

## 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*, has attracted a huge following, especially outside specialist legal history circles.<sup>1</sup> 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" against the lower orders.<sup>2</sup> In the present article 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 offences punishable by death. The list of nominally capital offences grew throughout the century;<sup>3</sup> various authors reckon it at upwards of 200 by the early nineteenth century, 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"<sup>4</sup> decline while the legislature was threatening ever more capital punishment?

The conventional account of this paradox is Radzinowicz's.<sup>5</sup> I have always found it fundamentally persuasive. I still do, and I shall return to it at the end of this article. Hay offers quite a different explanation. The widening gap between the expanding threats of death on one

\* 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, Owen Fiss, George Fletcher, Lawrence Friedman, Charles Gray, Thomas Green, Douglas Hay, R. H. Helmholz, Dennis Hutchinson, Gareth Jones, P. J. R. King, Mark Kishlansky, David Langum, Norval Morris, Richard Posner, A. W. B. Simpson, Lawrence Stone and John Styles are gratefully acknowledged.

<sup>1</sup> Douglas Hay, "Property, Authority and the Criminal Law", in Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975), pp. 17-63.

<sup>2</sup> *Ibid.*, p. 52

<sup>3</sup> For various counts, see Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 4 vols. (London, 1948-68), i, pp. 3-4; but see p. 118 below.

<sup>4</sup> The famous phrase of J. C. Jeaffreson, *Middlesex County Records*, 4 vols. (London, 1886-92), iii, p. xvii.

<sup>5</sup> Discussed on pp. 115-16 below.

hand and relatively infrequent imposition of the death penalty on the other hand enhanced the discretion of the élite 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.<sup>6</sup>

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".<sup>7</sup> This way of speaking directs attention away from the mechanism of class concert, which the essay hardly clarifies, and towards 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 . . .").<sup>8</sup>

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 question. 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 is 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 article 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, people who were overwhelmingly non-élite.

## I

### SOURCES

I shall develop this view by drawing on data from a group of 171 cases conducted at four sessions of the Old Bailey during the years

<sup>6</sup> *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, "Property, Authority and the Criminal Law", p. 41). *Trial*: "The nature of the criminal trial gave enormous discretion to men of property . . . [in addition to] the prosecutor" (*ibid.*, p. 42). *Sentencing*: character evidence from "employers, respectable farmers and neighbouring gentlemen" might "induce the judge to pass a lesser sentence, or recommend a pardon" (*ibid.*, p. 42). *Clemency*: the pardon process "epitomizes the discretionary element of the law . . ." (*ibid.*, p. 43).

<sup>7</sup> *Ibid.*, p. 52

<sup>8</sup> *Ibid.*, p. 48.

from 1754 to 1756. The data comes from a study being published elsewhere, which is devoted to reconstructing and establishing the reliability of a pair of sources that supply narrative accounts of what was happening at these criminal trials.<sup>9</sup> One source 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 171 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 survive for the period, 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 essay<sup>10</sup> and that 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, now called the Old Bailey Sessions Papers.<sup>11</sup> 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.<sup>12</sup> The pamphlets continue to be the main source for the detail of the criminal trials that I shall be discussing for the Ryder years. The Ryder notes both confirm the reliability of what the pamphlets report and add detail, especially legal detail, that the pamphlets bleached out.

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 sheep-stealing and more shop-lifting in London than we would find in Lancashire. Fortu-

<sup>9</sup> John H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources", *Univ. of Chicago Law Rev.*, 1 (1983). The Ryder Old Bailey Notes appear as Document no. 14 of the transcribed notebooks. The manuscript and a copy of the typescript are deposited in Lincoln's Inn. The manuscript diary (hereafter Ryder Assize Diary) is transcribed as Document no. 19(f), volume 1129 of the Harrowby Manuscripts, Sandon Hall. Copies of both typescripts have also been deposited at the University of Chicago Law School Library.

<sup>10</sup> Hay, "Property, Authority and the Criminal Law", pp. 28-9.

<sup>11</sup> During the Ryder years the pamphlets were published in London eight times a year, usually in two parts, and bear the title *The Proceedings on the King's Commissions of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London; and also the Gaol Delivery for the County of Middlesex, Held at Justice-Hall in the Old-Bailey* (hereafter *Old Bailey Sessions Papers*).

