

Michigan Law Review

Volume 94 | Issue 6

1996

Revenge for the Condemned

Sara Sun Beale
Duke University

Paul H. Haagen
Duke University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), [Legal History Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Sara S. Beale & Paul H. Haagen, *Revenge for the Condemned*, 94 MICH. L. REV. 1622 (1996).
Available at: <https://repository.law.umich.edu/mlr/vol94/iss6/13>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REVENGE FOR THE CONDEMNED

*Sara Sun Beale**
and *Paul H. Haagen***

THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868. By V.A.C. Gatrell. New York: Oxford University Press. 1994. Pp. xix, 634. \$35.

INTRODUCTION

David Donald begins his Pulitzer Prize-winning biography of Abraham Lincoln by recounting the story of President John F. Kennedy's annoyance with a group of scholars who had hoped to enlist him in a poll that ranked American presidents. No one who had not sat in the Oval Office, and who did not experience the pressures of the presidency, Kennedy bristled, could judge any of them failures. Taking Kennedy's observation to heart, Donald informs his readers that he had set himself the task of explaining, not judging, Lincoln.¹

Victor Gatrell² takes the opposite tack. As he notes in the preface, *The Hanging Tree* does not aim at objectivity (pp. ix-x). It claims to be "an emotional book" (p. ix), and it is certainly a judgmental one. Gatrell is appalled by the "furred homicides and sable bigots" who administered the English criminal law of the early nineteenth century and defended its reliance on capital punishment (pp. 497-514). He wants his readers to be appalled as well. He dismisses the leading common law judges of the period as bad-tempered mediocrities (pp. 502-14). King George IV, who began his reign determined not to execute anyone, emerges as "less a humane man than a sentimental or squeamish one," and one who was weak and ineffective to boot (p. 551). Gatrell denies Robert Peel the role of legal reformer and characterizes him as "the great hangman," a seriously flawed human being, only partially redeemed by the candor with which he revealed his questionable motives (p. 568). Gatrell judges all of them failures. Even the saintly Elizabeth Fry is portrayed as a person who was "prejudicially selec-

* Professor of Law, Duke University. B.A. 1971, J.D. 1974, University of Michigan. — Ed. The author would like to thank Robert Mosteller and Duncan Beale for their thoughtful comments on a draft of this review.

** Professor of Law, Duke University. B.A. 1972, Haverford; B.A. 1974, Oxford; M.A. 1976, Princeton; J.D. 1982, Yale; Ph.D. 1986, Princeton. — Ed.

1. See DAVID HERBERT DONALD, *LINCOLN* 13 (1995).

2. History Fellow of Gonville and Caius College, Cambridge University.

tive" in her campaigns on behalf of prisoners (pp. 404-05). Nor does Gatrell reserve his invective for those who are long and safely dead. He rejects the analyses of modern historians from Cynthia Herrup to E.P. Thompson as inadequate, and characterizes the approach taken by Tom Laqueur in interpreting the behavior of the scaffold crowd as "absurd" (pp. 29, 220).

As Gatrell explains, the scale of the phenomenon of hanging in England and Wales fueled his anger. Gatrell estimates that 35,000 men, women, and children were condemned to death in England and Wales between 1770 and 1830 (p. 7). Though most were reprieved to the hulks or transported to Australia, approximately 7,000 were executed (p. 7). After a sharp decline in the number of hangings in the early years of the nineteenth century, executions significantly increased with the end of the Napoleonic Wars. In London alone, sixty-five people were hanged between 1816 and 1830, compared with only seventy-nine during the eighty years from 1701 to 1780.³ In London, the authorities hanged an average of twenty-three persons per year throughout the 1820s (p. 9). Then, suddenly, the system ground to a virtual halt. After the Whigs came to power there were reforms in both law and practice, and death sentences dropped from well over four hundred in 1837 to fifty-six in 1839 (p. 9). Gatrell calls the "retreat from hanging" in the 1830s the most sudden and important "revolution in English penal history" (p. 10).

Gatrell explores how various segments of society in England *felt* as the number of executions increased dramatically during "the bloody code's fullest flowering" (p. ix) and then, quite suddenly, fell to a trickle in the late 1830s. *The Hanging Tree* ends in 1868, when Parliament abolished public executions. The book is divided into six main parts, plus an epilogue. The first three parts explore the reactions of the plebeian and polite classes of English society. The fourth and sixth parts consider the development and manipulation of public opinion and the official response to individual mercy petitions and to penal reform efforts, focusing on judges, the King-in-Council, and Home Secretary Robert Peel. The fifth part is a microhistory, developed from one of the most extensive mercy appeal files in the Home Office archives. The epilogue explores the events leading up to the legislation that abolished public executions in 1868.

The Hanging Tree is an extremely dense 611 pages. It includes enough material to make up several books, including a microhistory about a rape trial and its aftermath; a book about the flash ballads,

3. See p. 497. Gatrell's numbers appear to be for the City of London, although it is not possible to tell from the text. His footnote refers readers to the appendix, which shows statistics for London and Middlesex (325 executed between 1816 and 1830). See p. 616.

broad­sides, and other evidence of plebeian attitudes toward public hangings; a book about the attitudes of the polite classes toward hangings; and a book about the appeals process, the individual petitions, and the official responses to them. The successful combination of all of these elements in a single book would have required unusually effective editing, which Gatrell did not provide. The result is a book only marginally better than the sum of its parts.

Part I of this review provides some background on the period in question, discusses the organization and themes of *The Hanging Tree*, and examines the evidence from the flash ballads, broadsides, and mercy petitions. Part II evaluates *The Hanging Tree* as a work of legal history, and Part III evaluates it as a commentary on some of the law reform issues of our own time.

I. BACKGROUND

By the end of the eighteenth century there were over 200 capital crimes in England's criminal code — the so-called bloody code — and two-thirds of the executions during the period before the reforms of the 1830s were for property crimes, including burglary, housebreaking, robbery, forgery, and theft of horses, sheep, or cattle (p. 7). Although wealthy murderers and forgers were hanged occasionally, most of those hanged were the "poor and marginalized" (p. 8). Public hangings constituted a significant and frequent ritual in metropolitan and urban provincial life and were embedded deeply in the collective imagination.⁴ Crowds of 30,000 to 40,000 commonly attended executions, and reports place crowds of 100,000 at London's most highly publicized executions.⁵

Gatrell forces the reader beyond the euphemisms that typically enshroud discussions of the spectacle that those crowds witnessed. Arguing that other historians have sanitized the process (p. 29), he insists that the reader confront "the bleaker truth which social memory has censored — that most felons went to their deaths in quaking terror" (p. 37). He details the agony of death on the gallows, where suffocation took five, ten, or even fifteen minutes, and

4. See p. 30. Gatrell calculates that a Londoner growing up in the 1780s could have attended 400 execution days outside Newgate, and, if diligent, could have witnessed 1200 people hang. See p. 32.

5. See p. 7. Why did huge crowds assemble for executions, and travel long distances to attend provincial executions? Gatrell's explanation reveals the Freudian underpinnings of his view of human behavior and *The Hanging Tree's* highly personal style. He observes that executions provided welcome excitement in the drab lives of the lower classes, as well as other gratifications, including the encounter with repressed wishes that the criminals vicariously enacted, the engagement in quasi-erotic fantasies about the prisoner, and the exorcism of personal guilt projected onto the prisoner. See pp. 73-74. Recognizing these multiple possibilities, Gatrell concludes that "the one of greatest interest to us henceforth relates to the ways in which witnesses evaded the pain threatened in an identification *with* the victim." P. 74.

sometimes came only when the hangman pulled on the condemned prisoner's legs to put him out of his agony (pp. 45-50). Executioners bungled some hangings so badly that the prisoner had to be hanged again (p. 50). Despite technological advances in other fields, executions remained primitive and painful under "a policy of deliberate neglect: hanging was never meant to be a dignified or peaceful quietus" (p. 51).

A. *Plebeian Attitudes*

How did plebeians behave at executions, and what did they really think of them, and of the law? Gatrell argues that plebeian views of the hanging laws were far more complex than previously understood, either by historians or by the polite society that abhorred the crowd's behavior at executions. Gatrell challenges the view that the crowd celebrated executions in a drunken carnival-like atmosphere. He does not deny the fact of the outward behaviors but interprets them as strategies of psychological defense: "[T]he crowd's passion was not always or chiefly celebratory or ghoulish. On the contrary, its passion helped to cancel out terror while camouflaging its submission to the authority that did these things" (p. 76).

Gatrell employs two contemporary accounts of the same execution to illustrate the gap between the real feelings of the crowd and the interpretation of polite observers, and to demonstrate one of the major forms of plebeian response to the hanging laws. In 1848 a barrister wrote disapprovingly about the insolent bearing of a prisoner who "died with the apparent insensibility of a dog," and about the prisoner's mother, who cried "Bravo" when her son dropped, expressed pleasure that he "died game," and left the execution with others to 'go drinking in a public house.⁶ Other accounts reveal, however, that the prisoner in question was far from indifferent to his fate. The *Times* reported that the prisoner protested his innocence until the eve of his execution and then wept while writing farewell letters to his family and sending them locks of his hair so that something of himself might survive (p. 109). Taking comfort in the sheriff's promise to send his family home to Yorkshire, the prisoner bowed to the crowd at the scaffold and then "suffered severely" when he dropped.⁷ As for the prisoner's supporters in the crowd, Gatrell argues that they hid their true feelings and refused to play along with the state's ritual. The way to cope with the pain and shame of the gallows was "to display your contempt for it, to applaud the victim's courage, to parade your own

6. P. 109 (quoting W. HEPWORTH DIXON, JOHN HOWARD, AND THE PRISON WORLD OF EUROPE 275-76 (1849)).

7. See pp. 109-10 (quoting THE TIMES (London) Jan. 11, 1848).

courage in fellowship, and to lead life onwards" (p. 111). "[D]on't let the bastards grind you down."⁸

Gatrell finds the same spirit in the flash ballads. Flash ballads celebrated "drink, devil-may-care heroism, and bleak endings at Tyburn," and provide, Gatrell argues, the best evidence of the real attitudes of the common people toward executions.⁹ The flash ballads "confronted life's horrors without moralizing and sentimentality, and then refused to take them seriously" (p. 123). The energy of the songs was not for protest, but a celebration of triumph over adversity or getting something for nothing (p. 133).

