsham assizes a few days earlier Ryder sentenced to death a man named Millet for horsetheft. His diary records: “The clerk of assizes pressed me much to transport Millet, the hosteller, but I refused it because it seems to have been his practice (that is, he was a multiple offender), and nobody spoke to his character.”⁴⁸

Ryder’s handling of reprieve and pardon matters was principled. He was trying to take into account factors that ethical sentencing officers still consult. Conceivably, Ryder was an aberration, but on this score we are fortunate once again to have the work of Mr. King. His paper faults Hay for using a small number of quotations from (the judges’ reports to the monarch) to illustrate the importance of one particular factor—the role of respectability or respectable connections. . . .”⁴⁹ To correct for that, King undertook to categorize all the factors mentioned in all the cases in the state papers for the period from 1784 to 1787. He identifies “five broad groups of factors,” of which the respectability of the convict turned out to be the least important. The most frequent was good character, including previous good conduct. Although men of relatively high social standing supplied some of these references, Mr. King found that “the great majority of character witnesses were drawn from the middling sort or from the poorer but respectable sections of the local community.”

Next in order of frequency, he found, was the youth of the offender, which reflected both sympathy and a belief in reformability. Third, Mr. King says, came the circumstances of the crime, especially whether violent. The fourth most commonly mentioned factor was the poverty of the culprit and his family. A little of this may have had to do with the desire to spare the ratepayers from having to support an executed convict’s family, but the more usual concern was to recognize the lesser culpability of someone who acted in distress, and I remind you in that context of Dudley Ryder’s sympathy for the destitute highway robber Thomas Rolf. Furthermore, Mr. King says, wealth hurt. Judges were “very hard on prisoners who were relatively well off and could not therefore plead poverty at the time of the crime.” He quotes a judge’s report from a case in 1764, which says that it is better “that one man in good circumstances should suffer than 20 miserable wretches.” Fifth and last in Mr. King’s sample comes the factor Hay stresses, the respectability of the convict or his parents Mr. King’s numbers for these categories:

1. Character, previous conduct	126
2. Youth, old age, infirmity	61
3. Circumstances of the crime	56
4. Destitution, family poverty	33
5. Respectability	13

Radzinowicz directed attention several decades ago to the prevalence of a broad range of sentencing-type factors in the pardon process,⁵⁰ and Mr. King has now done us a great service in bringing some precision to the subject.

VI. Legitimation

A staple of Marxist argumentation for dealing with contrary evidence is what I call the legitimation trick. Evidence that cuts against the thesis is dismissed as part of a subplot to make the conspiracy more palatable to its victims, to legitimate it. The Hay essay contains some splendid examples. Hay notices the pervasive legalism of English criminal procedure, including “the extreme solicitude of judges for the rights of the accused, (in which contemporary visitors from Europe saw) such a sharp distinction from the usual practice of continental benches.”⁵¹ Hay also mentions the tradition of strict construction against penal statutes and the recurrent quashing of strong prosecution cases for technical flaws. But Hay undertakes to reconcile this

⁴⁷ Id.

⁴⁸ Id. at 13.

⁴⁹ King, *supra* note 12, at 22. The data quoted in text is from *id.* at 22–28.

⁵⁰ 1 L. Radzinowicz, *supra* note 3, at 115–16.

⁵¹ Hay 32.

attention to safeguard with his thesis by arguing “When the ruling class acquitted men on technicalities they helped instill a belief in the disembodied justice of the law in the minds of all who watched. In short, its very efficiency, its absurd formalism, was part of its strength as ideology.”⁵²

Now the question that comes to mind is, simply, how does one test that proposition? A revealing manner, I think, is to hypothesize the exact opposite facts. Suppose that the rulers of eighteenth-century England had been operating banana-republic courts, coercing confessions or lynching paupers without trial. Obviously, the ruling-class conspiracy would be equally well evidenced I have to ask, therefore, what kind of thesis it is that can be satisfied by any state of the evidence, and my answer is that it is not a thesis about the evidence, which means that it is not a thesis about history as I know and understand our discipline.

