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# BOOK REVIEW

## NED SLINKER AND ENGLAND'S ORDER

*Crime and the Courts in England 1660-1800*. By J.M. Beattie. Princeton, N.J.: Princeton University Press, 1986.

Reviewed by Barry Wright\*

### I. INTRODUCTION

J.M. Beattie's social history of crime and the courts in England from 1660 to 1800<sup>1</sup> provides a comprehensive background to the collection of largely specific episodes examined by the contributors to *Albion's Fatal Tree*.<sup>2</sup> That collection provided a remarkable view of eighteenth-century English society 'from below'. It continues to stimulate considerable debate among eighteenth-century specialists, social historians, criminologists and political theorists as well as legal scholars. Professor Beattie's approach is different from the provocative *Albion's Fatal Tree*. Extensive and valuable description of the legal process and interpretation of carefully gathered statistics is preferred to the analysis of suggestive vignettes. However, the end results are complementary, as Beattie's work tends to confirm the social and political dimensions of criminal law suggested by the contributors to *Albion's Fatal Tree*.

Lawyers and legal scholars might wonder why the criminal law has come to preoccupy social historians. As Professor Beattie notes, the records of crime and the courts provide insight into the behaviour of ordinary people.<sup>3</sup> Historical legal materials offer a picture of the vast majority of people in society who left little direct evidence of their own.

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<sup>1</sup> J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton, N.J.: Princeton University Press, 1986).

<sup>2</sup> D. Hay, et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975).

<sup>3</sup> Beattie, *supra*, note 1 at 3.

This history 'from below' has led some historians to questions central to the unlocking of the meanings of eighteenth-century society and politics. The ruling oligarchy's concern with social order, authority, and the value of property found embodiment in the ideology and practice of the law.<sup>4</sup>

It is not surprising that the best contemporary scholarship on law in history has come from social historians. They have posed critical questions about the nature of the relationship between law, the state, and civil society. Legal scholars have had difficulties transcending the traditional legal outlook that traces how the criminal law, and the legal system at large, evolved independently of political and social forces. Within this concept of law's neutrality and progress towards perfection, reform is perceived to have been achieved through an incremental accumulation of decency, through Royal Commissions and the efforts of polymathic reformers like Howard and Bentham.<sup>5</sup> The leading and influential historians of criminal law, James Fitzjames Stephen<sup>6</sup> and Sir Leon Radzinowicz,<sup>7</sup> have contributed to this uncritical paradigm. Fortunately, some legal scholars have begun to move away from the traditions of apologist or constitutional legal history; traditions which are at root fundamentally ahistorical.<sup>8</sup> Legal scholars truly concerned about history can no longer occupy a discrete category known as 'legal history'. They must share the social historians' critical concern about law-in-history. The history of law, in and of itself, is intellectually untenable because the notion of the law existing in a vacuum 'above' society is itself intellectually untenable.

An interdisciplinary approach to law in history is regarded by traditionalists as fundamentally subversive. An example is Professor Langbein's recent attack on the contributors to *Albion's Fatal Tree*, wherein he attempts to defend a traditional legal perspective on the role of criminal law.<sup>9</sup> He suggests that criminal law was not particularly central to eighteenth-century society and political rule, that the courts were above

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<sup>4</sup> Hay, *supra*, note 2 at 13 (Preface).

<sup>5</sup> Z. Bankowski & G. Mungham, "Schlock Talk: The Legal Problem and the Legal Textbook" from Z. Bankowski and G. Mungham, *Images of Law* (London, Boston: Routledge and Kegan Paul, 1976) 32 at 33-34.

<sup>6</sup> J.F. Stephen, *A History of the Criminal Law of England* (London: MacMillan & Co., 1883).

<sup>7</sup> L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 4 vols. (London: Stevens, 1948-1968).

<sup>8</sup> See B. Wright, "Towards New Canadian Legal History" (1984) 22 Osgoode Hall L.J. 349. I suggest that the common-law tradition causes many lawyers to visualize legal development as evolutionary and neutrally directed by impersonal processes of the legal system. Past ideas are used for present day authority, regardless of historical context. This traditional approach is ahistorical because it is the antithesis of historical concern with change, contradiction, and explanation.