Although some of the ballads are filled so with cant terms that they are difficult to follow even with the explanatory footnotes, the ballad of Jack (later Sam) Hall strongly supports Gatrell's point. The earliest known version concludes:

I sail'd up Holborn Hill in a cart, in a cart,
 I sail'd up Holborn Hill in a cart.
 I sail'd up Holborn Hill, at St. Giles's drunk my fill,
 And at Tyburn made my will in a cart, in a cart. [p. 141]

The last three stanzas of a popular later version express piety and contempt for authority even more clearly:

Then the sheriff he will come,
 He will come,
 Then the sheriff he will come,
 And he'll look so gallows glum,
 And he'll talk of kingdom come,
 Blast his eyes.
 Then the hangman will come too,
 Will come too,
 Then the hangman will come too,
 With all his bloody crew,
 And he'll tell me what to do,
 Blast his eyes.
 And now I goes up stairs
 Goes up stairs,
 And now I goes up stairs,
 Here's an end to all my cares,
 So tip up at your prayers,
 Blast your eyes. [(pp. 142-43)]

Gatrell identifies the subversive attitudes of this ballad — the refusal to be defeated, the cockiness, the celebration of cleverness,

8. P. 111. Gatrell also explores the question of whether the crowd's attendance at the executions shows its approval of the law and the executions. See pp. 99-105.

9. P. 123. Gatrell also provides a short appendix giving the text of several flash songs recorded from memory by Francis Place, including translations of cant terms. See pp. 149-55.

the facing of execution without flinching — as key components of crowd behavior until the end of public executions (p. 144).

The flash songs, however, did not sum up all of the attitudes that the plebeian crowd displayed at the gallows. Gatrell concedes that some members of the crowd exhibited other attitudes, such as “acquiescence, approval, identification with the law” (p. 156), and that these attitudes were shown in the popular printed broadside accounts of the executions. Unlike the flash songs, the broadsides were not subversive. Repetitive and formulaic, they sounded the themes of repentance and retribution. Instead of giving sensational details from each case, broadsides employed vague euphemisms, such as the saying that the prisoner “launched into eternity” (p. 175). The most noticeable feature of the broadsides was their simple woodcut illustrations; printers made little or no effort to reflect the particulars of the execution in question, and the same illustrations “did service for generations” (pp. 175-76).

Gatrell theorizes that the commercial success of the broadsides¹⁰ reflects the fact that the broadsides were “totemic artifacts” that served as “symbolic substitutes for the experiences,” mementoes of events worth “reifying” (p. 175). People bought the execution sheets not to learn the details of a particular execution, but because the ritually inflicted deaths had to be “tamed and possessed” (p. 175). The illustrations were ideograms, not clumsy representations.¹¹

B. *Attitudes Among the Polite Classes*

What about the feelings of the middle class, the literary, professional, and commercial people? Gatrell disagrees with the traditional view that the improved morals and increased humanity brought about the reform of the English penal laws (pp. 11, 325). Instead, he makes a three-part psychoanalytic argument:

(1) People had (and have) an “elemental excitement [and curiosity] about what happened on scaffolds” (pp. 238-39). “The Scaffold tap[s] into primal excitement and curiosity about death, aggression, and destructiveness, while in the crowd’s enjoyment of its own unanimity and in its support for the condemned, it might

10. Despite the repetitive quality of both the text and the illustrations, the broadsides were extremely popular, selling as many as 2.5 million copies after some executions in the mid-nineteenth century. See pp. 158-59. Execution sheets sold in even the poor and remote areas; two poor families in one village pooled their money to purchase a sheet, and 11 people listened as an old man read it to them by firelight. See p. 173.

11. What then of the deferential and even self-abasing language of the mercy appeals? Gatrell asserts that the flash ballads and the broadsides provide a more reliable gauge of the feelings of plebeian England than the mercy petitions filed by them and on their behalf. The petitions were often calculated and instrumental, their deference merely postured. See p. 218.

also bizarrely have been an arena of love" (p. 239). Initially, this was the attitude of the polite classes, including Samuel Pepys (p. 244), John Evelyn (p. 245), Henry Angelo, Walpole, Henry Matthews, and James Curtis (p. 253).

(2) The attitude of the polite classes shifted significantly at the end of the eighteenth and early nineteenth centuries, and taboos began to develop about executions. The old curiosity was no longer acceptable,¹² and the crowd — rather than the execution — became the scapegoat and the target of contempt. Newspapers criticized members of the polite classes who attended (p. 261).

(3) Despite the social sanctions, many people could not suppress their curiosity about the scaffold, so unconscious defenses became necessary to tame these drives.¹³ The defenses became "the socialized, conscious, and judgemental self" (p. 240). But the defenses did not work perfectly. Repressed curiosity caused conflicts and anxieties, as well as fantasies and regressions overlaid with shame and guilt.

Gatrell argues that concepts such as justice, fairness, and humanity were important elements in the reasoned attack on the *ancien regime* but insists that "it was through the emotional resonances associated with these images that opinion would be chiefly touched."¹⁴ He employs two examples to demonstrate how a fusion of rational argument and emotional appeal could shift understanding of the capital-punishment laws and permit the propertied classes to identify with the plight of those sentenced to be hanged. He characterizes each as involving a female prisoner who was "young, pretty, wrongly judged, and wrongly hanged" (p. 340). The first story is largely about the personal emotional journey of one country gentleman, Capel Lofft. Lofft was an eccentric barrister, justice of the peace, and sometime radical. He had for years opposed the "vindictive jealousy" (p. 343) of the criminal law. In

12. Gatrell gives several examples of this new uneasiness. For example, by 1779 Boswell began to fear that others would think his fascination unhealthy, and George Selwyn, who had well-known necrophilic tastes, was said to have disguised himself in women's clothing to attend executions. See p. 262.

13. For a brief Freudian explanation of unconscious mechanisms of defense, and of various defenses, see pp. 266-67 & n.19.

14. P. 326. Gatrell identifies a relatively small group of committed reformers — far smaller than the group that opposed slavery, for example — and suggests that they appealed to a public opinion that to a significant degree, they, themselves, had created. He suggests that, among the reformers, lawyers played a more influential role than commonly understood, while Quakers were latecomers whose influence has been overestimated. Among the relatively small group of Quakers (no more than 20,000 during the period in question), most were not active on the issue of capital punishment, and Gatrell demonstrates that those who were active confined themselves principally to opposing the death sentences of wealthy Quakers. See pp. 403-13. For example, they mounted campaigns against hanging for forgery, but not for the offenses committed by a large number of poor people, such as shoplifting, burglary, or horse stealing. See pp. 408-16.

the spring of 1800, Rev. Hay Drummond sought Lofft's assistance in petitioning the Home Secretary to commute the death sentence of a young servant girl named Sarah Lloyd. There was no doubt that Lloyd had committed the crime of which she had been convicted, stealing her mistress's property, but Drummond believed that she did not deserve to die for the crime. After meeting her, Lofft agreed. He threw himself wholeheartedly into the effort to save her life. He became convinced that she was a victim, and that her lover, Joseph Clarke, was the real villain. Lofft believed that Clarke had seduced her, brought her under his power, and induced her to commit the crime. When Lofft failed to interest the Home Secretary in the plight of this young woman, he became agitated, "suicidally so" (p. 347). "Identifying body and soul with the victim-woman in Sarah Lloyd upon whom he projected his long frustrations, and then in love with the creature he made of her" (p. 353), Lofft rode with Lloyd in the cart on the way to her execution (p. 348). This justice of the peace then mounted the scaffold with the condemned servant girl, and harangued the crowd for fifteen minutes eulogizing her and denouncing the Home Secretary. He later addressed a crowd of one thousand at her funeral (p. 349). These actions cost Lofft — whose behavior had been erratic for some time before his encounter with Sarah Lloyd (p. 345) — his position as a magistrate. He became increasingly eccentric and out of touch in the ensuing years (pp. 352-53). For Gatrell, the ability of this one justice of the peace to identify with a victim of the capital code was, nonetheless, "magnificen[t]" (p. 353).

The second and far more influential case was that of Eliza Fenning, a twenty-two-year-old cook, convicted of poisoning several members of the household in which she worked. Public interest and indignation over her case produced, not the personal transformation of one country gentleman, but rather a broader societal response reflected in an unusual outpouring of newspaper articles, ballads, pamphlets, and engravings. After she was hanged in 1815, John Watkins and William Hone published a book of unprecedented length for such works, 194 pages with a forty-six page appendix, detailing the mishandling of the case and "warning people 'to put little confidence in the reasonings of fallible magistrates, who have grown old in the ministration of death'" (p. 366). Her supporters put her body on public display "and for four days people queued to see it" (p. 356), marveling that her body did not change color for three days (p. 366). Ten thousand Londoners attended her funeral. She became a martyr, "as close to beatification as Londoners would ever bring a wronged maiden," and a symbol of incompetence and corruption in the administration of criminal justice. Witnesses referred to her case in testimony before the Lords' committee on capital punishment in 1856 (p. 368), and Charles

Dickens recalled it indignantly eleven years after that (p. 368). Fifty-six years after the event, Charles Hindley remembered Fenning as “‘a beauteous innocent creature’, her gallows dress ‘as spotless as her own purity’ ” (p. 368).

What made Fenning’s case so compelling, according to Gatrell, was that she was pretty, young, female, and pious-sounding (p. 361), the case against her was weak, the court’s handling of it was appalling, and the press was interested (pp. 359-61). The combination, Gatrell insists, mobilized a critique of the law through “identification with the plight[] of [a woman] wrongly condemned” (p. 370). Through “luxuriant sentiment and sentimentality,” it permitted, he contends, a projection that sustained a radical attack on the criminal law (p. 370).