Consider another example, the celebrated case of Lord Ferrers, who as Hay tells us “killed his steward, was captured by his tenantry, tried in the House of Lords, sentenced to death, executed at Tyburn, ‘like a common criminal’ as the publicists never tired of repeating.”⁵³ Hay dismisses such events as “part of the lore of politics that in England social class did not preserve a man even from the extreme sanction of death.”⁵⁴ But suppose instead that Lord Ferrers had been privileged to slay as many social inferiors as he pleased, suppose, that is, that the English had immunized the elite from capital punishment. Well, of course, that would fit the thesis just as conveniently. Consequently, the thesis is simply not testable. It floats above the evidence, it is self-proving. I am reminded of the way that some adherents of another economic-determinist school, the modern law-and-economics movement, are able to dismiss contrary evidence: the market makes everything efficient, and anything that is not is a consumption choice.

VII. The Statutes

Laying aside Hay’s ruling-class conspiracy, what does explain the eighteenth-century paradox—the profusion of capital statutes in an era of declining capital punishment? I do not have an answer, much less a thesis with the elegance of Hay’s. I can, however, point to some factors that I believe bear on this great question.

My starting point is Volume One of Radzinowicz’s *History*, published in 1948.⁵⁵ This work is not in fashion today, for reasons that I do not understand. In my opinion the burst of recent scholarship on eighteenth-century criminal procedure has done little to detract from Radzinowicz’s awesome book. Radzinowicz derived his account from the contemporary tracts and legal literature, as well as from the Parliamentary materials produced during the course of the reform movement that became prominent in the 1770s and ran into the middle of the nineteenth century. Radzinowicz observes⁵⁶ that Eden and Romilly, the legendary proponents of reform, followed the teaching of Beccaria and argued that punishment should be proportioned to the gravity of the crime. English law was wrong, they said, to invoke the death penalty for offenses of vastly different seriousness. Yet well into the nineteenth century, this manifestly sensible position was resisted by adherents of what Radzinowicz calls the theory of maximum severity. These people who supported the heavy English reliance on the threat of capital punishment were preoccupied with the deterrent policy of the criminal law, virtually to the exclusion of competing considerations such as proportionality. Why? They argued—and I think they believed—that England was uniquely dependent upon the deterrent effect of the capital threat because, alone of the great states of the day, England had neither a professional police force nor the system of noncapital sanctions known as penal servitude that had so widely displaced the death penalty on the Continent.

A large chapter of English constitutional and administrative history underlies the eighteenth-century aversion to professional police and corrections. Just as the prospect of a standing army evoked shivers in

⁵² *Id.* at 33.

⁵³ *Id.* at 34.

⁵⁴ *Id.* at 33.

⁵⁵ 1 L. Radzinowicz, *supra* note 3.

⁵⁶ *Id.* at 231ff.

those who thought back to the days of James II, the suggestion that the police power in the localities be turned over to a corps of hirelings raised alarm. A tyrant might use this force to undercut or repress the liberties of the political community. The administrative challenge of organizing police and corrections systems was also daunting to contemporaries. The English had scant experience in dealing with the problems of recruiting, training, financing, leading, and controlling such forces. Ultimately, of course, as the urban-industrial age unfolded, the English had to abandon their attachment to amateur law enforcement, but that was the work of the next century; scarcely anyone foresaw it in the eighteenth century when the capital legislation was expanding so greatly.

Radzinowicz emphasizes⁵⁷ the sense of insecurity that resulted from the want of effective policing. Contemporaries felt that they needed every ounce of deterrence that they could get. They had to put so much weight on deterrence because they had so little chance of catching and convicting the undeterred. If the fear of hanging deterred some potential criminals, as most people thought it did, then the capital threat was worth making. Likewise, the want of any alternative to the capital sanction better than transportation had a great bearing on the extension of capital punishment to offenses created in the eighteenth century.

I think that Radzinowicz's account of the explosion of capital statutes in an age of declining capital punishment has two major virtues when contrasted with Hay's.⁵⁸ First, Radzinowicz takes seriously the evidence of the people who were near to, and in some cases quite influential in, the legislative events. Contemporaries struggled for decades over the relative merits of maximum severity versus proportionality, and I am persuaded that we should listen to them. Second, Radzinowicz has related his explanation to other, fundamental features of the legal system—that is, to the weaknesses in detection and corrections. In that respect I may add that the comparative dimension reinforces Radzinowicz. A notable weakness of Hay's account is that he points to ruling-class self-interest to explain a phenomenon that was distinctively English. Other states of the day had comparable ruling classes, yet the burgeoning of capital legislation in the later eighteenth century was an English peculiarity. Surely it stands to reason that we should look for explanation to such peculiarly English circumstances as those that Radzinowicz identified.