<sup>9</sup> J. Langbein, "Albion's Fatal Flaws" (1983), 98 Past and Present 96.

society and politics, protecting both rich and poor from a well-defined, but marginal criminal element. This was a function that they continuously performed from medieval times to the present: "The criminal law is simply the wrong place to look for the active hand of the ruling classes. From the standpoint of the rulers, the criminal justice system occupies a place not much more central than the garbage collection system."<sup>10</sup>

This traditional view has been criticized by historians who see the criminal law as an important form of ruling class hegemony. In response, Peter Linebaugh continues the rubbish analogy, but does not trivialize it:

Professor Langbein may find garbage collection and criminal law of no great importance. To those who lived in fear of the hangman and typhoid, however, such systems were important indeed. . . . In both areas, "the active hand of the ruling class" — not in Langbein's sense of conscious conspiracy, but in Hay's sense of social control — was apparent and heavy.<sup>11</sup>

Professor Beattie's contribution arrives in the thick of this debate. Although he steers well clear of its explicit manifestations, his research does tend to confirm the view that study of the criminal law provides an important insight into eighteenth-century English society and political rule, and that the criminal law was an important influence on social order. The period that is the context of Beattie's careful investigation is one of sweeping transformation. During this period, there were radical changes in the definition of offences (especially the proliferation of property offences), the administration of the courts (accompanying new forms of state intrusion), and the imposition of punishment (from corporal and capital punishment's focus on the prisoner's body and emphasis on public example to the initial efforts to establish the penitentiary with its focus on the prisoner's mind, separation from society, and the underlying objective of class discipline). These changes were the result of pressures stemming from social transformations in political and economic power. Although Beattie studiously avoids using such broad brush strokes, he does make clear that underneath the discourse of law reform, the rolling tide of urbanization, and the concomitant development of wage labour, there are concentrations of social disorder that demand new legal responses.

Professor Beattie's evidence is based on the Surrey Assizes and Quarter Sessions, with comparative material drawn from the courts of Sussex and the Old Bailey. The focus on Surrey provides a balance of

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<sup>10</sup> *Ibid.* at 117.

<sup>11</sup> P. Linebaugh, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" (1985), 60 N.Y.U.L. Rev. 212 at 242.

rural and urban aspects of crime and its relation to the legal process. The result is a comprehensive overview of the social meaning of criminal offences and of the changing manner in which the accused was dealt with by the courts. Beattie's study is broken into two broad sections: "Criminality, Offenders and Offences," which deals with the social meaning of prosecuted offences, and "the Courts and the Administration of Criminal Justice," which deals with the ways in which offenders were processed by the courts and the changing punitive measures used against them. These two sections contain revealing new research and demand separate attention.

## II. CRIMINALITY: OFFENDERS AND THE PROSECUTION OF OFFENCES

Professor Beattie reproduces part of a fascinating exchange drawn from the *Public Advertiser* in 1764 between Ned Slinker, "footpad, pickpocket and housebreaker" and James Maclean, "esquire and highwayman." Maclean explains his fall into crime:

I cannot reproach myself with doing anything unbecoming a Gentleman. When the scanty allowance of five hundred a year that I had from that Old Gripe my Father was gone, having always entertain'd a just contempt for the Pedantry of Study, and being above mere mechanic Employment, I embraced the only Scheme left for a Man of Spirit, and commenced a Gentleman of the Shade, in which Occupation I have acquitted myself with equal Courage, Honour, and Genius.<sup>12</sup>

Slinker's fall is not explained, but he is undoubtedly a caricature of the more common criminal. Distinctions drawn between the romantic figure and the habitually deviant subculture of 'little crooks', as Professor Langbein refers to the majority of offenders before the Old Bailey docks,<sup>13</sup> or even the class warrior, tend to play into the contrived moral discourse of fallen men, dreadful exemplars and tragic heroes. Such distinctions perpetuate popular myths about criminality and obscure the social realities of crime.<sup>14</sup> Slinker's ilk was not a marginal group. The Slinkers of England came from the vast mass of English society living under difficult circumstances and causing considerable anxiety for a ruling oligarchy concerned about property, social order, and the most effective means

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<sup>12</sup> Beattie, *supra*, note 1 at 152-53.

<sup>13</sup> Langbein, *supra*, note 9 at 101.

<sup>14</sup> Linebaugh, *supra*, note 11 at 225.

Can these offenders be justly characterized as "little crooks" or "class warriors"? A historian, perhaps, is less interested in the labels than in exploring the nature of offenders and their offences within their social and historical context. The grouping of the cases-work related, residence-related, sex-related, and public appropriation that is suggested by even the most cursory historical investigation suggests a dynamic of class relations . . . that might explain the existence of the offences as a matter of contingent historical fact.

of exercising authority. The mechanism of the criminal law was an important means of meeting these concerns.