Upon closer examination, however, the fact that this case created so much public excitement is even more interesting than Gatrell suggests, because the record in the case was much less straight-forward than he portrays it. One or more contemporary witnesses contradicted every part of his characterization of the case. Fenning may have sounded pious, but, her employers insisted, she was not. The case against her, based on the testimony of her employers and a fellow servant, was that she had opportunity and motive. They testified that she was the only person with access to both the poison and the food, that she had a grudge against the family, and that she had warned another servant not to eat the poisoned food. The judge who handled the case apparently did have a bad reputation, but the bad reputation had been there for some time, and reactions to the trial did not force him from the bench. After her conviction, a local chemist came forward to claim that a member of the family for whom Fenning worked had “threatened poisoning” and acted “‘wild and deranged’ ” (p. 360), but the King-in-Council apparently heard this evidence and was not impressed with its credibility or relevance (p. 360). After the trial, reports surfaced that Fenning had a disreputable character and had threatened the prosecutor in her case. None of this apparently mattered either to Hone, Watkins, or the others who took up her case, nor to those who accepted Hone and Watkins’s characterization of it. The story that they told about Eliza Fenning must have tapped into anxieties about criminal law, and significant segments of the public were prepared to believe it.

C. *Mercy Petitions and the Response of the Polite Classes to Law Reform*

Part IV of *The Hanging Tree* describes the old order’s view of the function of the criminal law and its response to mercy petitions. Gatrell argues that Tories thought that only terror would protect

the public interest (pp. 518-19). The function of the criminal justice system was not to determine individual guilt or innocence, nor to determine the appropriate punishment for individual defendants, but rather to inspire the terror necessary to uphold the social order. This view was stated clearly by Archdeacon William Paley:

It was 'necessary to the good order of society, and to the reputation and authority of government' that people *believe* that convictions depended upon the proof of guilty and that sentences were appropriate to the crimes. But should mistakes happen and innocent sometimes hang, 'he who falls by a mistaken sentence, may be considered as falling for his country'. The chief end of the criminal law was not justice but 'the welfare of the community'. [(pp. 517-18)]

In Gatrell's account, all of the major actors in the criminal justice system — the judges, the King-in-Council, and the Home Secretary — shared this view of the function of the criminal law.

Gatrell derisively calls the criminal court judges "furred homicides" and "sable bigots" (p. 497). The criminal courts were at the bottom of the judicial hierarchy (pp. 502-05), and Gatrell concludes that the mediocre judges who served there had no sympathy with or interest in the lower classes and easily rationalized the harsh judicial system that helped preserve their "[e]conomic and status self-interest" (p. 498). The criminal court judges "worked within a criminal justice system which quite purposefully upheld propertied hierarchy first and delivered justice second, in which respectable patronage, perceived character, and local tensions were *meant* to affect sentences and appeals . . . in which juries were often timid, mercy grudging, [and] pardons rare" (p. 515).

The review of mercy petitions showed a similar disregard for justice in individual cases. Gatrell argues that George IV and his Cabinet Council wielded the power of life and death with "remote and capricious disdain" (p. 543). The Cabinet members were "aloof, arrogant, and merciless beings" who were "insulated from the cramped worlds of those whom they decided to kill, [and] half-attentive to the death-dealing business at hand" (p. 543). Though the King began his reign saying that he wished to have no more executions (p. 553), and he favored respiting nearly every death sentence that he considered, Gatrell faults him for having "little strength or determination in his gestures on behalf of the condemned" and generally capitulating to stronger voices, especially the voice of Robert Peel (p. 551).

As Home Secretary, Peel established his dominance over the Council and the King in determining the fate of those sentenced to death in the Old Bailey, and he dominated the provincial petitions as well. Although Peel recognized the need to respond to "the glaring anomaly of sentencing people to death when it was public knowledge that they would not be hanged" (p. 569) and supported

the repeal of many of the capital punishment statutes, he nonetheless bullied the King into approving the execution of many the King sought to save. Gatrell concludes that Peel never wavered in his support for the central tenets of the old regime — “the royal prerogative of mercy and the discretionary element in judicial and executive power” (p. 583).

Gatrell identifies among the mercy petitions he reviewed many defendants whose convictions were upheld (though the sentences often were respited to transportation or imprisonment on the hulks) despite the fact that they were innocent or their guilt was highly questionable. One example will give the flavor of the cases Gatrell discusses. Benjamin Ellis was sentenced to death for highway robbery despite his claim, corroborated by the testimony of his three brothers, that he was home asleep at the time of the offense (pp. 423-27). An independent investigation by a wealthy and disinterested gentleman produced confessions by two others and corroborated these confessions by the recovery of the gun Ellis had been convicted of stealing. The appeal revealed that there had been no highway robbery, as the gun had been left at the scene of the crime, and in any event the men who confessed were the perpetrators of any offense that did occur. The investigation also uncovered a letter that established that a man against whom Ellis had a legal action pending had prejudiced the magistrate. Peel nonetheless allowed Ellis’s conviction and sentence to stand, and he was sent to the Hulks and eventually to Australia.

Gatrell’s bleak conclusion is that most petitioners, like Ellis, were denied relief in an appeal process structured to uphold and reinforce the social order by terror, when doing justice in individual cases was at best a secondary consideration:

Even when convictions were obviously dubious or sentences excessive, the luckiest petitioners could hope only for “conditional” pardons. This meant that they were left off hanging on condition of confinement to the penal hulks or transportation for life, or left off transportation on condition of imprisonment at home. Even those whose innocence was tacitly admitted were kept on the hulks for an exemplary period of half their sentence or so and then pardoned, as if the law’s dignity must be sustained, its errors never openly admitted. [p. 207; footnotes omitted]

D. *Why Did the Law Change? How Important Was the Culture of Sensibility?*

Why did the law change? Gatrell rejects the usual account of the reform of the English penal laws, which ties it to “the improve-

ment of morals and manners [and] the growth of humanity.”¹⁵ Associating himself with Foucault¹⁶ and Elias,¹⁷ Gatrell suggests that “shifts in sensibility of this order usually ensue from rather than induce redeployments of power, so it is to two other causes that we should give priority” (p. 610). Early in the book, Gatrell states:

[H]umane feelings prevail when their costs in terms of security or comfort are bearable; when they can be productively acted upon; and when they bring emotional and status returns to the ‘humane’. . . . Culturally dominant groups most deplore brutality when the state’s authority or their own is strong enough to obviate the need for its outward display. In these conditions the humane people are usually those who eat, prosper, and are safe. [p. 12]

In other words, the development of the modern state, which obviated the need for the outward display of the gallows, was a necessary precondition for expression of more humane feelings in law. By the 1830s and 1840s a new form of disciplinary state was developing (pp. 296-97). There were professional police forces, better incentives that encouraged more prosecutions, and new penitentiaries. Magistrates’ courts were operating more efficiently and “disciplining more people more speedily, cheaply, and lightly than before. Hangings began to look unmodern, and disgust at them appropriate” (p. 297).

Once this precondition was met, Gatrell argues, law reform took place because of “a structural problem *within* the criminal law itself — in an *overloading* of the capital code which ensured that its repudiation had to come about sooner or later” (p. 19). The large increase in prosecutions and in capital sentences led to an even greater increase in the percentage of death sentences respited because “there was a threshold beyond which the number of executions could not safely pass” (p. 20). But, once ninety-five percent of those sentenced to death in London — and over ninety percent elsewhere — were reprieved, the capital code came to look “randomly cruel and terminally silly” (p. 21). In other words, “[t]he bloody code might fairly be said to have collapsed under pressure of the criminal law’s mounting prosecutory effectiveness” (p. 21). Gatrell argues that these factors were sufficient to explain the re-

15. P. 11 (quoting 4 LEON RADZINOWICZ, *HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 352-53 (1968)).

16. Foucault theorized that public executions were integral to the symbolic display of sovereign might. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 32-69 (Alan Sheridan trans., 1977) (1975). Gatrell notes that the collapse of English execution rates in the 1830s and the abolition of public executions in 1868 paralleled “the state’s consolidation and bureaucratic competence,” making symbolic displays of state power less necessary. P. 16.

17. Elias fused Freudian psychoanalytical theory and the history of political processes, claiming that the expanding State imposed emotional restraints on subjects. With economic diversification and bureaucratization, “self-control became both a mark of status and a condition of efficiency.” P. 17 (citing NORBERT ELIAS, *THE CIVILIZING PROCESS* (1939)).

duction in the number of capital crimes and capital prosecutions, but he sees other factors at work in the abolition of public executions in 1868. He disagrees with the general assumption that moving the executions inside the prisons was humane (p. 590). In Gatrell's view, it advanced urban decorum and civility by merely hushing up — but not ending — the horror of executions (p. 590). Gatrell believes that a consensus developed that hangings should continue for some crimes, despite the anxiety, shame, and squeamishness that they provoked among elites. The polite classes' dislike of the scaffold crowd increased because the crowd mirrored the state's violence too candidly. The crowd came to seem "a repudiated *alter ego* or shadow-self which spoke too truthfully for a progressive nation to tolerate" (p. 24). Private executions appeased the squeamish culture and eliminated the plebeian execution crowd's mockery of polite Victorians' pretensions to civility. In fact, the private executions were more cruel, because they removed the crowd that had supported the prisoners.

Gatrell concludes "that Victorians' civility only veneered the state's violence over; that in hiding penal violence they consulted their own feelings and not those of the punished; and that within the secret prison power was to be — and is — wielded more efficiently than ever it had ever been at Tyburn" (pp. 610-11).

II. *THE HANGING TREE AS HISTORY*

The tendentiousness that characterizes most of the judgments made in this book leads to the assumption that the arguments being made are deeper and more radical than they in fact are. But for such an emotional book, its major conclusions, with the exception of those relating to judgments about the motivation or character of individuals, are cautious and inconclusive. Anxieties about harsh law in the 1820s, he concludes, worked on many levels. Queasiness, piety, and Quaker hectoring all played their part on "many psychic and social levels" (p. 416), but Gatrell fails to give any pride of place. The Introduction suggests doubt about the importance of the 1867 Reform Act in the decision to abolish public hanging, only to have the Epilogue suggest otherwise, albeit in similarly cautious terms.¹⁸ Surprisingly, given the tone of the book, its contributions to historical debate about criminal law, law reform, crowds, punishment, and popular understanding of law are ones of shading, nuance, and labeling. Having first mocked a "body of social historians" for their inadequate treatment of the question of the relationship between mercy and deference (p. 213), Gatrell con-

18. Compare p. 23 (Introduction) with p. 609 (Epilogue).

cludes that the differences between him and them are merely ones of emphasis.