I wish to point to two other peculiarities of the English criminal justice system that help explain the burst of eighteenth-century capital legislation—benefit of clergy, and the conceptual impoverishment of the substantive law.

From the Middle Ages into the eighteenth century, the remarkable institution of benefit of clergy underwent an incessant and contorted transmutation.⁵⁹ Originally a device for preserving ecclesiastical criminal jurisdiction over clerics, it became by 1706 a privilege that anyone convicted of a common law felony could claim in order to obtain exemption from the imposition of the death penalty. Pursuant to legislation of 1717, almost all convicts who pleaded clergy after that date were transported to the British colonies in America for a seven-year term of indentured servitude. By the eighteenth century, therefore, benefit of clergy had drained most of the blood from the common law of crime. In order to preserve the capital threat for a crime that had been or would have been capital under the common law, special legislation had to be enacted making the offense nonclergyable. Some such statutes date from the sixteenth century, and a group of very important ones appeared in the reigns of William and Anne, but most were Georgian.⁶⁰ Accordingly, the so-called expansion of the capital sanction in the eighteenth century was to some

⁵⁷ Id. at 23–35, 248ff, 410.

⁵⁸ I should say, however, that I prefer Hay to Radzinowicz on the question of whether, as Radzinowicz contends, the declining penal death rate of the later eighteenth century was frustrating a legislative preference for higher levels of enforcement. Compare Hay 23 with 1 L. Radzinowicz, *supra* note 3, at 158–64, esp. 164.

⁵⁹ See generally 2 John H. Baker, "Introduction," *The Reports of Sir John Spelman* 327–34 (Selden Society, London 1978); 1 James F. Stephen, *A History of the Criminal Law of England* 458ff (London 1883). Hay dismisses benefit of clergy in a footnote, Hay 22 n. 2.

⁶⁰ See the convenient list of these statutes in Jerome Hall, *Theft, Law & Society* 35643 (2d ed., Indianapolis 1952).

considerable extent only a restoration. This process of piecemeal restoration was a major force in the transformation of the law of crime from a common law field to a predominantly statutory one.⁶¹

This movement from common law into statute law occurred in a legal system that was ill-equipped to handle it. Milsom, speaking of the late medieval period, overstates this point, but let me quote him for the flavor of a difficult notion that I think would repay careful study. “The miserable history of (the law of) crime in England can be shortly told. Nothing worthwhile was created.”⁶² Many aspects of the English medieval heritage had the effect of reducing the legal-scientific dimension of the criminal law by comparison with Continental law—we might mention the heavy use of laymen to decide and to prosecute criminal cases, the virtual absence of lawyers for prosecution and defense, the tiny number of royal judges, the decentralization of the assize system, and the opacity of the general verdict. English criminal law was primitive in matters of offense definition, especially the general part, that set of notions about criminal responsibility that cuts across all criminal offenses (for example, degrees of culpability, the law of attempts, aiding and abetting, capacity, and most of the affirmative defenses). This underdevelopment of the scientific side of English law greatly affected the multiplication of capital statutes. The English did not have 200 separate crimes in the modern sense that could be punished with death. Rather, they had a set of definitions and concepts so patchy that they were constantly having to add particulars in order to compensate for the want of generality.⁶³ The consolidation movement of the nineteenth century illustrates this point well; few offenses were repealed, rather definitions were improved so that the number of separate offenses could be reduced. Stephen, writing nearly a century ago, made the point that the 160 capital offenses that Blackstone complained were in force in the 1760s “might probably be reduced by careful classification to a comparatively small number.”⁶⁴

Not only did English criminal law lack scientific sophistication, on the legislative side it had no central direction. No minister of justice oversaw the administration and amendment of the criminal justice system. Most of the capital statutes, like most of the rest of eighteenth-century legislation,⁶⁵ originated as members’ bills. In such circumstances the extension of capital sanctions to new forms of property was natural enough, by sheer force of analogy. If the capital sanction suited offenses against sheep under Elizabeth, then why not factories under George III? “For once the death penalty is established as the most effective instrument of crime-prevention,” Radzinowicz remarks, “there can be no valid reason for invoking it to suppress one offence and not another.”⁶⁶

Some larger reform of principle is needed to interrupt that process. Legislatures incline to err on the side of severity when considering particular offenses. Particulars are inflationary, because there is no counter-constituency to resist the analogy that extends penal sanctions from one thing to the next. Leniency and proportionality are considerations that come to the fore when a legislature has occasion to compare offenses and sanctions—when, for example, it produces a penal code, or (as in nineteenth-century England) revises major segments of the law.