<sup>12</sup> John H. Langbein, "The Criminal Trial before the Lawyers", *Univ. of Chicago Law Rev.*, xlv (1978), pp. 263, 267-72. For further discussion, see Langbein, "Shaping the Eighteenth-Century Criminal Trial".

nately, 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.<sup>13</sup> It should also be observed that English criminal procedure was very much a national system. Although a few details of Old Bailey practice were peculiar,<sup>14</sup> the fundamental principles applied equally in the metropolis and in the provinces. However much the clientele differed, the procedural institutions were shared. So were the royal judges who sat in turns at the Old Bailey and rode the assize circuits. In 1755, for example, Dudley Ryder presided on the Northern Circuit in March, at the Old Bailey in April, on the Home Circuit in August, and back at the Old Bailey in October.

## II

### OFFENCES AND OFFENDERS

Prosecutions for felony in the eighteenth century were for offences 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. An itemization of the offences in my sample for 1754-6, 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. (See Table.)

The prosaic nature of these offences will come as a surprise to readers who have taken seriously Hay's preoccupation with such legislation as that against food riots and work-place insurrections.<sup>15</sup> In my data we do not see offences that exemplify the advance of pre-industrial capitalism. Virtually all of the offences had been felonious back into the middle ages, a point Hay has lately acknowledged in another context in an article in this journal.<sup>16</sup> Most of the offences

<sup>13</sup> 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). King's paper, still unpublished, was presented to a conference at the University of Kent, Canterbury, in April 1981.

<sup>14</sup> For example, (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 rotating common law judges like Ryder; the recorder pronounced sentence and conveyed recommendations for clemency to the monarch on behalf of the court; (3) the pre-trial process that culminated in trial before the Old Bailey was more systematic, on account of the work of the quasi-official "court justice" (J.P.) for Middlesex and the institution of "the sitting Alderman" in the City.

<sup>15</sup> See Hay, "Property, Authority and the Criminal Law", pp. 20-1: "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".

<sup>16</sup> Douglas Hay, "War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts", *Past and Present*, no. 95 (May 1982), p. 146: "In spite of the flood of new capital statutes that followed the Restoration, most capital prosecutions continued to be made under Tudor legislation. In the years considered here, 1742 to

(cont. on p. 100)

were only nominally capital, as benefit of clergy pertained and reduced the sanction from death to transportation.<sup>17</sup>

### TABLE

#### OFFENCES PROSECUTED AT DUDLEY RYDER'S FOUR OLD BAILEY SESSIONS 1754-1756\*

|                                     |    |
|-------------------------------------|----|
| Homicide                            | 3  |
| Burglary, breaking and entering     | 7  |
| Highway robbery                     | 4  |
| Livestock theft                     | 6  |
| Pocket-picking                      | 13 |
| Shop-lifting                        | 20 |
| Theft from lodgings, inns, pubs     | 15 |
| Domestic theft                      | 10 |
| Theft from work-places or employers | 13 |
| Other theft, 40s. or over           | 15 |
| Other theft, under 40s.             | 53 |
| Receiving stolen goods              | 13 |
| Forging a will                      | 1  |
| Aiding a gaol-break                 | 1  |
| Assault and robbery                 | 2  |
| Perjury and abuse of legal process  | 3  |

\* Notes and sources: Offences prosecuted October 1754, April and October 1755, and April 1756, the four sessions at which Dudley Ryder was among the trial commissioners. Offences are categorized in the Table in lay terms; each has been tabulated as originally charged, although juries returned lesser offences or acquitted outright in many. When a case involves multiple charges, only the most serious has been tabulated, in order to avoid double counting. In eight cases involving multiple defendants the court tried separate indictments for receiving stolen goods simultaneously with the related larceny cases, which accounts for the discrepancy between 171 trials and 179 offences. Ryder Old Bailey Notes, pp. 1-62; *Old Bailey Sessions Papers* (Oct. 1754, Apr., Oct. 1755, Apr. 1756). See nn. 9, 11 above.

It is very hard to find figures worthy of romance, even social romance, among the shop-lifters, 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".<sup>18</sup> 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

(n. 16 cont.)

1802, at least 95 per cent of the 450 capital charges tried at Staffordshire assizes were based on statutes enacted before 1742". (The main Tudor legislation that Hay has in mind supplied statutory basis for offences that had been common law felonies from medieval times. Developments in benefit of clergy, discussed on p. 117 below, precipitated much of the Tudor legislation.)

<sup>17</sup> Discussed on p. 117 below.

<sup>18</sup> Anatole France, *Le lys rouge* (Paris, 1894), quoted in John Bartlett, *Familiar Quotations*, 15th edn. (Boston, 1980), p. 655.

turn these little crooks into class warriors one must wear rose-coloured glasses of the deepest hue.