As Gatrell himself recognizes, *The Hanging Tree* does not change our understanding of the chronology of legal change (p. vii). Although he states that "we owe it to the subject (and to specialists) . . . to count and compare the numbers condemned and hanged in this period" (p. 6), the counting and comparing are done more for rhetorical effect than for analytical purposes.¹⁹ *The Hanging Tree* makes no attempt at a serious contribution to the history of legal doctrine or penal theory. While it does persuasively add its voice to those that have depicted nineteenth century legal reform as more ambiguous than previously had been thought, its conclusions comport with recent revisionist history.²⁰ What the book does is present a very rich account of the complex and conflicted responses to the spectacle of public hanging. It forces a serious consideration of the ways in which the English responded to a criminal law that large numbers of them, for a wide variety of reasons, no longer could accept.

The book begins with two radically different accounts of the hanging of a fourteen-year-old boy, John Amy Bird Bell, for the robbery and murder of another child (pp. 1-4). The first is a bitter, fictionalized narrative written by Edward Gibbon Wakefield, an outspoken opponent of capital punishment (p. 2). The second is a "cool" report that appeared in *The Times* (p. 3). These very different narratives represent for Gatrell the two different "countries" inhabited by Englishmen as they debated the morality of the gallows, and neatly frame what Gatrell promises will be the questions addressed by the book. How did people respond to public hangings? Did they worry about them? If feelings changed, how did they change? Did the scaffold system collapse because of changing opinions?

While the discussion of these issues is often revealing and stimulating, the conclusions at which Gatrell arrives are less than earth-

19. Gatrell compares, for example, the situation in Scotland and Ireland in an effort to demonstrate how unusual the extensive use of capital punishment by the English was. He refers to the number of hangings in Scotland as "meagre" in comparison with that in England and to Ireland and Scotland's "relative innocence of the noose." P. 8. He claims that between 1836 and 1842, Scottish executions were "eight to ten times less than the English rate." P. 8 n.14. He is able to make these claims because he does not control for the relative sizes of these kingdoms. If "rate" is treated as the number of executions per unit of population, then the rate of executions in Scotland between 1836 and 1842 was not eight or ten times lower than in England and Wales at the same time, it was 25 to 40% lower. In 1813 to 1814, it was actually higher in "innocent" Ireland than it was in bloody England and Wales. Gatrell has demonstrated in his earlier work that he knows how to use statistics in a sophisticated way. His failure to do so in *The Hanging Tree* is clearly deliberate, and for rhetorical effect.

20. See, e.g., G.R. Rubin, *Law, Poverty and Imprisonment for Debt, 1869-1914*, in *LAW, ECONOMY AND SOCIETY, 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 241-99* (G.R. Rubin & David Sugarman eds., 1984).

shattering. The answer to the last question is, in fact, assumed. Gatrell takes as given both that hanging was repudiated for reasons "greater than" emotional reactions to it and that those emotional reactions depended on material conditions that made the population feel safe. He characterizes the other matters as factors that he assumes are "derivative as distinct from causative" (p. 24). Lest any of his readers balk at more than six hundred pages about derivative matters, Gatrell observes that "only rash historians would privilege material, or political, or cultural causes without interrelating all three" (p. 25). If legal change could not have taken place until material conditions made it safe enough to indulge sensibilities, sensibilities affected the timing and shape of change. His account of how such emotions affected legal change is, however, much less full than his account of the emotions themselves.

Gatrell depicts the "two different countries" inhabited by Englishmen as reflecting differing attitudes toward human nature. The "'old' voices, as we may call them, though they still speak" (p. 5) who appealed to "retributive imperatives" are contrasted with the voices of men like Wakefield who refused to blind themselves to the greater atrocity of "cold-blooded judicial killing" (p. 6). The organization of the book, however, then immediately shifts focus to a different way of dividing the world as Gatrell looks successively at the reactions of the scaffold crowd, the responses of polite society, the involvement of a single community in a particular capital case, and the attitudes of the political actors who administered the system of public hanging.

A. *The Scaffold Crowd*

By interpreting the behavior of the scaffold crowd and reading the plebeian texts of broadsides and ballads, Gatrell seeks to demonstrate that Londoners neither passively accepted the lessons that public hanging were intended to impart, nor attended hangings simply out of a spirit of ghoulishness. Instead, he concludes, humble and middling Hanoverians contemplating hanging law "steered a wavering course between tacitly ethical approval, sardonic and transgressive defiance, and mockery, sentimental anguish, or outright voyeurism" (p. 196). He argues that "their actions always made *sense*, even though at this remove in time, and even by the people themselves, precisely *what* sense can sometimes only be guessed at" (p. 196). Gatrell's account mirrors the wavering course he says the Hanoverians steered. Like the scaffold crowd, he takes his hat off to those unfairly hanged, and boos the hangmen, but as he steers his wavering course it is often difficult to say precisely what sense to make of it all.

Gatrell's own evidence demonstrates that the scaffold crowds did not oppose hanging *per se*. In fact, there was broad popular approval for some hangings (p. 104), especially when the crowd perceived the victim as a social other (p. 101). Nonetheless, he argues, there was a "dangerous perception" that the gallows "often and perhaps usually symbolized an illegitimate power" (p. 104). On the nature of that danger, he is neither consistent, nor entirely clear.²¹ Although he insists repeatedly that the authorities knew that they could safely hang only so many criminals a year, he systematically denies that the scaffold crowd had sufficient control to bring about change.²²

According to Gatrell, the danger embodied in the perception of illegitimate power could not be expressed fully at the scaffold itself. There, "[s]tate power determined crowd reactions" (p. 91). Gatrell uses this argument to attack the recent writings of Laqueur and others, who have emphasized the "'carnavalesque'" qualities of hanging days (p. 91), contending that the scaffold was not plausibly a place where the world could be turned upside down.²³ He asserts that power explains the crowd's failure to resist the authorities. It was state power, he insists, that caused an angry crowd protesting the taking of Anne Hurle to the gallows in 1804 immediately to become silent after being reprimanded by the sheriff (p. 97). It was also state power that led crowds seldom even to contemplate rescue, "even though many knew that 'nothing certainly could have been made more easy'" (p. 97). Gatrell, ironically, also invokes state power to explain the mayhem that did take place at executions. It reflected, he argues, the "state's olympian indifference" to what was after all not very threatening activity (pp. 95-96). Gatrell does not explain how his insistence on the significance of state power can be reconciled with his earlier claim that the state could

21. Gatrell denies in the face of pretty strong evidence that the decision to stop the procession to and proceedings at Tyburn in 1783 and transfer those hangings to Newgate had anything to do with concerns about the crowd. See PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* 363 (1992). Gatrell argues that the transfer of the gallows from Tyburn resulted from a decision to defer to the "high-born property developers north and east of Hyde Park." P. 96. His own discussion of the decision does not support that characterization. The petitions from the proprietors of estates near Tyburn were written in the 1750s and 1760s. The two sheriffs who suggested the change to Lord North and Lord Chief Justice Mansfield talked only about the need to get better control over crowd behavior in order to insure that the hanging conveyed the appropriate message. See p. 96.

22. The source of this knowledge is unexplained, and Gatrell's statistics show that the authorities were prepared to hang large numbers of persons during periods of turmoil or disruption. See p. 8 n.14.

23. He also insists without explanation or obvious justification that public hangings were not "convincingly the locus of what Burke discerns as the three major themes in carnival — food, sex, and violence." P. 94. As he notes, on hanging days taverns opened early and piemen hawked their wares. See p. 94. It is not difficult to find prints that add sex and violence as well. See pp. 189-93.

not prevent the crowd from effecting a "parodic inversion" of an "execution's intended significance" (p. 88).

In building his picture of the scaffold crowd, for the most part, Gatrell uses sources that have been used by other scholars, but in his extensive use of the petitions for mercy filed on behalf of persons sentenced to death, he breaks new ground. He employs them as a window on the process by which the condemned appealed for mercy, and as a way of looking at one community's response to a criminal conviction.

The mercy petitions developed out of one of the peculiarities of the unreformed English criminal law. Although capital punishment was the ideological cornerstone of the criminal law and the courts handed down many capital sentences, a relatively small proportion of these sentences were carried out. After 1800, more than eighty-seven percent of all those convicted of a capital crime and sentenced to death had their sentences commuted. Did this process of petitioning for mercy have the effect of encouraging deference and legitimating the law? Gatrell attempts to introduce doubt. He questions whether these petitions reflect "real" deference, and mocks a "hefty body of social historians," whom he accuses of stressing benign motifs.²⁴ He recognizes that there were many real expressions of deference. There were old voices whose deference to the great and their law was habitual and reflexive (p. 214), and the "yeoman-to-middling kinds of people, or those who aspired to be like them," whose "fawning" was not dissimulated (p. 215). But with all of that, he reaches the entirely plausible conclusion that much of what appeared as deferential was in fact an instrumental language of free plebeians. Gatrell leaves unexplored how much more the Tories who defended the criminal code expected.

A tension pervades the section of the book dealing with the scaffold crowd. Gatrell wants to portray the lower orders as actors with dangerous opinions, but their actions remain limited to an emotional world, and one that remains resolutely conflicted and confused.

B. *Reading the Polite Classes*

Historians conventionally attribute the broad shift in sensibilities relating to the death penalty to growing feelings of humanity (pp. 226-28). It was conventional at the time, and has been conventional ever since, to attribute an important role in encouraging and

24. Turning to a footnote, we learn that the "hefty body" consists of five individuals, and that Gatrell is quarreling only with "the balance of emphasis" in their work. Three of them qualify their positions enough so that he does not intend "to parody" them. Of the other two, whom Gatrell apparently regards as the legitimate subjects of parody, one writes about the seventeenth century. See p. 213 & n.50.

forming that shift to a variety of middle class philanthropic reform efforts (p. 371). By looking at the writings of private individuals, persons actively involved in various reform movements, political radicals, and the lawyers and court officials who participated in putting together mercy appeals, and by reading them through the lens of psychological analysis, Gatrell attempts to demonstrate the problematic nature of such conventional accounts. He probes the anxieties created by the increasingly arbitrary nature of capital cases and the defenses that polite society erected to avoid dealing with the horror of hanging. He discusses the difficulty that polite society had in identifying with the condemned, and argues that the emotion that caused increasing numbers to recoil at hanging was not empathy or humanity, but squeamishness (p. 267). By placing these "[d]ead people" "on couches . . . to diagnose them Vienna-style," he hopes to make sense of "the strange behavioural patternings apparent" in the responses of the polite classes to hanging (p. 266).