Professor Beattie's examination of various pre-trial matters, especially the role of the private prosecutor and the record of indictments, provides us with a more rigorous and less caricatured picture of the behaviour that lay behind offences and how they came to be prosecuted. In this manner, an image of the character and social meaning of prosecuted offences is created that offers evidence of public attitudes toward crime, authority, and the role of law as a social institution. These findings suggest that crime and the role of law were not as marginal as Professor Langbein asserts.

#### A. *The Private Prosecutor*

In order to answer the question of what typically led to prosecutions, Professor Beattie begins by examining the important role of the private prosecutor. The state and police did not take over initiating criminal proceedings and apprehending criminals until well into the nineteenth century. The victim was the key agent in instituting a case and seeing it through various stages.<sup>15</sup> The decision to prosecute was influenced by a number of social factors.

The character of the offence is found to be very important, and Professor Beattie traces changing social attitudes towards violent and property offences.<sup>16</sup> Violent offences were less likely to be settled by self-help and more likely to be reported and formally prosecuted towards the end of the eighteenth century.<sup>17</sup> There was also a dramatic rise in the prosecution of property offences.<sup>18</sup> Decisions to prosecute were influenced by the value of property involved, the nature of the activity surrounding the offence, and whether the offence was subject to benefit of clergy or was non-clergyable, with obvious implications as to whether the offence was capital or not. Most significant were considerations of cost and community factors. Prosecutions required money and the prospect of having to lay out greater sums as the case proceeded. Prosecutors were invariably persons of property, while the offender was usually an 'outsider' or not well integrated in terms of the local *status quo*.<sup>19</sup> Yet Professor Beattie suggests:

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<sup>15</sup> See D. Hay, "Controlling the English Prosecutor" (1983), 21 Osgoode Hall L.J. 165.

<sup>16</sup> Beattie, *supra*, note 1 at 75-198.

<sup>17</sup> *Ibid.* at 137-39.

<sup>18</sup> *Ibid.* at 140.

<sup>19</sup> *Ibid.* at 195.

One does not have to think that the legitimacy of the criminal law was accepted in its entirety throughout society to acknowledge that when it came to straightforward crime against property . . . there was no sharp class distinction between rich men of large property and the large majority of the working population.<sup>20</sup>

However, the large majority of the working population were unlikely to possess the sort of property that would be protected by the law and, if they did, few could afford the costs of proceeding. As the eighteenth-century progressed and the apparent tide of crime rose, various innovations were introduced to facilitate prosecutions and involve the less wealthy. Prosecution associations, directives to local magistrates, the watch, and other forms of surveillance served the interests of middling property owners. Statutory rewards and thief-takers constitute a possible exception. However, the use of 'blood money' to induce the poor to prosecute arguably reflected the hegemonic pressures of the state rather than an attempt to democratize prosecutions.

### B. *Criminality and the Meaning of the Indictments*

The record of indictments not only provides the historian with evidence of crimes actually prosecuted, but reveals potentially valuable *indicia* of the larger social reality of crime. Methodological issues are raised concerning the indictment levels. Do patterns in the judicial record suggest larger patterns in crime unlikely to have been observed by contemporaries? Or should one take a narrower approach and hold that the indictments merely reflect the legal process involving the opinions of prosecutors and officials? These questions highlight traditional criminology's unreliable use of statistics. They question whether the criminal law serves as a system of power where prosecutions reflect the behaviour of those who control the law more than the experience of those subject to it.<sup>21</sup> Professor Langbein's analysis of the Old Bailey sessions from 1754 to 1756 reflect an uncritical use of the judicial record.<sup>22</sup> He concludes that it is "hard to find figures worthy of romance, even social romance, among the shoplifters, pickpockets, pilfering housemaids, and dishonest apprentices who populated the Old Bailey Dock."<sup>23</sup> Langbein fails to provide any context, historical specificity, or any account of changes in the organization of control.<sup>24</sup> So, as Linebaugh points out, in the years

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<sup>20</sup> *Ibid.* at 196.

<sup>21</sup> D. Hay, "War, Death and Theft in the Eighteenth-Century: The Record of the English Courts" (1982), 95 *Past and Present* 117 at 118-19.

<sup>22</sup> Langbein, *supra*, note 9 at 99-101.

<sup>23</sup> *Ibid.* at 100.

<sup>24</sup> Linebaugh, *supra*, note 11 at 225.