### III

#### PROSECUTION

If the criminals were often poor, their victims (whom we see serving as private prosecutors in the Old Bailey trials) were not much better off — a point that is played down in Hay's essay.<sup>19</sup> 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 victims seldom come from the propertied élite. They are typically small shopkeepers, artisans, lodging-house keepers, innkeepers and so forth. Included on the list of victim-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-house keeper and a former room-mate prosecuting for the theft of furniture and domestic goods from lodgings; and a calico printer who had been mugged on the street. Only one — a major who prosecuted a stablehand for horse-stealing — fits Hay's image with any ease.

King's data corroborates the Old Bailey sources in a helpful way. He has worked with Essex quarter sessions records, mostly recognizances in which descriptions of the victims appear fairly regularly. I stress, as 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 non-capital, that is, petty larceny. Nevertheless, it is very telling that King's tabulations of the occupational status of prosecutors for the period 1760-1800 show that "Around 90% of these prosecutors came from three groups — the farmers, the tradesmen and artisans, and the labourers".<sup>20</sup> King further points to the works of Brewer and Styles and of David Philips, both published

<sup>19</sup> Hay, "Property, Authority and the Criminal Law", p. 37: "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".

<sup>20</sup> King, "Decision-Makers and Decision-Making in the 18th Century Criminal Law", p. 9

after the Hay essay, which reach similar conclusions.<sup>21</sup> Prosecution was not a preserve of the ruling class.

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 horse-stealing.<sup>22</sup> 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,<sup>23</sup> 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.<sup>24</sup>

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 non-reporting of crime. We are all familiar with the recent discussion about whether increases in reported instances of rape reflect increased incidence of the offence, 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. But this was hardly a

<sup>21</sup> *Ibid.*, pp. 3, 12, citing John Brewer and John Styles, *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (London, 1980), Introduction, pp. 18-19; David Philips, *Crime and Authority in Victorian England: The Black Country, 1835-1860* (London, 1977), pp. 123-9.

<sup>22</sup> See the convenient summary in Patrick Colquhoun, *A Treatise on the Police of the Metropolis*, 7th edn. (London, 1806), pp. 390-2.

<sup>23</sup> 25 George II, c. 36, s. 11 (1752); 27 George II, c. 3, s. 3 (1754). Hay has remarked upon these and subsequent acts in his recent article, "War, Dearth and Theft in the Eighteenth Century", pp. 147-8, but without attempt to reconcile the earlier essay.

<sup>24</sup> Ryder Assize Diary, pp. 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 L. A. Knafla (ed.), *Crime and Criminal Justice in Europe and Canada* (Waterloo, Ont., 1980), pp. 127, 130.

peculiarity of eighteenth-century English social structure. It is true in today's Anglo-American legal systems and, indeed, in contemporary socialist legal systems. The victim of the property crime has a practical monopoly over disclosure of the offence. Every criminal justice system must depend upon the self-interest of owners for the enforcement of the laws protecting property.

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 pre-trial binding-over system administered by the justices of the peace purported to limit prosecutorial discretion by requiring the J.P. to bind over to trial "all such . . . as do declare anything material to prove the . . . Felony . . .".<sup>25</sup> Yet this scheme assumed, in the language of the statute, a victim willing to "bring" the accusation to the attention of the J.P. 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.<sup>26</sup> 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 pre-trial system that limited the discretion of a victim in not reporting to the J.P. Whenever the victim needed the J.P. 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 J.P. had notice and was able to bind over. These pre-trial investigative steps are frequently evidenced in the Old Bailey cases in my sample, although of course I have no way of identifying the dark figure of unreported events.

When the J.P. did bind over, it was usually on pain of a hefty fine for the prosecutor's non-appearance. Such recognizances survive for most of the Old Bailey trials of the mid-1750s; typically the penal sum they impose is twenty pounds. 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

<sup>25</sup> 2 & 3 Philip & Mary, c. 10 (1555).

<sup>26</sup> Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers* (London, 1751), p. 106.



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 . . .".<sup>27</sup> This picture of a wretched little shopkeeper and his wife, too poor to be able to hire someone to relieve them on the day of the trial, and now terrified of the fine for non-prosecution, 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 offences 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 down-values the goods, or neglects to charge an aggravating circumstance — for example, that the offence was committed in a dwelling house or a shop. In other cases when such matters are charged, or fully charged, we see juries down-valuing the goods or refusing to find the aggravating circumstance, in order to make the offence clergyable and spare the culprit from the capital sanction. The patterns of indictment down-charging seem sufficiently recurrent that we may doubt whether there was much room for prosecutorial caprice. I suspect that the J.P.s and the clerks of assize and their Old Bailey counterparts had an important hand in advising prosecutors how to charge,<sup>28</sup> and that they were guided primarily by their sense of what verdicts juries were customarily prepared to return in various circumstances.