His efforts do not call into question the conventional claim that there was a profound change in public attitudes toward hanging in the first three decades of the nineteenth century, although they do call into question both the depth and breadth of that change. He identifies the same actors as those in traditional accounts and leaves the usual chronology of attitudinal shifts undisturbed. Gatrell, however, does challenge the conventional understanding of the wellsprings of that change. He minimizes the role of religion (p. 372), and seeks to demonstrate the shakiness of the commitment of the Society of Friends to reform of the criminal law (p. 405). He emphasizes the contributions, largely ignored by others, of those lawyers and court officials who took a large role in the preparing of mercy petitions on behalf of the condemned, and who made their arguments in terms of justice (pp. 417-44). He calls into question how much the reformers changed public opinion, and reveals that the reformers "exaggerated the clarity, ubiquity, and intensity of the public concern for which they spoke" (p. 416). If he denies the prison reformers and the monarch the dignity of having acted from the motives of selfless humanity that other historians have granted them, he does not deny that they played their part "in the extended process of social learning," or that they succeeded in framing much of the debate in their own terms (pp. 443-44).

The explanatory power of this part of the book depends on the insightfulness of his psychological analyses of persons long dead, who have left fragmentary records in the idiom of another time. Reactions to such an enterprise are likely to vary, as are judgments on the skill with which Gatrell has carried it out.

The Hanging Tree focuses on the emotions that surrounded hangings, but the book is at least as much about the author's own

emotional reactions: to hangings themselves, to a judicial system that imposed and defended them, to ways in which society reacted to them, and to the modern historian's account of the first three. These multiple emotional foci create powerful tensions in Gatrell's account.

These tensions seriously interfere with the narrative descriptions of public executions that play such a large part in this book. Despite the fact that they are often very moving tales, there is surprisingly little immediacy about them. This is not a book of rich description. We never *feel* part of the crowd at the scaffold. We do not smell it, or hear it, or see it. When the emotional power of the setting and events threatens to break through, Gatrell's own self-consciously uncensored emotions and judgments distance the reader from the scene. We find ourselves focused on the author, not the hanging.

For a book that has as one of its central themes the ability, or inability, of the polite and political classes to empathize with the sufferings of those condemned to die on the scaffold, *The Hanging Tree* itself demonstrates very little ability to empathize with any of them. In recounting the experiences of Capel Lofft and his three- or four-week involvement with the case of Sarah Lloyd, a young servant girl executed at Bury St. Edmunds on April 23, 1800, Gatrell maintains an ironic detachment. Lofft, he tells us, achieved "some magnificence" through this involvement (p. 353). But if there was a kind of "splendour" (p. 353) in the case, Lofft himself emerges as slightly ridiculous. His attempt to save Sarah Lloyd's life, Gatrell notes, had "a kind of lunacy" about it (p. 353). It was the work of a man "who projected his long frustrations" upon "the creature he made" of Sarah Lloyd, "the victim-woman" (p. 353). The increasing lunacy of the man himself later confirmed the lunacy of his attempt, for, after the execution of Sarah Lloyd, Lofft increasingly withdrew from society and his eccentricities grew (p. 352).

There is at least some measure of condescending warmth in the ironic detachment with which Gatrell treats Lofft. Elizabeth Fry is too much of a social other and gets much less sympathetic treatment. In describing her efforts to involve women as prison visitors, Gatrell notes that prison governors and prison chaplains found them hard to take, "and they had a point" (p. 381). It "must have been trying" for governors to have to put up with Fry's ladies' visiting days. If Lofft projected his frustrations on Lloyd, it appears that Gatrell projects his on the governors. He finds Fry, and her Quaker sensibilities, trying, almost as trying as he finds those who have yielded to the temptation to beatify her (p. 371). He reads the diary entries of the seventeen-year-old Fry, and discovers that she had

learned "how to gush as well-bred girls of feeling must gush" (p. 393). He recoils in horror at the "disciplined denials of belief" with which she met the death of her four-year-old daughter (p. 393). He finds a "luxuriantly self-referential quality in [her] instinct to good works" and appears repulsed by her account of her efforts to protect her sanity in the face of the hangings that she found so distressing (p. 394). Gatrell introduces the fact that Elizabeth Fry had eleven children to worry about in addition to the prisoners at Newgate not to demonstrate how remarkable her achievements were in the context of her other duties, but for the purpose of showing that she "did not spend more than a moiety of her time" at the prison (p. 404).

In 1818, Fry tried to save the life of Harriet Skelton. Her efforts failed, but in the process she managed to offend the Home Secretary, Viscount Sidmouth. Offending the Home Secretary was the sort of thing that might have made her prison reform work more difficult, and Fry understandably feared that she had "too incautiously spoke[n] of some in power" (p. 373). Gatrell cites her comment as evidence that she was more upset by his coolness to her than by the hanging of Skelton (p. 373). Her prudential advice to the Ladies' Society a decade later that it was "wiser for visiting ladies to be quiet, and to submit to decrees, which they cannot alter" "unless they can bring forward decided facts in favor of the condemned"²⁵ becomes proof that she "was not one to rock political boats" (p. 389).

Gatrell meets in Elizabeth Fry someone whose language and world view was both unbearable and inaccessible, except on those occasions when she, like a few other "[r]are birds," managed to get "close to the sinner's physical terror in this world without obliterating it in obsessive references to the world to come" (p. 389). He is "inclined to believe" her distress and empathy when she used vocabulary that was "sensationalist" and "secular" and grants that she, at least in that moment, succeeded in "an imaginative projection" "passing from one woman to another" (p. 389). Gatrell is much less sympathetic with the attempts of Fry and others to empathize with the spiritual terrors of the condemned. He is not prepared to dismiss such efforts as merely a defense against anxiety about scaffold killing (p. 374). He does, however, label them as defensive "if it is agreed that belief in bodily resurrection has been the main denial system through which most societies have kept the fear of death at bay" (p. 375). Starting with the propositions that the spiritual language of the reformers is incomprehensible and that religious belief is a form of denial, he comes to the conclusion that

25. P. 373 (quoting E. FRY, OBSERVATIONS ON THE VISITING, SUPERINTENDING, AND GOVERNMENT OF FEMALE PRISONERS 24 (1827)).

religious belief was not the driving force behind the only form of empathy that he considers legitimate, empathy that addresses the physical terror and pain of the hanged. This insight highlights elements of the work of Elizabeth Fry that other accounts submerge. How powerful an insight it is is open to greater doubt.

C. *Community Reactions*

Part V of the book consists of a microhistory of the rape of Elizabeth Cureton (pp. 447-93). The Cureton case was one of the biggest appeal campaigns in the 1820s, and it was this case that first drew Gatrell's interest in the Home Office Archives (p. 448). It forms the third focus of the book, the focus on the attitudes of a single community.

In June 1829, in the village of Coalbrookdale in Shropshire, John Noden, a twenty-seven-year-old odd-job man and wheelwright, forced Elizabeth Cureton to have sex with him. She regarded the incident as a rape, and reported it to the authorities. The authorities agreed with her assessment. Noden was charged with the capital crime of rape, convicted, and sentenced to death. The community rallied to Noden's defense, and the judges of the assize court recommended him for mercy. The Home Secretary, Robert Peel, accepted the recommendation, and commuted Noden's sentence to transportation. The people of Coalbrookdale, however, were not satisfied. A surgeon who had intimate knowledge of the parties involved launched a second appeal drive in an effort to get Noden a full royal pardon. Despite the clamor in Coalbrookdale, the presiding judge's doubts about the case, and a mercy petition of unprecedented size, Peel let the judgment stand. After spending two years in the hulks, Noden was transported to Bermuda. He apparently returned to Coalbrookdale from Bermuda some twenty years later, and died twenty years after that. Elizabeth Cureton apparently moved away from Coalbrookdale, although possibly not very far. She may have been one of the two persons with that name who married in nearby parishes in 1831 and 1832.

What are we to make of this "microhistory"? Gatrell argues that it "put[s] us in touch with the lived texture of past times" (p. 448), and "addresses a different kind of opinion about capital justice from those surveyed so far" (p. 447). It is an interesting story, very well told, and it demonstrates the potential richness of the mercy petition archives. Unfortunately, it is not well integrated with the rest of *The Hanging Tree*. Gatrell observes that the microhistory:

is about one community's attitudes to a woman who challenged male assumptions about her body's accessibility and who paid a familiar

not to say predictable price. It is a cruel story which feeds in to the long history of collective connivance in male violence against women. . . . [W]hatever was thought privately, nobody spoke of the capital code in this case; and the Coalbrookdale Quakers were marginal players in the campaign. The audible issue was the right relations between men and women, to which the law failed to attend. [(pp. 449-50)]

Gatrell never successfully ties this microhistory of gender relationships and the rape laws back into the quite different subject of the capital laws. The Cureton microhistory, moreover, appears to stand as a challenge to many of the themes that Gatrell seeks to develop. Though Gatrell generally assumes that the function of the criminal law was the protection of property and social privilege (p. 515), here the law becomes a vehicle to challenge male, and apparently community, assumptions about male access to a woman's body. The community reaction to the Noden case appears to have been motivated not by hostility to capital punishment, or even to capital punishment for this type of crime, but rather out of a belief that Noden was not guilty of the substantive offense charged.²⁶ The much larger and more extensive second mercy petition did not even relate to hanging. It was a plea that Noden not be punished at all.

Indeed, despite the harsh tone of the comments quoted above, Gatrell concludes later that Peel's comments on the case were "roughly right" (p. 491). Noden supporters submitted substantial new evidence in two appeals, but it consisted chiefly of affidavits about the prosecutrix's prior sexual experience, none of which were legally admissible (pp. 488-92). Nonetheless, in his closing comments on the case, Gatrell calls Noden "the victim of his times," who was neither released nor retried despite the "unsound[ness]" of the verdict against him (p. 492). Gatrell never bridges the gap between this view of Noden's conviction as unsound and his earlier view that Noden really raped Elizabeth Cureton but escaped more severe punishment because of the law's connivance in male violence against women.