Langbein examines there was an elaboration of the law of theft with the introduction of property distinctions: "Such distinctions correspond to new patterns of material and economic life. The shop, the warehouse, the stables, the workplace, and the home, from the standpoint of larceny, was decisive to the fate of the offender, determining whether he or she would be hanged."<sup>25</sup>

The monetary value of the stolen goods assumed new importance, reflecting a decline of personal relations and a rise of commodified value.<sup>26</sup>

Douglas Hay has taken a reflective and rigorous examination of indictment levels. On one hand, Hay finds that indictment levels corresponded to incidence of dearth and the timing and nature of demobilization, suggesting that the indictments do provide a clear picture of the reality of crime.<sup>27</sup> On the other hand:

Heightened anxieties among those with property and power, particularly in times of acute political tension or economic crisis, result in calls for more rigorous enforcement of the law, and sometimes, as a result, in the creation of crime by the redefinition of acts to make them more serious offences, and by arrests and prosecutions of people who in easier times would not have found themselves before the courts.<sup>28</sup>

Hay concludes that the record of indictments reflects both the behaviour of those subject to the law and of those controlling it.<sup>29</sup>

Professor Beattie appears to follow Hay in concluding that fluctuations of indictments broadly reflect both the changing reality of crime and the changing attitudes towards it by the prosecutors and those responsible for the administration of justice.<sup>30</sup> For Beattie, shifts in property offence indictments were related to short term innovations, like the watch and rewards, and more fundamental changes in social and economic circumstances, such as food prices and demobilization. In turn, when it became difficult for the poor to support themselves, offences would provoke a sense of social crisis and induce prosecutorial zeal. Nonetheless, Beattie concludes that indictments are a fragile guide to criminality. The issues surrounding the use of indictments serve as warning about the limitations of quantitative methods. As Douglas Hay suggests:

It [the simple statistical analysis of indictments] can, in fact, be a distraction if it leads one to the assumption that property definitions are unproblematic, that they do not change, that there is social agreement on what is legitimate behaviour

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<sup>25</sup> *Ibid.* at 221.

<sup>26</sup> *Ibid.* at 222.

<sup>27</sup> Hay, *supra*, note 21 at 145.

<sup>28</sup> *Ibid.* at 152.

<sup>29</sup> *Ibid.* at 158.

<sup>30</sup> Beattie, *supra*, note 1 at 220.



and rightful ownership. This was clearly not the case in the eighteenth-century when the mercantile, industrial and landed élites of England were pressing in many different areas to redefine and restrict the property rights of the poor, to make them more amenable to the disciplines of industrial capitalism, and to divide recalcitrant plebeian communities into stigmatized criminals and acquiescent labouring poor.<sup>31</sup>

### III. THE COURTS AND THE ADMINISTRATION OF CRIMINAL JUSTICE

In the second part of the book, Professor Beattie moves from the broad area of the social dimensions of crime to direct consideration of those who were tried before the courts. Beattie's examination of the nature and timing of changes in the trial and the changes in the administration of punishment debunks the leading traditional view that the criminal law evolved towards efficiency and humanity sparked by reform pressure.<sup>32</sup> Significant changes took place throughout the period Beattie examines. Although they were in full flood by the end of the eighteenth century, they were not the result of reform pressure against a previously inflexible *ancien régime*. To a certain extent, on the level of detailed administrative problems, the criminal justice system changed under its own momentum. More fundamentally, the level and forms of 'crime problems' experienced in a rapidly growing London were a pre-cursor of things to come elsewhere. Increasing property offences, perceived as moral decay and social disorder, threatened the rule of the élite. Changes to the legal mechanism reflected a political problem.

#### A. *Nature and Timing of Changes in the Trial*

Once the offender was indicted, he or she was dealt with by a system that was shot through with discretion. This reflected the Weberian notion of traditional authority of Khadi justice.<sup>33</sup> The identity of the offender was as important as what was done. An exemplary and public exercise of authority were seen as necessary to stave off disorder. However, personalized discretion became increasingly ineffective with urbanization and the decline of community. As a result, there was a haphazard move towards 'formal legal rationality'.<sup>34</sup> Changes to examinations before the magistrate, the introduction of legal counsel, shift in the onus of proof,

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<sup>31</sup> Hay, *supra*, note 21 at 159.

<sup>32</sup> See Stephen, *supra*, note 6, and Radzinowicz, *supra*, note 7.

<sup>33</sup> M. Weber, *On Economy and Society*, trans. E. Shils and M. Rheinstein (Cambridge: Harvard University Press, 1966) at 336.

<sup>34</sup> *Ibid.* at 63. See generally, Cotterrell, "The Sociology of Max Weber" in D. Sugarman, ed., *Legality, Ideology and the State* (London, Toronto: Academic Press, 1983) c. 4.

development of rules of evidence, and transformation in the relationship between judge and jury were hardly the result of enlightened reform. They stemmed from changing social conditions and the demands of rule.