<sup>27</sup> Corporation of London Record Office, Sessions Papers, April 1754 Sessions, loose document, unnumbered, commencing "Moses Smith of Aldersgate . . .".

<sup>28</sup> In the case of Thomas Rolf, discussed on pp. 111-12 below, 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, p. 30.

I concede, although the actual evidence for it is thin, that élite 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 non-prosecution, even though the prosecutor had used the J.P.s of Liverpool to obtain a search warrant and to conduct a pre-trial examination of the accused.<sup>29</sup> If we assume that this was not an aberration, it shows us only that the prosecutorial system was not an engine of egalitarianism. Of course, the prosecutorial system of so stratified a society will be sensitive 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 been constructed for the purpose of furthering the class interests of the élite. It is one thing to avoid conflict with the privileged orders, another thing to promote class aims.

The whole of the criminal justice system, especially the prosecutorial system, was primarily designed to protect the people, overwhelmingly non-élite, 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 non-élite prosecutors who predominated. They were aided and afforded by the J.P.s, and in some cases subsidized and rewarded for prosecutorial efforts. Accordingly, 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 down-valuing goods or returning what we today call a "lesser included offence". I shall

<sup>29</sup> Hay, "Property, Authority and the Criminal Law", p. 41 n. 2, citing *Blundell's Diary and Letter Book, 1702-1728*, ed. M. Blundell (Liverpool, 1952), pp. 109-11.

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 1736-53 that about 10 per cent of the bills submitted to the Surrey grand jury in urban cases of capital crime were dismissed.<sup>30</sup> I am concerned with the second jury, the trial or petty jury. Beattie has computed that the petty juries acquitted in a third of the capital cases in which the Surrey grand juries had indicted; in another 30 per cent the petty juries returned partial verdicts.<sup>31</sup> My figures for the Old Bailey are in accord. The 171 cases produced 203 accused, of whom 84 were acquitted. I have not tabulated the frequency with which juries down-valued or convicted of lesser offences 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. Otherwise, juries applied what should be called a strong presumption against capital verdicts, a presumption that 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 shop-lifting and for theft from a dwelling house usually occurred in cases with gang overtones, often involving multiple offences and requiring the evidence of an accomplice-turned-crown-witness.

<sup>30</sup> John M. Beattie, "Crime and the Courts in Surrey, 1736-1753", in J. S. Cockburn (ed.), *Crime in England, 1550-1800* (Princeton, 1977), pp. 155, 163.

<sup>31</sup> *Ibid.*, p. 176.

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 non-conspirators 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".<sup>32</sup> 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.<sup>33</sup> In the Reverend Martin Madan's *Thoughts on Executive Justice*, a source several times cited by Hay, the author worries that petty jurors at assizes are receiving inadequate instruction from the judge, "as they usually consist of low and ignorant country people!".<sup>34</sup> 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 élite.<sup>35</sup> From an Elizabethan sample 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 . . .".<sup>36</sup> It hardly seems tenable for Hay to align petty jurors with the English social élite.

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

<sup>32</sup> Hay, "Property, Authority and the Criminal Law", p. 38.

<sup>33</sup> The act of 4 & 5 William & Mary, c. 24, s. 15 (1692) fixed the juror qualification at ten pounds a year for England, six pounds for Wales; ss. 18-19 set the sum for talesman at five pounds for England and three for Wales. For the city of London the act of 3 George II, c. 25, ss. 19-20 (1730) imposed a hundred-pound qualification. An act of 4 George II, c. 7, s. 3 (1731) qualified for jury service in Middlesex men possessed of leaseholds of fifty pounds per year, apparently 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*, 8th edn. (London, 1766), pp. 110, 162-4.

<sup>34</sup> Martin Madan, *Thoughts on Executive Justice, with Respect to the Criminal Laws, Particularly on the Circuits*, 2nd edn. (London, 1785), p. 148. In his recent "War, Dearth and Theft in the Eighteenth Century", p. 154 and n. 100, Hay states the point somewhat more softly, saying that "at quarter sessions and assizes trial jurors were drawn from a much higher social class than most of those indicted for theft".

<sup>35</sup> Douglas Hay, "Poaching and the Game Laws on Cannock Chase", in Hay *et al.*, *Albion's Fatal Tree*, pp. 189, 211.