Perhaps this microhistory helps to explain why many Englishmen steered the wavering course that they did. The emotions generated by the scaffold were powerful, but not easily channeled. They even may have increased the difficulty of developing an alternative coherent vision of criminal law that might have enabled communities to challenge the status quo. The people of Coalbrookdale appear not to have been motivated by any strong sense about capital punishment or about whether it could be applied appropriately

26. Gatrell's account does not make clear whether the people of Coalbrookdale disbelieved Elizabeth Cureton's account or felt that the conduct she described did not amount to rape, though his reference to "male assumptions about her body's accessibility" suggests that he believes it was the latter. P. 449.

in cases of rape. Rather, they believed that in this particular case the justice system had gotten it wrong. They, like the scaffold crowd, reacted to individual cases, not with some general theory of law or punishment, but with what were probably conflicting, unresolved, and possibly even irreconcilable views. Informed by such views, and buffeted by strong emotions, they might have had no choice but to steer a wavering course.

III. THEN AND NOW

Gatrell's book is not simply a history of emotions, as he suggests at one point (p. ix), but also a description of the functioning of the criminal justice system. It is to that facet of his account that we now turn, and to the question of how much the present differs from the past recounted in *The Hanging Tree*. Although a full evaluation of the contemporary criminal justice system is obviously beyond the scope of a book review, we want to note some disturbing contemporary parallels to Gatrell's observations about the criminal trial and appellate process and the selection of the individuals who are executed by the state. Gatrell's account reveals that fact-finding at capital trials was not very reliable, that the mercy appeals process did not provide relief even when evidence of guilt was questionable or the trial was not conducted fairly, and that the process that re-rieved most capital prisoners and selected a few to be executed was standardless and capricious. These fundamental problems persist to a greater degree than we like to acknowledge in the contemporary American legal system.

A. *Criminal Trials: The Adequacy of the Determination of Guilt, Innocence, and the Proper Sentence*

A mechanism for accurate fact-finding is an essential element of a fair system of criminal justice, and the Anglo-American legal system historically has employed the adversarial trial to perform this function. Gatrell's description of criminal trials in the eighteenth and nineteenth centuries depicts a system that failed to meet rudimentary standards of fairness and failed as well to ensure the accuracy of verdicts. Trials were incredibly brief. For example, the Noden rape case was heard at the Shrewsbury assize, where a dozen cases, seven of which yielded death sentences, were tried in two days (p. 536). Trials in the Old Bailey were even more rapid, with noncapital cases taking an average of only eight and a half minutes.²⁷ Gatrell concludes that innocent defendants had little chance of an acquittal in these slapdash affairs. Most defendants had no

27. See p. 536. Gatrell also notes Beattie's estimate of an average trial duration of 30 minutes per case, all formalities included, for cases in Surrey in the late eighteenth century. See p. 536.

counsel to assist them. For example, two-thirds to three-quarters of those tried for property offenses in the Old Bailey in 1800 went unrepresented (p. 537). Even when defense counsel were available, they played a very restricted role; before 1836 they were not permitted to address the jury in felony cases (p. 534). An accused might languish for months in prison before trial, making it difficult if not impossible to mount an effective defense (p. 534). Often key evidence or character witnesses in the defendant's favor were not heard, because the authorities made little effort to ensure that defense witnesses were present for the trial, even in capital cases (p. 538). As for the judges, Gatrell depicts them as either openly hostile to defendants or preoccupied by matters other than the cases before them, making a mockery of the legal fiction that the judge acted as the prisoner's friend (p. 535).

Most readers unfamiliar with the criminal justice system probably assume that the picture Gatrell paints is just a feature of our benighted past, like imprisonment for debt or prosecution of witches. In the United States, the Sixth Amendment guarantees the right to trial by jury, to compulsory process to secure the presence of defense witnesses, and to the effective assistance of defense counsel. Indeed, in the wake of the televised trials of O.J. Simpson and the Menendez brothers, each of which took many months, one might conclude that the criminal justice system now devotes excessive resources to the trial process.

In fact, the Simpson and Menendez trials were wildly unrepresentative. Notwithstanding the Sixth Amendment, the right to trial itself (and thus all of the associated trial rights) is imperiled in our own overcrowded urban courts. This is particularly true in the New York City Criminal Court. In 1990 there were trials in only 973 of the 213,000 cases filed in that court.²⁸ In 99.6% of the cases there was no trial, and the researcher who studied the court concluded that "[t]he Sixth Amendment right has become little more than a phrase, uttered as part of the threat ritual engaged in by the judge, the prosecutor and defense attorney as they prepare cases for disposition by plea or dismissal."²⁹ Throughout the United States it is estimated that eighty to ninety percent of cases — including murder cases — are disposed of by plea bargain, without trial.³⁰ Even if we

28. See HARRY I. SUBIN, *THE NEW YORK CITY CRIMINAL COURT: THE CASE FOR ABOLITION* 4 (1992).

29. *Id.* at 5.

30. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 *CASE W. RES. L. REV.* 1, 11 (1995) (citing Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 *U.C. DAVIS L. REV.* 1221, 1246-47 (1985)). Approximately 58% of the defendants charged with felonies in the 75 largest counties in the United States in 1990 eventually pled guilty, 7% were convicted after a trial, and 1% were acquitted; the remaining cases were dismissed, diverted from the criminal justice system, or

assume that contemporary trials are far fairer than those depicted by Gatrell, there is still a troubling question of the fairness of the vast bulk of contemporary convictions, that result from guilty pleas after plea bargaining.³¹

The picture is somewhat different in capital cases, because they generally go to trial, but here again the data challenge any easy assumption that our recognition of constitutional rights ensures the fairness and the accuracy of the verdicts. In capital cases the most significant threat to the fairness and reliability of the resulting convictions and capital sentences is the inadequate representation provided for indigent defendants. A blue-ribbon Task Force from the American Bar Association concluded in 1990 that inadequate representation in capital cases is a pervasive problem that calls for fundamental structural reforms.³² Witnesses before the Task Force "described the current state of affairs for indigent criminal defendants as 'scandalous,' 'shameful,' 'abysmal,' 'pathetic,' 'deplorable,' and 'at best, exceedingly uneven.'" ³³ The Task Force found capital cases that had been "marred" by inadequate representation "ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase."³⁴ The Task Force concluded "[w]ithout any

adjudication was deferred. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 536 Table 5.66.

31. When there is no trial, parties in theory can explore matters of both factual and legal guilt through the process of investigation by the parties and plea negotiations. Most states now give the defense at least a limited right to pretrial discovery, and procedural rules in most states also require a finding that there is a factual basis before a guilty plea may be accepted. The question then is how well these procedures work and whether we truly have reduced the number of cases in which the innocent are convicted. There is a substantial literature on the subject of guilty pleas and plea bargaining. For a range of views on the fairness and desirability of plea bargaining and the degree to which it protects innocent defendants, see generally Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949-66 (1992); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992).

32. See TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 7 (1990) [hereinafter ABA BACKGROUND REPORT] ("[The] principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings."). The Task Force's Background Report provides material supporting this recommendation. *Id.* at 49-56.

33. *Id.* at 55 (footnote omitted). Similarly, a recent Note surveyed the state of death-penalty defense representation in 1994 and found it "appalling." Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1940 (1994).

34. ABA BACKGROUND REPORT, *supra* note 32, at 52-53 (footnotes omitted). Although these examples were all taken from Georgia, the Task Force reported that representation was

doubt," that the inadequacy of representation "increases the risk of convictions that are flawed by fundamental factual, legal, or constitutional error."³⁵ Mistakes by counsel have led to the execution of one codefendant while the other obtained relief on an issue present in both cases.³⁶ A former U.S. Supreme Court law clerk commented that "the death penalty frequently results from nothing more than poverty and poor lawyering."³⁷ As Sister Helen Prejean learned when counseling Louisiana death row inmates, "you're never going to find a rich person on death row."³⁸

B. *The Appeals Process as a Mechanism for Correcting Procedural Errors and Avoiding the Execution of Innocent Defendants*

A second important element of a system of criminal justice is a mechanism for review to correct procedural errors and to avoid the punishment of persons who are not factually guilty. Although this function is important in all criminal cases, it is most significant in the case of erroneous capital sentences. As described earlier in this review,³⁹ Gatrell paints a bleak picture of the English mercy appeals for capital and noncapital cases.

At first blush, our system bears little or no relationship to the discretionary and essentially standardless appeal process Gatrell describes. We have a highly formalized, multitiered process for postconviction review in capital cases. Capital cases now represent a significant part of the caseload of many courts. It has been estimated, for example, that death penalty cases consume one-third of the time of the Florida Supreme Court⁴⁰ and one-half of the time of the justices on the California Supreme Court.⁴¹ If state appeals fail, defendants may raise constitutional claims in federal court on petition for writ of habeas corpus, and in many cases successive federal habeas petitions are filed. Historically, federal habeas review has

not necessarily any better in other states. *Id.* at 54. For example, in Tennessee defense lawyers offered no mitigating evidence in about one-quarter of all death penalty cases affirmed by the state supreme court. *Id.*

35. *Id.* at 55.

36. See *id.* at 54 & n.152, citing *Stanley v. Kemp*, 737 F.2d 921 (11th Cir. 1984); see also Note, *supra* note 33, at 1924 & nn.7-10.

37. Clifford M. Sloan, *High Court's Handling of Death Cases*, FULTON COUNTY DAILY REP., Mar. 25, 1987, at 2, 3, quoted in ABA BACKGROUND REPORT, *supra* note 32, at 51. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

38. HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 49 (1993); see also Bright, *supra* note 37, at 1835.

39. See *supra* part I.C.

40. See Kozinski, *supra* note 30, at 3 n.10 (citing Robert Sherrill, *Death Row on Trial*, N.Y. TIMES, Nov. 13, 1983, § 6 (Magazine) at 80, 112).