We can, of course, trace the hand of commercial interests (who were often more petty bourgeois than elite, as I have said before) in a considerable fraction of the eighteenth-century criminal legislation, both capital and noncapital. I doubt that anyone would argue with Jerome Hall’s assessment that “it is in this century that one comes upon the law of receiving stolen property, larceny by trick, obtaining goods by false

⁶¹ See John Styles, *Criminal Records*, 20 *Historical Review* 977, 980 (1977).

⁶² S.F.C. Milsom, *Historical Foundations of the Common Law* 403 (2d ed, London 1981).

⁶³ See, e.g., Radzinowicz’s succinct account of the succession of larceny statutes. 1 L. Radzinowicz, *supra* note 3, at 41–49.

⁶⁴ 1 J.F. Stephen, *supra* note 59, at 470.

⁶⁵ “In the eighteenth century, legislation was not . . . especially a matter for the ministers of the Crown. There was little government legislation apart from routine financial measures . . .” P.D.G. Thomas, *The House of Commons in the Eighteenth Century* 45 (Oxford 1971). On the Treasury’s oversight of revenue bills see Sheila Lambert, *Bills and Acts: Legislative Procedure in Eighteenth Century England* 71–74 (Cambridge 1971).

⁶⁶ 1 L. Radzinowicz, *supra* note 3, at 49.

pretenses, and embezzlement. Here, for the first time, the modern lawyer finds himself in contact with a body of substantive criminal law which he feels is essentially his own.”⁶⁷ New forms of economic activity and commercial organization gave rise to new issues of definition. Yet the very fact that the solutions that were reached in the eighteenth century strike us as essentially modern (on issues of culpability, that is, rather than sanction) suggests to me that these measures were enacted because they were reasonable rather than because a ruling class wrested advantage from others. There is no social interest in failing to criminalize receiving stolen property, larceny by trick, obtaining goods by false pretenses, and embezzlement. The Labour governments of twentieth-century Britain have left this component of the criminal law undisturbed despite its eighteenth-century provenance, and comparable provisions grace the codes of modern socialist states.⁶⁸

VIII. The Rulers

In a recent essay⁶⁹ Richard Sparks makes a point that helps us understand why the Hay thesis is so improbable. The criminal law, says Sparks, is only important “at the margins of social life; . . . in day-to-day affairs it is not all that important to the maintenance of late industrial capitalism’s social order (G)ive me the law of contracts (including contracts of employment), and you can have all the rest of the statute book. . . . (T)he most generally useful laws are likely to be the ones that define . . . ownership and control (of the means of production), and not some ancillary laws that promise to thump individuals for rather trivial kinds of tampering with those means.”⁷⁰ The criminal law is simply the wrong place to look for the active hand of the ruling classes. From the standpoint of the rulers, I would suggest, the criminal justice system occupies a place not much more central than the garbage collection system. Yes, if the garbage is not collected the society cannot operate and ruling-class goals will be frustrated, but that does not turn garbage collection into a ruling-class conspiracy. The Hay thesis, in a similar fashion, confuses necessary and sufficient conditions.

In this paper I have been maintaining two themes about the administration of the criminal law in the eighteenth century. First, most of the discretion was exercised by people not fairly to be described as the ruling class, especially the prosecutors and the jurors. Second, the discretion that characterized this system was not arbitrary and self-interested, but rather turned on the good-faith consideration of factors with which ethical decision-makers ought to have been concerned. The historian does not need a conspiracy theory to explain the discretion, and the discretion does not fit the theory. I concede fully that when men of the social elite came into contact with the criminal justice system in any capacity, they were treated with special courtesy and regard, just they were elsewhere in this stratified society. To seize upon that as the *raison d’être* of the criminal justice system is, however, to mistake the barnacles for the boat.

⁶⁷ Hall, *supra* note 60, at 34–35.

⁶⁸ E.g., Criminal Code of the Hungarian People’s Republic 108, 110 (P. Lamberg, trans., Budapest 1962), S292 (embezzlement), S293 (criminal fraud), S301 (receiving goods unlawfully obtained).

⁶⁹ Richard F. Sparks, *A Critique of Marxist Criminology*, 2 *Crime and Justice: An Annual Review of Research* 159 (1980).

⁷⁰ *Id.* 193–94 (emphasis original).