<sup>36</sup> Joel B. Samaha, "Hanging for Felony: The Rule of Law in Elizabethan Colchester", *Hist. Jl.*, xxi (1978), pp. 763, 781-2.

the day “convicted against the evidence”, he speculates that “a more democratic jury might not have convicted at all”.<sup>37</sup> I doubt whether the English poor of the eighteenth century generally condoned the theft of livestock and victuals, and Hay does not produce evidence that they did. Empirical study of twentieth-century juries in the United States — juries long since democratized and freed of property qualifications — squarely contradicts the notion that they are hostile to the law of larceny.<sup>38</sup>

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 granted 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 his essay was the uniquely class-based and arbitrary game law. There certainly was popular dissatisfaction with the game law (and not confined to the poor),<sup>39</sup> but to extrapolate from that bizarre scheme (most of it misdemeanour) 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 towards marijuana offences 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 non-élite could predominate (as prosecutors and jurors) in convicting persons who committed property crimes.

## V

### JUDGES

The royal judges who presided at assize and Old Bailey trials for felony were certainly élite 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

<sup>37</sup> Hay, “Property, Authority and the Criminal Law”, pp. 38-9.

<sup>38</sup> Harry Kalven Jr. and Hans Zeisel, *The American Jury* (Boston, 1966), pp. 76-7.

<sup>39</sup> It would be a mistake to think that hostility to the game laws followed any line between élite and non-élite. Blackstone, for example, who thought the game laws “of so questionable a nature”, implied derisively that the “false grammar” of one of the statutes reflected on those who promoted the cause: William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-9), iv, pp. 174-5. See also P. B. Munsche, *Gentlemen and Poachers: The English Game Laws, 1671-1831* (Cambridge, 1981); P. B. Munsche, “The Game Laws in Wiltshire, 1750-1800”, in Cockburn (ed.), *Crime in England*, pp. 210-28.

law.<sup>40</sup> 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, all those open-and-shut cases went to jury trial that would today be processed in short-form procedures such as plea bargaining or trial "by the bench" (that is, by judges sitting without juries).<sup>41</sup> Accordingly, most cases that went to jury trial in the eighteenth century 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 should stand as warning enough against the notion that judges could command jury verdicts by fiat.<sup>42</sup> When the sources for the Old Bailey cases permit us to see what the judges were saying to the juries, it seems largely dictated by the state of the facts or the law.

Hay's boldest theme concerns the supposed discretion of the judges in post-verdict proceedings, that is, in sentencing and clemency matters. In the modern world we are accustomed to judges having a broad, explicit discretion to fix sentences, 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.<sup>43</sup> The jury, however, did — through the power that it exercised so vigorously of returning a partial verdict that reduced a non-clergyable offence to a clergyable one. Hay is correct to stress that the trial judge had considerable influence over the process by which convicts might receive executive clemency after sentencing. The pardon process is best understood as an adjunct to the sentencing system, compensating for the lack of direct judicial discretion. The secretaries of state and the monarch regularly deferred to the judges on pardon matters.<sup>44</sup>

<sup>40</sup> Langbein, "Criminal Trial before the Lawyers", pp. 284-300.

<sup>41</sup> See John H. Langbein, "Understanding the Short History of Plea Bargaining", *Law and Society Rev.*, xiii (1979), p. 261.

<sup>42</sup> See Thomas A. Green, *The Jury, Seditious Libel, and the Criminal Law* (forthcoming William Andrews Clark Memorial Lib. ser., Univ. of California at Los Angeles).

<sup>43</sup> The statute of 4 George I, c. 11 (1717) that had made transportation the regular sanction for clergyable offences did preserve to the judge the option to impose the lesser sanction of branding, and there are a couple of cases in which that happens in the Dudley Ryder sources under discussion. I should say that I do not understand what conventions may have been prevailing in respect of that seldom-used option. I suspect that a larger sample would show that a disproportionate number of these cases involved married women or gainfully employed fathers — cases in which transportation would have worked hardship on the family (and, perhaps, on the ratepayers as well).

<sup>44</sup> When the trial judges initiated pardon requests, the monarch granted them routinely. Chief Baron Macdonald described the long-established practice to a parlia-

“Roughly half of those condemned to death during the eighteenth century did not go to the gallows”, Hay writes, “but were transported to the colonies or imprisoned”.<sup>45</sup> Data published in 1772 by Theodore Stephen Janssen, who had served as mayor of London in 1755, discloses that for the 23 mayoral years 1749-71 some 443 capital convicts were reprieved (or died in gaol) out of a total of 1,121 sentenced to death at the Old Bailey. Of these 443 who escaped execution, 401 were pardoned for transportation. One indication that these pardons were not awarded capriciously, but with a view to considerations of principle, is that pardon rates varied with the gravity of the offence. Of the 81 persons convicted of murder in Janssen’s figures, 72 were executed; of 17 for attempted murder, 15 were executed; of 362 for highway robbery, 251 were executed; of 208 for house-breaking, 118 were executed. By contrast, only 6 of the 23 persons convicted of shop-lifting above the clergyable limit were allowed to hang; 22 of 90 for livestock thefts; 27 of 80 for stealing privately (picking pockets); 27 of 63 for stealing from a dwelling house in an amount above the clergyable sum; and neither of the two condemned sodomites.<sup>46</sup>