The preliminary proceedings, 'coming to trial' as Professor Beattie puts it, focussed on the magistrate's examination. The examination was not designed as an inquiry into the truth of the charge. Rather, it served as a means of collecting the strongest evidence of the prisoner's guilt. During the course of the eighteenth century, the examination took on the characteristics of a judicial inquiry,<sup>35</sup> even though the changes were not fully codified until the *Jervis Acts* of 1848.<sup>36</sup> According to Beattie, the increasing role of lawyers was an important impetus of change.<sup>37</sup> Also, the large increase in numbers coming to trial, resulting in overburdening of the courts, and in incidents like the "Black Session" at the Old Bailey when gaol fever spread throughout the court, were important.

Professor Beattie's superb description of the criminal trial debunks many of the cherished notions of ancient English liberties derived from the jury trial and the Rule of Law. The principle of 'innocent until proven guilty' with the burden on the Crown to prove beyond a reasonable doubt emerged in the nineteenth century. Under the older form of trial, the underlying assumption was that if the accused was innocent, he or she ought to be able to demonstrate it to the jury's satisfaction by the quality and character of replies to the prosecutor's evidence. Trials proceeded at a blistering pace, and prisoners had little or no knowledge of the prosecution's evidence. The judge alone was responsible for ensuring that the prisoner had a brief opportunity to prove his or her innocence.<sup>38</sup>

Professor Beattie finds that the introduction of lawyers to the criminal trial served as an important force of change. Their role was not merely a matter of developing professional hegemony. Concern about the stability of the Hanoverian regime led to the encouragement of lawyers acting as prosecuting counsel in sensitive cases. However, memories of the highly political use of lawyers in treason proceedings in the 1660s were fresh. As a concession to balance, defence counsel began to be admitted at the Old Bailey.<sup>39</sup> The growing use of counsel on the defence side put greater pressure on the prosecution to prove its case. Effective cross-

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<sup>35</sup> Beattie, *supra*, note 1 at 274.

<sup>36</sup> See W. Pue, "The Criminal Twilight Zone: Pre-trial Procedures in the 1840's" (1983) 21 *Alta. L. Rev.* 335.

<sup>37</sup> Beattie, *supra*, note 1 at 280.

<sup>38</sup> *Ibid.* at 340-41.

<sup>39</sup> *Ibid.* at 355-59.

examination shifted the burden of proof from the defendant and prompted the development of evidentiary rules.

However, it is important to stress that for most of the period the prisoner's fate depended not so much on an effective case, as on the exercise of discretion. Discretion was exercised by the grand juries. Although they often threw out bills, Professor Beattie finds that they were anxious to send forward property cases thought to strike at the public interest.<sup>40</sup> An even more significant aspect of discretion was the operation of trial jury verdicts and royal pardons, which reflected the variable personal application of power according to the perceived level of disorder. A jury could find a prisoner guilty, not guilty, or find a partial verdict — that is, guilty of a lesser charge. As capital punishments were broadened and benefit of clergy was narrowed during the eighteenth-century, this discretionary power assumed immense significance. Acquittals tended to reflect the jury's general view of crime and the relation of the particular crime to their own interests.<sup>41</sup> Partial verdicts became more common as alternatives to hanging expanded. If the jury failed to show leniency, the judge could reprieve the accused and allow a request for royal pardon. This procedure heightened the exemplary drama by encompassing the solemnity of the death sentence and the uncertainty during the reprieve period. Pardons were very much a mechanism of regulating admissions to the gallows and involved practical political considerations. Pardons that were granted were usually conditional and based on available secondary punishments. Accordingly, both partial verdicts and pardons were the focal points of discretion in a discretion-laden system. This reflected the nature and essence of the criminal court's function; a personal and particularistic administration influenced by the abstract character of the offence, the prevailing state of crime, and the offender's utility as an exemplar.<sup>42</sup> As Beattie makes clear, the discourse of equality of treatment and certainty of punishment was the ideology of the future.<sup>43</sup> The politics that underlay the essence of discretion is summarized by Professor Beattie:

The execution of a thief or robber sent a message to the broad ranks of the labouring poor as a terrible example of the consequences of falling into immoral habits and breaking the law. The gallows also got rid of the occasional individual who was permanently committed to a life of crime. But fundamentally the value of

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<sup>40</sup> *Ibid.* at 403.

<sup>41</sup> *Ibid.* at 408-20.