41. See *Figuratively Speaking*, 81 A.B.A. J. 37, 37 (1995).

provided a substantial additional measure of protection in death penalty cases. Seventy percent of habeas corpus petitions in death penalty cases decided by the federal courts between 1976 and 1983 resulted in the reversal of the defendant's conviction, or sentence, or both.⁴² The process of postconviction review is complex,⁴³

42. See *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting).

43. Judge Alex Kozinski has described the typical postconviction review of a capital case as follows:

Post-trial proceedings begin with a mandatory appeal (everywhere except Arkansas and federal court), usually to the state supreme court. If the California Supreme Court is any indication, these appeals are backed up. The California Supreme Court generally decides no more than three-quarters of the death cases it receives annually, and currently has slightly more than 200 death cases pending, half of which are on hold because the state has been unable to find lawyers willing and able to take them. . . .

In order to be eligible for federal habeas, our inmate must first avail himself of state post-conviction remedies and collaterally attack his conviction and sentence in state court. Assuming his guilt and penalty trials were impeccable, he loses. He then petitions the United States Supreme Court for a writ of certiorari, which is denied.

At some point, a death warrant is issued, which is often the signal for starting federal habeas proceedings. A federal stay of execution is entered while this first petition is considered, and although the district court can make a decision in as little as three months, it can take more than two years if the court decides to hold extensive evidentiary hearings, which is not at all unusual. The inmate then appeals the district court's decision, which keeps the stay of execution in place. In a death case involving a first habeas petition, it is fairly typical to consume a year on the appeal, although two years or more certainly is not unheard of. While our inmate loses this appeal, he inevitably petitions for rehearing and suggests rehearing en banc. At least in the Ninth Circuit, this guarantees a vote on whether to go en banc, which adds a few more weeks to the procedure. Our inmate then petitions the United States Supreme Court for a writ of certiorari, and for the second time his petition is denied.

In this streamlined version of events, we now stand poised for execution — maybe. The case has been reviewed at four levels of the state and federal courts and the United States Supreme Court has twice passed up the opportunity to jump in. The federal stay of execution is then lifted, and the case goes back to the state court where the government will obtain a death warrant setting a new execution date.

With an execution date in place, the petitioner's lawyers go into high gear to raise some issue that will forestall the execution. They might seek collateral relief (and a stay of execution) in state court. But, more likely, they will file a successive federal habeas petition. In the Ninth Circuit, the district court can enter a stay while the new issues raised by this petition are considered; if it refuses a stay, the appellate panel assigned to the case can enter one; and if execution is imminent, any single judge of the circuit can enter a temporary stay. Any federal stay entered can remain in effect until long after the putative execution date.

Often this successive federal petition will raise unexhausted claims, which may get shipped off to state court, with the federal stay intact. Otherwise, in this hypothetical, squeaky-clean case, the district court reaches a decision against the defendant. In the Ninth Circuit, a panel of three court of appeals judges is standing by and has been receiving the briefs at the same time as the district court. When an execution is pending, the Supreme Court also gets papers in the case as they are filed in the lower federal courts. Unique to the Ninth Circuit, there is also an eleven-judge en banc panel standing by. If the three-judge panel refuses to issue a stay of execution or a certification of probable cause, any active judge of the circuit can force an expedited en banc vote by simply requesting it. There are close to thirty active judges in the Ninth Circuit and, without exception, one of them will seek en banc reconsideration. The en banc panel meets to consider the case, rules against the petitioner, and dissolves the stay of execution. Within hours, sometimes within minutes, the petitioner's lawyers are before the Supreme Court with a stay petition. The Justices are polled, often at home and occasionally woken from sleep, and they deny the stay. This usually signals the end of the process.

Kozinski, *supra* note 30, at 6-10.

lengthy,⁴⁴ and expensive.⁴⁵

Unfortunately, despite the countless dollars and hours expended on postconviction review of capital cases, our legal system has not solved one of the fundamental problems that confronted Robert Peel. There are still nagging doubts whether some of the defendants who are executed would have been convicted and sentenced to death had all of the evidence amassed on appeal been presented at the trial.

There are numerous reasons for our continued inability to put to rest doubts about the accuracy of the verdicts and sentences imposed on those condemned to die. The deficiencies of counsel for indigent defendants continue to play a significant role at this stage, in two respects. In the first place, there is no assurance that a death-sentenced inmate will have competent counsel at the postconviction stage.⁴⁶ Even more important, it is often impossible for even highly skilled counsel at the postconviction stage to remedy defense counsel's failures at the trial level. Failures at the trial level literally can be fatal because the constitutional standard for adequacy of counsel is extremely low,⁴⁷ and the defendant generally is deemed to have defaulted on claims his counsel did not raise at trial.

The restricted scope of review presently available in the federal courts now serves as a substantial barrier to redressing the failures of the trial system by postconviction review. As Professors Carol and Jordan Steiker have explained:

44. The average time for postconviction review of a capital case is 10 years, and it is rare for the review process to be completed in less than seven years. See Kozinski, *supra* note 30, at 10.

45. A number of studies of the cost of the death penalty are collected in Kozinski, *supra* note 30, at 11 n.45. For a discussion of the costs of the death penalty, see *id.* at 11-16; PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* (1993).

46. The ABA's Task Force noted that "[f]ailures of counsel are also not uncommon on appeal," and found that "[o]ften the lawyer on post-conviction review . . . is completely unaware of a whole body of applicable law." ABA BACKGROUND REPORT, *supra* note 32, at 56-57. It also found that many of the lawyers appointed to represent indigents in postconviction review "are totally ignorant of habeas corpus law and procedure and make little or no attempt to learn." *Id.* at 57. The mistakes made by these attorneys "either complicate or delay post-conviction review or deprive their clients of meaningful review." *Id.* at 58. The Task Force also concluded that "there is a grave crisis in the lack of counsel to handle capital cases in post-conviction proceedings." *Id.* at 57; see also *supra* note 43.

47. For a discussion of the inadequacy of the prevailing standard for the adequacy of counsel, see, for example, Bright, *supra* note 37, at 1857-66; William S. Geimer, *A Decade of Strickland Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Ellen Kreitzberg, *Death Without Justice*, 1995 SANTA CLARA L. REV. 485; *Panel Discussion: The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105 (1994); Note, *supra* note 33.

Under the [Supreme] Court's current doctrine, states need not provide any postconviction proceedings in criminal cases, including capital cases. In addition, the Court has recognized that this "greater" power to deny any mechanism for postconviction relief permits a state to exercise the "lesser" power of denying counsel to indigent inmates should the state choose to establish collateral proceedings. Capital defendants likewise fare no better than other defendants in federal habeas proceedings. Over the past fifteen years, the Court has imposed . . . virtually insurmountable bars to claims defaulted in state court, same-claim and new-claim successive petitions, and claims seeking the benefit of "new" law. These bars apply equally to death-sentenced inmates, with the result that an increasing number of these inmates' constitutional claims are rejected on procedural grounds. Given that constitutional rights are no more effective than their means of enforcement, the Court's "equal" treatment of capital and non-capital defendants in postconviction proceedings has the effect of diluting whatever "heightened reliability" is sought by other death-penalty doctrines.⁴⁸

In capital cases the Supreme Court's rulings bar federal relief not only for procedural errors that would otherwise require reversal of the conviction and capital sentence⁴⁹ but also for colorable claims of factual innocence. If a procedural default is deemed to have occurred, a capital habeas petitioner who claims to be innocent must show — at a minimum — that it is "more likely than not that no reasonable juror would have found [him] guilty" at an error-free trial.⁵⁰ The current restrictions on the scope of habeas review for capital defendants provide an eerie parallel to Gattrell's conclusion that the English mercy appeals process did not provide a full pardon unless the defendant's evidence was "overwhelming" (p. 207).

Does the restriction of federal habeas review mean that innocent persons are being executed for crimes they did not commit? It is impossible to know with certainty whether there are innocent persons currently on death row, and academics hotly debate the question whether any demonstrably innocent persons have been ex-

48. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 399-400 (1995) (footnotes omitted).

49. See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991) (holding that capital petitioner's failure to raise *Massiah* claim in first habeas petition constituted abuse of the writ that barred review, although the district court had found that the claim was supported by evidence and warranted habeas relief).

50. *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995). This standard applies when a claim of actual innocence is coupled with a claim of procedural error in violation of the Constitution. An even more demanding standard is applicable when the claim of actual innocence stands alone, or when the claim is that the defendant does not deserve the death penalty but is guilty of the offense. See 115 S. Ct. at 860-69.

ecuted in recent years.⁵¹ However, our experience in noncapital cases strongly supports the view that the conviction of innocent persons is more than simply a “ghostly phantom” haunting the criminal justice system.⁵² The development of new scientific techniques has permitted the reexamination of key physical evidence, leading to the exoneration in recent years of as many as twenty defendants who had been serving long prison sentences for crimes they did not commit.⁵³ The Cardozo Law School’s Innocence Project has used DNA evidence to exonerate and secure the release of eight persons, most of whom were convicted on the basis of the eyewitness testimony of one or more witnesses who sincerely were convinced of the defendant’s guilt.⁵⁴ There is no reason to believe that good-faith errors like those which led to the erroneous convictions of the defendants freed by the Innocence Project could not occur in capital cases as well. Moreover, there will not always be scientific evidence available to establish the innocence of a defendant who has been wrongly convicted. The criminal justice system has made, and presumably will continue to make, some errors, including some false positives. The demonstration in the DNA cases that innocent defendants are still being convicted forces us to confront squarely the moral issue whether the execution of some innocent defendants is acceptable.⁵⁵

C. *The Overall Fairness of the Selection of Individuals To Be Executed*

One of the most disquieting aspects of the English criminal justice system was the haphazard quality of the proceedings from beginning to end. Because trials were slapdash affairs and the mercy

51. Compare MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 271 (1992) (as many as 23 innocent persons have been executed in the United States in this century) with Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). For an impassioned defense of the innocence of one Florida death row inmate and an indictment of the inability of the legal system to provide relief, see Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald — And Not to Any Defense Lawyer or Judge*, 20 VT. L. REV. 19 (1995).

52. *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925) (Learned Hand’s warning that “a ghostly phantom of the innocent man falsely accused” can prevent the enforcement of the criminal law).