What factors were motivating the commutations and pardons? Hay notices that “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

(n 44 cont.)

mentary committee in 1819: “The judges send what are called ‘circuit letters’ to the secretary of state, stating the places where prisoners have been convicted, their offences, and in general the favourable circumstances that have appeared, that would make a case proper to be recommended to His Majesty, for his pardon; and I do not remember any case in which such pardon was refused when recommended”: *Report from the Select Committee Appointed to Consider of So Much of the Criminal Law as Relates to Capital Punishment in Felonies*, Parliamentary Papers (1819), viii, p. 48. The Recorder of London prepared an equivalent document for each Old Bailey sessions; for an example from one of the four sessions at which Dudley Ryder sat, see Public Record Office, London (hereafter P.R.O.), S.P. 36/132/296 (Apr. 1755 sessions). When the convict or a supporter petitioned for clemency, as in the case of Richard Tickner discussed on p. 112 and n. 54 below, the secretaries of state and often the monarch reviewed the merits of the case.

<sup>45</sup> Hay, “Property, Authority and the Criminal Law”, p. 43.

<sup>46</sup> Stephen Theodore Janssen, *This Sheet Contains Three Tables, from 1749 to 1771* (London, 1772; Guildhall Lib., London, B’side 27.15). The broadside is reprinted as a foldout appendix in the endpapers of John Howard, *An Account of the Principal Lazarettos in Europe*, 2nd edn. (London, 1791).

It is interesting to note that Janssen emphasizes in this compilation the theme to which John Beattie and now Hay, in his “War, Dearth and Theft in the Eighteenth Century”, have been directing recent scholarly attention, namely the seeming connection between rising crime rates and demobilization of the forces following periods of war. Janssen says: “It is worth observing that, as a great many idle Men and Lads are taken into the Sea & Land Service during a war; so we then find the Gangs of Robbers soon broken & that the Business at the Old Bailey gradually diminished to half its duration in time of Peace, nor are half the number of Criminals condemned. For in some Years of war they have not amounted to 20, whereas in Peace they have arisen to 70, 80, and 90. It is farther observable that at the conclusion of a War, through very bad Policy, when we turn adrift so many thousand Men, great numbers fall heedlessly to thieving as soon as their Pockets are empty, and are at once brought to the Gallows”.

an exemplary hanging",<sup>47</sup> but Hay thinks that these grounds formed a mere smoke-screen. 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".<sup>48</sup> In support of this view Hay offers the evidence of a few cases in which elite petitioners referred to the previous good character of the accused and especially to 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 large-scale penal imprisonment, the existence of family and employment relationships was highly relevant to the decision whether or not to release an offender into the community (or, likewise, whether or not to turn him 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.

Hay's account of the clemency system highlights the peripheral issue of social class 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 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.<sup>49</sup> 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

<sup>47</sup> Hay, "Property, Authority and the Criminal Law", p. 43 (my italics).

<sup>48</sup> *Ibid.*, pp. 43-4.

<sup>49</sup> *Old Bailey Sessions Papers* (Oct. 1754), Case no. 504, p. 326.



want of necessaries to maintain himself, wife big with child, and two infants".<sup>50</sup> Ryder made this notation with a view towards advising the recorder, and Rolf thereafter received a free pardon,<sup>51</sup> 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.<sup>52</sup>

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 assizes he noted that he let two burglars hang because "It was a very plain and bad case", but he reprieved a horsethief "because the evidence doubtful", a sheepthief "because the evidence not clear", and a pickpocket against whom the evidence amounted in Ryder's view "not quite [to] a clear case".<sup>53</sup>

At the same assizes Ryder resisted élite 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 offences 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, Richard Onslow the lord lieutenant of Surrey, and Henry Talbot the high sheriff of Surrey. Arthur Onslow went to the king; Ryder's opinion was sought, and he records it thus: since "there was no reason to doubt [that Tickner had committed the crime] and there were no circumstances of alleviation, I could not take on myself to say he was an object of mercy . . .".<sup>54</sup> The king let him

<sup>50</sup> Ryder Old Bailey Notes, pp. 21-2.

<sup>51</sup> *Old Bailey Sessions Papers* (Jan. 1755), p. 80.

<sup>52</sup> P.R.O., T. 53/45, Money Book, p. 353.

<sup>53</sup> Ryder Assize Diary, pp. 17-18.