<sup>42</sup> *Ibid.* at 426. Beattie points out that a contemporary observer Cottu stressed how the English courts, unlike the French courts, demonstrated indifference to the details of the individual case and little anxiety about specific guilt or innocence. *Ibid.* at 420.

<sup>43</sup> *Ibid.* at 427.

public hangings . . . was the reminder of what eventually lay in store for those who strayed far from the paths of duty and obedience. That required not hundreds of victims — for that could only have confused the message — but a few only, and a number that could be varied depending on the state of crime and the present danger to the social order. The regulation of that flow and the choice of those who would serve as examples was very much the business of the courts and the criminal trial.<sup>44</sup>

Unfortunately, few specific details are provided concerning the relationship between the courts and the processes of political rule. Professor Beattie does point out that emphasizing legalities misses out on the essential agreement and co-operation between the jury, judge and the political élite.<sup>45</sup> However, he also suggests that juries acquitted a remarkable number of people, and he questions Hay's assertion that a more democratic jury would acquit even greater numbers.<sup>46</sup> The point remains that both judge and jury exercised discretion in a manner that was appropriate to governmental demands.

Composed largely of small and middling property owners, juries shared a common perception of the social order with the bench and political élite.<sup>47</sup> Loyalty was cemented by the jury's role in the legal process. This view clashes with the ideology of jury independence, but arguably this ideology served as disguise and mystification. Prominent political and legal writers, like Sir John Hawles, extolled the ideology, making much of lessons learned from earlier seventeenth-century battles such as Judge Kelyng's jury bullying and Bushel's case.<sup>48</sup> Even modern scholars, like Professor Langbein, suggest that the eighteenth-century jury was autonomous, objectively deciding 'open and shut' cases.<sup>49</sup> However, although the jury members' social stakes might not have been identical to the judiciary and the political élite at large, they were part of a social continuum defined by property. Their interests were far more closely allied with and dependent on the élite than the working population that constituted the vast majority of offenders.<sup>50</sup>

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<sup>44</sup> *Ibid.* at 423.

<sup>45</sup> *Ibid.* at 408.

<sup>46</sup> *Ibid.* and Hay, "Property, Authority and the Criminal Law" in Hay, *supra*, note 2 at 38-39.

<sup>47</sup> See Linebaugh, *supra*, note 11 at 230; 3 Geo. 11, c. 25 (1731); 4 Geo. 11, c. 7 (1732) (property ownership qualifications for service). See also, Sir John Hawles, *The Englishman's Right; A Dialogue between a Barrister at Law and a Jurymen*, 10th ed. (London: Reprinted by the London Corresponding Society, 1793).

<sup>48</sup> Beattie, *supra*, note 9 at 407.

<sup>49</sup> Langbein, *supra*, note 9 at 108.

<sup>50</sup> Linebaugh, *supra*, note 11 at 230-31. See for instance J. Bunyan, *Pilgrim's Progress* (London: Cresset Press, 1928) which went on at length about the venality of jurors. Cornish described how "regular special jurors . . . lived off the guinea which each case brought, and . . . knew continuance of their stipend depended on bringing a verdict for the crown." *The Jury* (1968) at 131-32.

As an additional matter, it is important to point out that judges had no direct power to choose alternative punishments to hanging at the post-verdict stage. Nonetheless, they had considerable influence over the process by which prisoners received executive clemency, a highly developed adjunct similar to sentencing. Hay suggests that the ostensible grounds for mercy were that the offence was minor, the convict was of good character or that the offender's status made mitigation appropriate. In reality, these grounds were smoke-screens, and the claims of class served more than the claims of humanity within the requirements of exemplary hangings.<sup>51</sup> Langbein and Radzinowicz notwithstanding, both of whom assume that the pardon was exercised in a social and political vacuum,<sup>52</sup> Hay has found that rather than reflect increasing humanity, pardons reflected a limiting of the number executed within boundaries acceptable to public opinion. As such, pardons worked in class-biased ways through the patronage network. Respectable connection or high social station served to mitigate far more often and successfully than desperate poverty.<sup>53</sup> The discretion available at the pardoning stage explains the discrepancy between proliferating capital statutes and the declining number of hangings.<sup>54</sup> There was very direct communication between the bench and executive concerning crowded gaols and local disorder. Emphasis on character and other humanitarian grounds merely reflects that judges were professionally expected to stress the so-called 'merits' in their reports.

#### B. *Punishment: The Development of Secondary Alternatives*

The final stage of the process reflected aspects of all spheres of the administration of criminal law. While recognizing the importance of the enlargement of the capital code, Professor Beattie provides important new research on the broadening of secondary punishments. Again, the reader is struck by the personalized discretion and larger political dimensions implicit in the criminal justice system.

