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**The Judge and the Carpenter**

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**This piece derives from a much longer study of Payne, which will be included in my book Inferior Politics: Social Problems and Social Policy in Eighteenth-Century Britain (Oxford University Press, forthcoming, 2008?)**

Between 1760 and 1782, a London master carpenter by the name of William Payne appeared several dozen times in the court of King's Bench, before William, Lord Mansfield, usually as prosecutor, occasionally as defendant. Payne's appearances arose from his secondary career, as constable, 'reformer' (as contemporaries called people who brought morals prosecutions) and 'informer' (as they called people who prosecuted various infractions under acts that awarded a share of the fine to the prosecutor). Payne was a vigorous, not to say obsessive man, who pursued certain targets with particular diligence: prostitutes, pickpockets, profiteers and papists. He most commonly appeared before the sitting alderman in Guildhall, bringing in nightwalkers and prostitutes who were prosecuted summarily, and other offenders who were committed for jury trial; he appeared more than a hundred times in the witness box at the Old Bailey. His appearances in the King's Bench represent the non-trivial tip of the iceberg of his activity.

There's no doubt that Payne and Mansfield became quite familiar with one another – in their official roles. It was not a cordial relationship. 'A very illiterate man.. and moreover...an evidence in his own cause, because if Payne convicts him, he is entitled to a hundred pounds reward': that was how Mansfield once characterised Payne to a jury. 'No honest man could take a salary from the government and at the same time' encourage a principle which would dethrone the king and set up a popish pretender – that's Payne on, by implication, Mansfield. Though Mansfield upheld, and was presumably happy to uphold, Payne's authority in his routine law-enforcement activities, he was much more troubled by Payne's use of his court to pursue campaigns against profiteers and papists, for Mansfield was committed to the opposite causes: free trade and religious toleration.

I've been working on William Payne on and off for thirty years; some of you have heard me talk about him before; Jim Oldham cites my unpublished work in his edition of the Mansfield Notebooks. I'm now about to publish a long article on Payne, which will incorporate some significant new work, especially on his campaign against profiteers (that is, forestallers and engrossers). Bearing in mind the theme of this conference, in my paper today I want to focus on the Mansfield-Payne relationship, and especially on Mansfield's response to Payne. I want to direct attention to the options open to a judge in this period faced, as Mansfield was, with a litigant using his court in ways the law allowed, but of which the judge did not approve, and I want to look at which of these options Mansfield took at which times, and why.

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Mansfield was longer lived than Payne. He was born about fifteen years earlier, but nonetheless outlived Payne by ten years, dying at the age of 88. In 1719, the year when I believe Payne was born, Mansfield left Scotland to complete his schooling at Westminster. By the time Payne finished his apprenticeship, to a carpenter in Bell Yard (down the side of what are now the main law courts), Mansfield had completed his studies at Oxford and Lincoln's Inn, been called to the bar, built up a reputation in practice, been elected an MP and appointed solicitor general. Payne doesn't seem to have married and set up as an independent householder and master carpenter until he was in his mid 30s; at about the same time, Mansfield became attorney general, and shortly afterwards (1756), was raised to the Lords as baron Mansfield and appointed lord chief justice of the court of King's Bench. Payne, in his new role of householder, became involved in the affairs of the self-governing liberty of the Rolls, in which his house stood; in 1759, he was asked to serve as headborough, that is, as assistant to the constable. The scene was set for Mansfield and Payne to meet.

Religion clearly played a central part in Payne's life: he was a Calvinistic Anglican, follower of George Whitefield (for whom he did a considerable amount of building work), and of probably the most prominent London-based Calvinist Anglican, William Romaine. What they had to say about man's sinful nature and fallen state seems to have chimed well with Payne's experience of London life, on the axis between Covent Garden and St Paul's, which was then well stocked with brothels, pimps, prostitutes, costermongers with a sideline in street gambling and boy pickpockets.

Given Payne's religious affiliations it is not surprising that, during his term as headborough, he should have fallen in with members of a newly revived Reformation of Manners Society, who made it their mission to combat vice and irreligion, by encouraging the prosecution of vice. Payne joined with them in a number of raids on brothels in and around Chancery Lane. Brothel keepers proved formidable opponents, however, and vigorous counter-litigants. It's in that connection that I first find Payne appearing, as a defendant, in the King's Bench. Opponents of reformation found a sympathiser in Charles Pratt (later Lord Camden) at the Court of Common Pleas. Pronouncing judgement against some of the Society's constables for false imprisonment, Pratt announced his pleasure at having a chance to show 'my dislike towards these reformers'. Mansfield was more sceptical. He questioned the probity of a witness in a suit brought against reforming constables at the King's Bench, and encouraged his subsequent, successful prosecution for perjury. That same man had been a key witness in the Common Pleas case. The reformers felt morally vindicated, but, as their supporter John Wesley wrote 'They never could recover the expenses of that suit. Oh lord, how long shall the ungodly triumph?'