<sup>54</sup> *Ibid.* Both Onslow's letter and Ryder's reply survive in the State Papers. Onslow wrote that Tickner, condemned "for a Robbery on the highway of some few shillings", was "a young Man of a very honest Family with us, and for the saving of whose life I am so much importuned, that I cannot avoid troubling your Lordship [the secretary of state] with a humble request for your assistance in obtaining a reprieve for him, in order to his transportation for any time, be the length of it what it will": P.R.O., S.P. 36/128/67 (3 Sept. 1754). Ryder's reply recites that a copy of Onslow's letter had been transmitted to him. Ryder reports on the evidence that had been adduced at Tickner's trial, remarking that the victim testified that Tickner "came up to him, presented a Pistol to his Breast & demanded his Money with a Curse, which on the Second like demand he delivered him to the amount of 14 Shillings". Ryder also reports that three pistols were found on Tickner when he was taken, and that he initially refused to identify himself. He concludes: "On the Whole, as I see no Reason to doubt of the Truth of the Fact, & no circumstances appeared to alleviate the guilt of it, I cannot take on my Self to represent him as an object of your Majesty's Mercy. But if your Majesty out of your great clemency shall be graciously pleased to extend your Royal Mercy to him, I humbly Submit it to your Majesty's wisdom whether it may not be on the Terms of Transportation for Life [as opposed to the seven or fourteen year terms otherwise current]": P.R.O., S.P. 36/128/77-8 (7 Sept. 1754).

hang. At Horsham assizes a few days earlier Ryder sentenced to death a man named Millet for horse-stealing. 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".<sup>55</sup> Ryder's handling of reprieve and pardon matters was principled. He was trying to take into account factors that ethical sentencing officers still consult.

King 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 . . .".<sup>56</sup> 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, 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, 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 we remember Dudley Ryder's sympathy for the destitute highway robber Thomas Rolf). Furthermore, 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 King's sample comes the factor Hay stresses, the respectability of the convict or his parents. King's totals for the five categories: (a) character and previous conduct, 126; (b) youth, old age and infirmity, 61; (c) circumstances of the crime, 56; (d) destitution or family poverty, 33; (e) respectability, 13. Radzinowicz directed attention several decades ago to the prevalence of a broad range of sentencing-type factors in the pardon process,<sup>57</sup> and

<sup>55</sup> Ryder Assize Diary, p. 13.

<sup>56</sup> King, "Decision-Makers and Decision-Making in the 18th Century Criminal Law", p. 22. The data quoted in text is from *ibid.*, pp. 22-8.

<sup>57</sup> Radzinowicz, *History of English Criminal Law*, I, pp. 115-16.

King has now done a great service in bringing new 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 sub-plot 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".<sup>58</sup> 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 attention to safeguard with his thesis by arguing: "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".<sup>59</sup>

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 understand the 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, and dissected 'like a common criminal' as the publicists never tired of repeating".<sup>60</sup> 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".<sup>61</sup> 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 élite from capital punishment. Well, of course, that would fit the thesis

<sup>58</sup> Hay, "Property, Authority and the Criminal Law", p. 32.

<sup>59</sup> *Ibid.*, p. 33.

<sup>60</sup> *Ibid.*, p. 34.

<sup>61</sup> *Ibid.*, p. 33.

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 a full 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 of English Criminal Law* published in 1948.<sup>62</sup> 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 observes 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.<sup>63</sup> (Blackstone advanced similar ideas in the 1760s.<sup>64</sup>) English law was wrong, they said, to invoke the death penalty for offences of vastly different seriousness. Excessive severity was counter-productive, it weakened deterrence by discouraging victims from prosecuting and by encouraging juries to down-charge or acquit. Nevertheless, adherents of what Radzinowicz calls the theory of maximum severity resisted the reformers' manifestly sensible position well into the nineteenth century. 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 non-capital sanctions known as penal servitude that had so widely displaced the death penalty on the Continent.

<sup>62</sup> Radzinowicz, *History of English Criminal Law*, i.

<sup>63</sup> *Ibid.*, pp. 231 ff.

<sup>64</sup> Blackstone, *Commentaries on the Laws of England*, iv, pp. 16-19.

A large chapter of English constitutional and administrative history underlies the eighteenth-century aversion to professional police forces and correction systems. Just as the prospect of a standing army evoked shivers in 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 correction 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 emphasizes the sense of insecurity that resulted from the want of effective policing.<sup>65</sup> 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 offences 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.<sup>66</sup> First, Radzinowicz takes seriously the evidence of the people who were near, 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 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.

<sup>65</sup> Radzinowicz, *History of English Criminal Law*, i, pp. 23-35, 248 ff., 410.