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<sup>51</sup> D. Hay, "Property, Authority and the Criminal Law" in Hay, *supra*, note 2 at 44-45.

<sup>52</sup> See for instance, Langbein, *supra*, note 9 at 111. See also R. King, "Decision Makers and Decision Making in English Criminal Law" (1984) 27, 1 *Historical Journal* 25. Both Langbein and King focus on a small sample from a selected period in the Ryder assize which suggests highly controlled discretion. During the particular period selected, George II revived an old custom by instructing judges concerning their duties on circuit.

<sup>53</sup> D. Hay, "Reply to Langbein" [unpublished].

<sup>54</sup> Mystified by this discrepancy, Radzinowicz suggested that Parliament and judges were at odds — judges pardoned greater numbers as Parliament enacted more capital statutes. *Supra*, note 7.

The development of transportation and imprisonment, in particular, transformed the treatment of convicted felons by the second half of the eighteenth century. Before 1660, all felonies were potentially of a capital nature for prisoners unable to plead benefit of clergy because of illiteracy: a variety of corporal punishments, as well as fines and imprisonment, were available to prisoners committing non-felony crimes. Considerable concern developed by 1660 with regards to serious offenders who successfully pleaded benefit of clergy and were discharged with a branding on the cheek. For the next fifty years a number of expedients were tried. The end result was the *Transportation Act, 1718*, which established transportation to the American colonies as a regular punishment. The legislation emerged at a time when it was recognized that an effective system needed to be well-funded and well-administered.<sup>55</sup> The legislation changed the way the courts dealt with serious offenders:

Transportation decisively broadened the options available to the courts and transformed the patterns of punishment in the second quarter of the eighteenth century. It removed the deep misgivings about benefit of clergy that had been so evident at least since the Restoration. . . . Transportation was immediately taken up because it bridged the gap between capital punishment and the branding of benefit of clergy that typified the penal system at the Restoration. Since it could also be employed to punish vagrants, it erected a large middle ground in which punishment of serious offenders overlapped. Transportation created a penal system that could never again operate without a centrally dominant secondary punishment.<sup>56</sup>

It is important to stress that transportation did not displace or challenge the utility of capital punishment. It became an important adjunct to a system that centred on capital punishment and provided an alternative, substantial punishment that prevented an offender from simply returning to society. More importantly, transportation as a condition of pardon became a crucial aspect of a discretionary system that made the selective application of the increasing number of capital statutes feasible.<sup>57</sup>

However, even before the American Revolution wars closed off the main destination for the transported, the crises of disorder in London led to a search for effective penalties for the majority of property crimes that could not be regularly punished by costly transportation. Imprisonment and hard labour in the chain gangs became more prominent, along with expansion of the capital code and calls for its stricter enforcement.<sup>58</sup>

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<sup>55</sup> Beattie, *supra*, note 1 at 470, 506.

<sup>56</sup> *Ibid.* at 512-13.

<sup>57</sup> *Ibid.* at 518.

<sup>58</sup> Radzinowicz wrongly portrays the House of Commons Committee on Criminal Law in 1757 as a force of humanist reform. However, as Beattie points out, the Committee did not call for the displacement of capital punishment by imprisonment. Rather, it sought the reduction of transportation in favour of hard labour in chain gangs put on display as "examples of justice." See Beattie, *supra*, note 1 at 520.

The American Revolution saw the establishment of the notorious hulks (floating workhouses on the Thames) and the eventual return to transportation in 1784, with the establishment of a penal colony in New South Wales. However, the *Penitentiary Act, 1779* was a precursor of things to come. By the turn of the nineteenth century, a term of imprisonment became the most common sentence in non-capital property cases.<sup>59</sup>

By the end of the eighteenth century, the old penal regime which stressed physical punishment and public example, gave way to a new system which stressed the 'rehabilitation' of the mind and physical separation. Judges began to stress certainty of punishment and to make the magnitude of punishment commensurate with the gravity of the offence. The change in the penal regime marked the transformation of the entire system:

A system of justice that had been intensely personal and concerned with the particular attributes of the offenders and that had conceived of punishment as a means of deterring others by bloody example was giving way to a system of administration that came to emphasize equality and uniformity of treatment as ideals and the thought of punishment as reformative. Violent punishments that attacked the body, carried out in public, were replaced by incarcerations and punishments that aimed to reconstruct the prisoner's mind and heart. Undoubtedly the earlier system had served reasonably effectively the needs of rural communities, maintaining serious offenses at an acceptable level while supporting and enhancing local men of property and influence. But it had been clear at least as early as the second half of the seventeenth-century that it did not serve as adequately the needs of an urban society in which vast amounts of moveable property provided targets and temptations for a large population of men and women who were both more independent of authority and more liable to suffer from extreme and sudden deprivation.<sup>60</sup>

While it is very important to examine the class discipline that underpinned the discourse of 'equality and uniformity of treatment' and 'reformative statement', the central point — the changing nature of the crime problem with the rise of urban centres serving as a catalyst for that change — suggests the importance of the criminal law in meeting the new demands on political rule.