The Society collapsed under the weight of its legal debts. But Payne's career in policing, which the Society helped to launch, had only just begun. While headborough and reforming constable, he seems to have fallen in with the city marshals, who coordinated certain aspects of policing across the City of London. Thomas Gates, then recently appointed upper marshal, took his duties seriously, but found it hard to bend his supposed assistants, the marshalmen, to his will: they had purchased their offices and were mainly interested in milking them for fees and

perquisites. Gates hired extra men to help; Payne may well have been among these. He also occasionally secured appointment for a year at a time as a deputy or extra constable, filling the place of a householder nominated for the office who was disinclined to serve. Even when he wasn't a constable, Payne regularly patrolled the stretch along Fleet st, up Ludgate Hill to St Paul's, making citizen's arrests of pickpockets. He gained a reputation among the City's trading classes – which lasted for decades after his death – as an extraordinarily diligent officer. In the late 70s, the City decided to buy out retiring marshmen and to appoint their own candidates to these posts: Payne was the first man to be elected under the new regime, gaining 96 out of 124 votes from members of the appointing body, the City's common council. Though by this time 60 years old, Payne then entered upon a final, characteristically vigorous phase of his career, pursuing a variety of malefactors at the behest of the mayor. These policing activities occasionally brought him into the King's Bench, as prosecutor or defendant. One case found in his favour, *Samuel vs Payne* (1780), became a classic case in the law of arrest without a warrant. There is other evidence that Payne made a practice of approaching people queuing at Guildhall or the Mansion House to obtain warrants, telling them that as a constable he could act on their suspicions, even without a warrant.

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Over and above all this, during the 1760s Payne embarked on two extraordinary campaigns, which for some time ran in parallel, one against profiteers, one against papists. In pursuit of these campaigns, he not merely brought prosecutions (though that was his chief *modus operandi*) but also lobbied (in one instance giving evidence to a House of Lords committee) and wrote pamphlets. He achieved a high public profile: his deeds were widely reported in London and provincial newspapers. In each case, he responded to pervasive public concern. It was the means he found to address these concerns that was distinctive.

The 1760s saw the beginning of what was to prove a decades-long rise in food prices. Of particular concern in the early 60s was the high price of meat; a bad harvest in 1766, also helped direct attention to grain and bread prices. This prompted a flood of correspondence in the newspapers and much pamphleteering; both Commons and Lords set up committees of enquiry. Profiteers, who interfered with the proper operation of the market, by buying up cattle or grain with a view to selling it on at a higher price, attracted much opprobrium. Some of their activities were in contravention of one or another of a series of marketing laws. However, these laws were not normally enforced – except sometimes, in dearth years, against grain dealers.

In 1764, apparently against the background of some consultation and collaboration with the Westminster magistrate Sir John Fielding, Payne brought prosecutions, in the court of King's Bench, against two butchers for 'forestalling the market' by buying cattle from dealers in the fields at Knightbridge, for resale at Smithfield. They were found guilty, and Mansfield sentenced them to fines and short terms of imprisonment. This action, reported in the press, released a further flood of informations and prosecutions which continued for the best part of the next decade. Payne himself brought several further such prosecutions, but he did not act alone; among other prosecutors, especially notable was Robert Williams, who seems to have acted on behalf of some collectivity of retail butchers; prosecutions by Williams at City Quarter Sessions and in the King's Bench were reported in the press as matters of

special moment. Payne for his part clearly acted in close concert with retail butchers, but there's no evidence that he was their agent – and in fact in the early 70s he extended his activities to buttermongering, bringing prosecutions against four buttermongers for buying butter from carts outside the market, and taking it off to resell in their shops.

Though he probably had some supporters, Payne's activities were nonetheless controversial. This was partly because there was debate at the time about whether the consumer was in the end disadvantaged or on the contrary advantaged by the activities of middlemen. It was also possible to suggest that Payne was not motivated, as he claimed, by concern for the public good, and the wish to chastise sinners grinding the faces of the poor, but rather by hope of personal gain: forestalling laws commonly allowed the informer a share of the fine, or part of the value of the good stolen. Had all Payne's prosecutions against buttermongers been successful, for example, he would have stood to gain some £150 -- which wouldn't have been a bad haul for a master carpenter whose net annual income was probably usually somewhere around that level.