<sup>66</sup> 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. Cf. Hay, "Property, Authority and the Criminal Law", p. 23, with Radzinowicz, *History of English Criminal Law*, i, pp. 158-64, esp. p. 164. Belief in the deterrent efficacy of capital punishment need not presuppose high levels of actual execution.

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.<sup>67</sup> 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 offence non-clergyable. Some such statutes date from the sixteenth century, and a group of important ones appeared in the reigns of William and Anne, but most were Georgian.<sup>68</sup> Accordingly, the so-called expansion of the capital sanction in the eighteenth century was to some 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.<sup>69</sup>

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 flavour of a 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".<sup>70</sup> 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 defence, 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 offence definition, especially

<sup>67</sup> See generally *The Reports of Sir John Spelman*, ed. J. H. Baker, 2 vols. (Selden Soc., xciii-xciv, London, 1977-8), ii, Introduction, pp. 327-34; James F. Stephen, *A History of the Criminal Law of England*, 3 vols. (London, 1883), i, pp. 458 ff. Hay dismisses benefit of clergy in a footnote: Hay, "Property, Authority and the Criminal Law", p. 22 n. 2.

<sup>68</sup> See the convenient list of these statutes in Jerome Hall, *Theft, Law and Society*, 2nd edn. (Indianapolis, 1952), pp. 356-63.

<sup>69</sup> See John Styles, "Criminal Records", *Hist. Jl.*, xx (1977), pp. 977, 980.

<sup>70</sup> S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edn. (London, 1981), p. 403.

the general part, that set of notions about criminal responsibility that cuts across all criminal offences (for example, degrees of culpability, the law of attempts, aiding and abetting, capacity, and most of the affirmative defences). 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 lacked general definitions, especially for larceny and embezzlement, with the result that they were constantly having to add particulars in order to compensate for the want of generality.<sup>71</sup> The consolidation movement of the nineteenth century illustrates this point well; few offences were repealed, rather definitions were improved so that the number of separate offences could be reduced. Stephen, writing nearly a century ago, made the point that the 160 capital offences that Blackstone complained were in force in the 1760s "might probably be reduced by careful classification to a comparatively small number".<sup>72</sup>

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,<sup>73</sup> 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 offences 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".<sup>74</sup> Some larger reform of principle is needed to interrupt that process. Legislatures incline to err on the side of severity when considering particular offences. 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 offences and sanctions — when, for example, it produces a penal code, or (as in nineteenth-century England) revises major segments of the law.

<sup>71</sup> See, for example, Radzinowicz's succinct account of the succession of larceny statutes: Radzinowicz, *History of English Criminal Law*, i, pp. 41-9.

<sup>72</sup> Stephen, *History of the Criminal Law of England*, i, p. 470.

<sup>73</sup> "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* (Oxford, 1971), p. 45. On the Treasury's oversight of revenue bills, see Sheila Lambert, *Bills and Acts: Legislative Procedure in Eighteenth-Century England* (Cambridge, 1971), pp. 71-4. See also Hugh Amory, "Henry Fielding and the Criminal Legislation of 1751-2", *Philol. Quart.*, 1 (1971), pp. 175, 191-2.

<sup>74</sup> Radzinowicz, *History of English Criminal Law*, i, p. 49.

We can, of course, trace the hand of commercial interests (who were often more petty bourgeois than élite, as I have said before) in a considerable fraction of the eighteenth-century criminal legislation, both capital and non-capital. I doubt whether 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 pretences, 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".<sup>75</sup> 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 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 pretences, and embezzlement. These offences persist with only technical refinement in modern English law, and comparable provisions grace the codes of modern socialist states.<sup>76</sup>

## VIII

### THE RULERS

In a recent essay Richard Sparks makes a point that helps us understand why the Hay thesis is so improbable.<sup>77</sup> 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 . . . give me the law of contracts (including contracts of employment), and you can have all the rest of the statute book . . . the 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".<sup>78</sup> 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. True, 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-

<sup>75</sup> Hall, *Theft, Law and Society*, pp. 34-5.

<sup>76</sup> For example, *Criminal Code of the Hungarian People's Republic*, trans. P. Lamberg (Budapest, 1962), pp. 108, 110, ss. 292 (embezzlement), 293 (criminal fraud), 301 (receiving goods unlawfully obtained).

<sup>77</sup> Richard F. Sparks, "A Critique of Marxist Criminology", *Crime and Justice: An Annual Review of Research*, ii (1980), p. 159.

<sup>78</sup> *Ibid.*, pp. 193-4.



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. Secondly, 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 élite came into contact with the criminal justice system in any capacity, they were treated with special courtesy and regard, just as 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.

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