To summarize, from the Restoration to the beginning of the nineteenth century, the changes in criminal law, procedure, and punishment reflected a larger transformation in the administration of criminal justice. This did not depend on Enlightenment reform, but rather on the anxieties and concerns of *élites* about increasing levels of social disorder that were influenced by forces unleashed at the beginning of the Industrial

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<sup>59</sup> For a review of scholarship concerning the rise of the penitentiary, see M. Ignatieff, "State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment" in Sugarman ed., *supra*, note 34 at c. 8, 183.

<sup>60</sup> Beattie, *supra*, note 1 at 636-37.

Revolution. Professor Beattie admits that the criminal law represented an important means of political rule:

The criminal law in the eighteenth-century served several purposes. It acted broadly to sustain and legitimize the established social and economic and political arrangements of the society, and in some crucial areas it was enlisted in the effort to effect changes that powerful groups in society wanted. In addition, the opportunities for the exercise of discretion at all stages of criminal administration provided occasions in which men of the propertied elite could exercise their influence and thus enhance the base upon which their local reputation and local authority rested.<sup>61</sup>

However, this means of political rule underwent changes as the problems of rule became more complicated in urban centres. When the criminal law did not appear to be effective in preserving order, its administration was subject to criticism. Disorder and rising rates of property crime in London sparked changes to the judicial process and punishment.<sup>62</sup> As Beattie points out, landed men may have resisted the loss of the means to enhance their personal power through discretionary justice at a community level. But, as it became clear that features of the old legal system proved inadequate for maintaining social order in impersonal urbanizing areas, the rejection of the old system was decisive.<sup>63</sup>

Professor Beattie goes to great lengths to provide a picture of the social context and detailed institutional influences on the wide changes in the administration of criminal justice during the eighteenth century. He alludes to the importance of law to political power; how the mechanics of the legal process and the broader ideological effects of the law promoted order and elite rule. Beattie, therefore, provides an incomparable description of the social conditions that produced Ned Slinker and of the legal processes that he would be subject to; a revealing analysis of the often desperate search for more effective penal policy; and the importance of the criminal law to the elite's political rule. Perhaps the expectation of the next logical step to make explicit the concretization of the relations between law and politics in the continuing maintenance of order is overly demanding. Such a task requires moving beyond the social contextualization of law to a critical approach that encompasses a developed theory of state and an appreciation of the ideological dimensions of law. Beattie fails to do this and thus inadequately addresses the translation of class interests through the manipulation of the law as well as the larger hegemonic forces involved. However, this is no easy task. As Douglas Hay has pointed out, these processes were rarely made explicit:

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<sup>61</sup> *Ibid.* at 621.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* at 632.



There is a danger . . . of giving the impression that a system of authority is something, rather than the actions of living men . . . much of the ideological structure surrounding the criminal law was the product of countless short term decisions . . . the necessity of gauging reactions to executions was an immediate problem of public order, not a plot worked out by eighteenth-century experts in public relations for a fee. The difficulty for the historian of law is twofold. He [she] must make explicit convictions that were often unspoken, for if left unspoken we cannot understand the actions of the men who hold them. Yet in describing how convictions and actions molded the administration of justice, he [she] must never forget that history is made by men [women], not by the Cunning of Reason or the Cunning of the System. The course of history is the result of a complex of human actions — purposive, accidental, sometimes determined — and it cannot be reduced to one transcendent purpose. The cunning of a ruling class is a more substantial concept, however, for such a group is agreed on ultimate ends. However much they believed in justice (and they did); however sacred they held property (and they worshipped it); however merciful they were to the poor (and many were); the gentlemen of England knew that their duty was, above all, to rule. On that depended everything. They acted accordingly.<sup>64</sup>

In this elegant and effective manner, some of the difficulties facing the social historian in exploring the relationship between politics, class and the criminal law are posed. Professor Beattie provides a valuable foundation for further critical work on an important period of social change and challenge to the *status quo*.

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<sup>64</sup> Hay, *supra*, note 51 at 52-53.