In several cases brought by Payne and others we find evidence that Mansfield, and other judges and government officials, tried to blunt the force of prosecutions. Sometimes prosecutor and defendant were encouraged to settle out of court; it might be argued that the defendant had been ignorant of the law, and he might be let off with an admonition not to offend again; numerous cases failed on technicalities. In the case of one of Williams' prosecutions, under an Elizabethan statute which did not allow the defendant's intent to be taken into account, the treasury agreed to remit its share of the fine, though the defendant still had to pay Williams. Room for manoeuvre was in general restricted by prosecutions being brought under statutes that left only a little scope for interpretation. By 1767, a body of opinion had begun to build up in the Commons in favour of their repeal, or at least modification. When better harvests followed and rioting abated, the issue was however shelved.

We don't know at what point Mansfield came to believe that repeal was the way forwards. But in 1772, faced with one of Payne's buttermongering prosecutions, which it seemed difficult to deflect by the accustomed means, Mansfield's patience snapped. He directed the jury to return a special verdict; within days, a motion was made in the House of Commons for a bill to be brought in to repeal the marketing laws; when the draft bill was tabled, it included a clause terminating proceedings in any case then in train. The bill passed quickly through both houses, and became law in June. Although the shift in mood that made possible the repeal of these laws had taken shape against the background of a wide range of initiatives and a tremendous amount of public discussion, two contemporary commentators identify Payne's prosecution as the trigger that precipitated repeal, and the timing supports that interpretation.

The same years saw considerable public concern about a supposed popish threat. Increased official willingness to tolerate, and even support Catholicism as an organised religion became evident following the conquest of Quebec in 1760; this was one source of concern. Protestant polemicists flooded the press with essays and alarmist reports; one contemporary later recalled that at this time 'the field preachers inveighed with the utmost vehemence against popery'. City marshals and marshalsmen

moved into action, closing down ‘mass houses’. And Payne once again set on foot a campaign of prosecutions, mainly against priests, under a statute of 1700, which made saying the mass an offence punishable by life imprisonment; the statute also provided that informers in such cases should be paid £100 reward. In this set of cases, Payne was always the main prosecutor. He secured more than 30 indictments, over a 5-year period, in four metropolitan courts, including the court of King’s Bench.

Once again, this was an issue on which public opinion was divided. Catholics were associated with Jacobite challenges to the Hanoverian regime, and with tyrannous regimes and persecution abroad. Catholic cruelty and persecution, recorded in Foxe’s *Book of Martyrs*, and in the contemporary press was the chief ground on which Payne argued the case for action against popery, in a pamphlet that he published at this time. Suspicion of Catholics was widespread; those strongly committed to toleration in principle, like Burke and Mansfield, had to work hard to maintain their case.

Though Payne had his supporters, there were nonetheless many who saw him as the unsavoury face of anti-Catholicism. Once again, he found difficulty in making his prosecutions stick. Of six prosecutions he brought before Mansfield, not one stuck, and he had much the same experience in other courts. Not only defence counsel but judges were often unsympathetic; Payne’s co-witnesses, humble men of the kind he commonly employed as assistants, often wilted under hostile questioning and professed uncertainty as to what precisely they had seen. In this context, Payne himself sometimes offered to settle prosecutions informally, on condition that accused priests would enter into a bond to desist from exercising their calling in future. Unsympathetic to what he perhaps perceived as an attempt to make the most of a weak position, at least one judge told him that this was not a proper thing to be proposed in court.

On one occasion, nonetheless, Payne did succeed in winning a conviction, at the Surrey Assizes, against the priest John Baptist Maloney, who was sentenced under the statute to life imprisonment. In the face of this, Mansfield convened the twelve judges, and suggested new canons of interpretation. Henceforth juries would be instructed to interpret the offence of saying the mass with a strictness analogous to that observed in certain formal legal matters, but not hitherto in this context. Mass should be found to have been said, it was agreed, only if not a word had been left out – and it was to be suggested to juries that they must suppose that, seeing the informer in the congregation, the priest would have left out a word; unless they were entirely confident that he had not done so, they should not convict. Burke was subsequently to describe the judges’ action in this matter as a breach of ‘the strict rules of their artificial duty’ in the interests of real justice. Payne won no more convictions. Three years later, the priest Maloney was pardoned. Ten years later, the statute was repealed; its misuse by ‘the lowest and most despicable of mankind, a common informing constable of the city of London’ was repeatedly cited in parliament as a reason for taking it off the books. Payne became a leading light among the rank and file of the Protestant Association, founded to protest the repeal of the statute. I think it highly unlikely, nonetheless, that he was among the ‘Gordon rioters’ who set fire to Mansfield’s house in Bloomsbury square in the disturbances of June 1780, or among those who marched out to threaten Mansfield’s country house, Caen Wood. The Privy Council later showed a lively interest in his movements during this time, but failed to

pin anything on him. But he may have thought that Mansfield had got what he deserved.

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What options were open to an eighteenth-century judge, faced with a litigant using his court for purposes of which he disapproved? What use did Mansfield make of these options, and why? In what ways were these options and choices distinctive to this time, place, situation and person? These are the questions with which I want to conclude – and on which I'd like especially to encourage contributions from the audience.

Payne posed most problems for Mansfield when he acted as an informer. Informers had had a bad reputation for centuries, and every so often there were attempts to restructure part of the legal and policing system with a view to bringing some aspect of law enforcement more strictly under official control. Several such moves took place in this period. But the limits of official manpower, and dependency on private individuals to finance most prosecutions, made it difficult for the government to do more than respond to the most troubling forms of abuse. In any case, even had it been feasible, it seems doubtful that there would then have been much public enthusiasm for across-the-board restraint on private initiative in prosecutions: the period saw several outcries against the government's disinclination to let certain politically sensitive prosecutions run their course. In this system of limited official control over prosecutions, judges were less likely than now to find themselves at odds with police or government, more likely to find themselves faced with officious enthusiasts with their own notions of the purposes that courts should serve. Though such things can also happen now. My attention has been drawn to Gouriet's attempts to procure injunctions against the Union of Post Office Workers in the later 1970s as a possible modern parallel.

There were a whole battery of little devices that judges could use to discourage or impede prosecution when they considered such prosecutions badly motivated or against the public interest – for example, they could encourage out-of-court settlements; insist on the most rigorous application of canons of proof, suggest to juries that there were issues about a prosecutor's character and motives, or otherwise seek to influence their interpretation of the law in a fashion adverse to the prosecution. Much of the time of course it's hard to be sure whether judges who took such steps might have done so in the given circumstances, whatever the charge, and when their actions arose from a particular animus against a certain kind of prosecution. Nonetheless there certainly was, and is, often some room for the exercise of judicial discretion in these matters, and it seems to me entirely plausible that Mansfield would deliberately have used it to thwart Payne when he could. (Certainly he didn't scruple to express disapproval. Oldham cites his response to a 1776 motion for an information against Catholics who hadn't taken loyalty oaths: he is reported not only to have refused the motion but also to have 'expressed his disapprobation of this attempt to revive the severity of these very penal laws'.)

One problem, in the case of both marketing and popery cases, was that prosecutions were brought under statutes which did not leave enormous latitude for judicial discretion. Of course, if statutes -- especially old statutes, believed by many to have been effectively defunct -- were evoked against the public interest, there existed an

obvious recourse: to have the statutes amended or repealed. Lord Mansfield was better placed to have a hand in such matters than the modern law lord might be: he had had a very political career, and claimed to have been raised to the Lords independently of his appointment to the bench (though the two appointments were simultaneous); he sat in cabinet in the 1750s and early 1760s; routinely presided over the Lords in the Chancellor's absence, and when not chairing was not shy of joining in debates (even if Almon's Parliamentary Register does index his contributions under the heading 'Mansfield, Lord, interferes in public business...', followed by relevant page numbers.) He did not publicly sponsor particular bills – but some contemporaries thought he played a vital part behind the scenes in promoting the 1772 act repealing laws against marketing offences, and it is clear that he used his influence when he could to promote toleration of Catholics, as indeed also of Dissenters. Nonetheless, his views on what was in the public interest did not always prevail in parliament. In 1772, parliamentary opinion did swing behind repealing marketing laws, so it did prove possible to end Payne's and others' prosecutions by this means – but the issue had been under discussion for some years previously without reaching that conclusion. Stopping Payne's anti-popery prosecutions by repealing the statute under which he prosecuted probably didn't look politically possible in the heat of the crisis; it's suggestive, I think, that the priest Maloney was not pardoned for three years – until after the hubbub had died down.

To thwart Payne's anti-popery campaign, therefore, Mansfield resorted to a strained interpretation of the statute. I think we might take it that this was not his preference. Mansfield had a reputation in his time and since for creatively interpreting the law. But though this would earn him the admiration of Lord Denning, closer to our own day, it is not clear to me that Mansfield wished to assign the courts the kind of independent, critical role, as instruments of broadly conceived justice that Denning did. In *Foone v Blunt* (1776) (another Catholic relief case), Mansfield expressed the orthodox view that whether or not statutes against popery were sound policy, 'as long as they continue in force they must be executed by courts of justice according to their true intent and meaning.' (In that case, he was however able to argue that the true intent and meaning of the statutes was not consonant with an action of which he disapproved). That Mansfield in the face of Payne did, as Burke put it, breach 'the strict rule of his artificial duty' was I think a measure of his discomfort at the position into which the carpenter had driven him.

In conclusion, while I'll be happy to answer any questions people may have about Payne, I'd be interested to hear what you, the audience, might have to say to correct or develop my account of Mansfield's options and choices – and to assess their historical specificity, or otherwise.