53. See Paula Span, *Innocence Project Fights Injustice with DNA Testing*, WASH. POST, Dec. 14, 1994, at C1 (15 to 20 inmates across the United States have been exonerated by DNA testing).

54. See *id.*

55. See generally CHARLES L. BLACK JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

appeals process little better, there was a random quality to the selection of those individuals who actually were executed.⁵⁶

In contrast we have acknowledged that such arbitrariness is constitutionally unacceptable with regard to capital sentencing. Most readers will be familiar with the broad outlines of the Supreme Court's modern rulings on capital punishment, beginning with the Court's 1972 decision in *Furman v. Georgia*.⁵⁷ *Furman* had the effect of invalidating every existing capital punishment statute in the nation under the Eighth Amendment, thus bringing about a nationwide moratorium on executions. The Court announced the result in *Furman* in a brief per curiam opinion without any supporting explanation, and each of the nine Justices wrote separately in opinions that occupy more than two hundred pages in the United States Reports. Justices Marshall and Brennan concluded that the death penalty was incompatible with evolving concepts of human decency and thus cruel and unusual within the meaning of the Eighth Amendment,⁵⁸ but their approach did not command a majority in *Furman*, and it has never done so. The three additional votes necessary to invalidate the death sentences before the Court were provided by Justices Stewart, Douglas, and White, who concluded that the sentencing procedures — rather than the sanction of death itself — were constitutionally defective.⁵⁹ These three Justices articulated an understanding of the Eighth Amendment that has guided constitutional litigation for the past two decades. Their views were later summarized by another plurality in *Gregg v. Georgia*:

Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Indeed, the death sentences examined by the Court in *Furman* were "cruel

56. Perhaps the most memorable example in *The Hanging Tree* is the clash between George IV and Peel over a group of men who had been convicted of burglary in 1822. See pp. 554-64. The King's Council considered the crimes of eight of the burglars serious, and Peel wanted them all hanged. See p. 555. The King dug his heels in with regard to four of the prisoners who were young, whose prosecutors, jurymen, or victims had petitioned against their execution, and whose "lapses from respectability could be encased within exonerating narratives." P. 558. After initially accepting Peel's argument that no significant distinctions could be drawn among the eight, the King changed his mind, insisting that there must be grounds to reprieve them. In a process that Gatrell compares to an auction, the Cabinet reached a unanimous compromise: instead of hanging eight men as Peel wished or only four as the King wished, six of the eight would be hanged. See p. 560. The King acceded, six were hanged, and two seventeen-year-olds were respited. See p. 560.

57. 408 U.S. 238 (1972).

58. See 408 U.S. at 305, 360.

59. See 408 U.S. at 256-57, 310, 312-13.

and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁶⁰

In *Gregg* the swing voters — now Justices Stewart, Powell, and Stevens, who had succeeded Douglas — concluded that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”⁶¹

Since the decision in *Furman* in 1976, the Supreme Court has decided scores of death penalty cases and the lower federal courts have decided hundreds more. Substantial judicial and societal resources have been expended on the effort to administer the capital punishment system in accordance with the basic standard articulated in *Furman* and *Gregg*. Unfortunately, there are unmistakable signs that we have been unable to keep the promises of *Furman* and *Gregg*, and that we continue to enforce the death penalty in a way that could be described as freakish — like being hit by lightning. More than 5,000 persons have been sentenced to death since 1976, and of that number only 302 have been executed;⁶² it would be difficult if not impossible to find a knowledgeable observer who believes that those who actually were executed were the persons whose acts were the most heinous. No single factor is responsible for the persistence of arbitrariness in the application of the death penalty, and there is no simple solution.

Ironically, some of the arbitrariness appears to be an unintended product of the reforms set in motion by *Furman* and its progeny. *Furman* required every state to employ the model of guided jury discretion in capital sentencing as the principal means of avoiding arbitrariness. The initial empirical data gathered by the National Science Foundation's Capital Jury Project indicate that jurors have a poor understanding of their task in the capital sentencing phase. For example, contrary to the law of their states, four out

60. *Gregg v. Georgia*, 428 U.S. 153, 188 (1986) (opinion of Stewart, Powell, and Stevens, JJ.) (citing *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (citation omitted)).

61. *Gregg*, 428 U.S. at 195.

62. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. REPORTER 859 (Fall 1995). In addition to the 3,046 inmates currently on death row and the 302 that have been executed, 1,480 death row inmates have had their convictions or death sentences reversed, 72 have had their death sentences commuted, and 138 have died of natural causes, committed suicide, or been killed. See *id.*

of ten capital jurors *erroneously* believed they were *required* to impose the death penalty if they found the aggravating factor that the defendant's crime was heinous, vile, or depraved.⁶³ A related finding by the Capital Jury Project is that the guided discretion statutes have tended to diminish and perhaps even displace the jurors' sense of responsibility for the punishment they impose by "appearing to provide them with an authoritative formula that yields the 'correct' or 'required' punishment."⁶⁴ The Supreme Court recognized the significance of such confusion with its comment that an "uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."⁶⁵ Of course, both of these errors bias the jury in favor of capital punishment.

The process of postconviction review also becomes a kind of Catch 22: though it is intended to ensure procedural regularity and to prevent the execution of any defendant whose guilt has not been established, it introduces another source of arbitrariness into the selection of the individuals who actually are executed. Success or failure in obtaining relief turns on matters such as whether a procedural default by counsel bars raising an issue that otherwise might warrant relief. Some factually guilty capital defendants, whose deeds may rank among the most heinous, obtain relief, at least for a time, because of procedural errors committed at the trial level or the exceptional abilities of counsel who specialize in postconviction review. Others, whose guilt is less certain or whose crimes are less heinous, are executed because they cannot identify a constitutional error at their trial or their claims are barred by procedural default on the part of their lawyers. Finally, the cases of many others remain in limbo, sometimes for years, because of the overcrowded dockets of particular courts or the unavailability of counsel for the defendant in the particular case.

There are also other even more troubling factors at work in the selection between those sentenced to die and those actually executed that are the product of inequalities in our society. As noted

63. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 (1995). More than three-quarters of the jurors reported that the state had proved the existence of the aggravating factor in the case before them. See *id.* Although the jurors were not asked this question directly, it appears that as many as one-third believed that they were required to impose the death penalty in the case before them, when in fact state law clearly made such a determination discretionary. See *id.* at 1091-92.

64. *Id.* at 1093; see also Joseph L. Hoffman, *Where's the Buck? — Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995).

65. *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985).

above,⁶⁶ in many cases indigent defendants do not have adequate counsel. The adequacy of counsel has such a powerful impact on the imposition of the death penalty that these defendants are, in effect, executed because of their poverty, not the heinousness of their offenses. Perhaps equally troubling, the continuing specter of racial prejudice and stereotyping hangs over the system, despite some notable improvements. This problem is not unique to capital sentencing. As one scholar concluded after an extensive review of scores of empirical studies:

Over the period of three decades, researchers have carefully demonstrated persistent, though idiosyncratic, bias in outcomes at every level of the criminal justice system. . . . [T]he most important of these studies . . . demonstrated likely bias in crime reporting, arresting, and pretrial treatment. Bias was further demonstrated throughout the courts themselves. Prosecutorial bias, grand jury bias, and sentencing bias were profoundly clear. Bias persisted despite examinations of court performance from several perspectives. Attitudinal, organizational, community, environmental, and decisional perspectives all presented similar results.⁶⁷

There is substantial evidence that racial prejudice taints the administration of the death penalty.⁶⁸ In 1990 the General Accounting Office reviewed twenty-eight studies conducted by twenty-one sets of researchers and concluded that the studies show "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision."⁶⁹ In testimony before Congress, a GAO expert concluded, "[t]he results show a strong race of the victim influence: the death penalty sentence was more likely to be sought and imposed for an offender if the victim was white."⁷⁰

66. See *supra* notes 46-47 and accompanying text.

67. GREGORY D. RUSSELL, *THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS* 69 (1994).

68. See generally SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); RUSSELL, *supra* note 67; David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409 (1985).

69. GENERAL ACCOUNTING OFFICE, *REPORT TO THE SENATE AND HOUSE JUDICIARY COMMITTEES, DEATH PENALTY SENTENCING: RESEARCH INDICATES RACIAL DISPARITIES IN SENTENCING* 5 (1990).

70. Statement of Lowell Dodge, Director, Administration of Justice Issues, GAO, before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary (May 3, 1990), *quoted in* Walter L. Gordon III, *Death Penalty: National Disaster Visits California*, 33 SANTA CLARA L. REV. 283, 293 (1993).

Despite the disturbing implications of these studies, the Supreme Court has held that statistical data of the death penalty's disparate impact is not sufficient to establish a constitutional violation under the Equal Protection Clause or the Eighth Amendment. In *McCleskey v. Kemp*,⁷¹ the Court assumed the validity of a study finding that Georgia defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than those charged with killing blacks, and black Georgia defendants were 1.1 times more likely to receive the death sentence than other defendants, even after the researchers had accounted for the effects of 230 other variables.⁷² Five members of the Court held that this statistical evidence of unexplained racial disparity in the application of the death penalty did not demonstrate intentional discrimination in any particular case, and thus did not establish an equal protection violation.⁷³ Noting the many procedural protections now available to capital defendants,⁷⁴ and emphasizing the importance of discretion in the application of the death penalty and in the criminal justice system as a whole,⁷⁵ the Court concluded that the defense evidence did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."⁷⁶

Although the Supreme Court is the final arbiter of constitutional doctrine, its decision did nothing to challenge the conclusion that the death penalty is being applied inequitably and arbitrarily — if not unconstitutionally.⁷⁷ Perhaps it is inevitable that prejudice will infect the discretionary sentencing determination required under *Furman* and *Gregg*. Welsh White believes that:

most knowledgeable observers agree that the switch to post-*Furman* statutes had only a minimal effect on racial discrimination in capital sentencing. Perhaps the most significant reason for this is that racial prejudice is a powerful force that may not be easily extirpated by statutory or verbal formulas. . . . Some of the findings required — for example, whether the murder was committed by torture or whether the defendant is likely to present a future danger to the community — involve guidelines that are so vague that they restrain the sentencer's

71. 481 U.S. 279 (1987).

72. See 481 U.S. at 287, 291 n.7.

73. See 481 U.S. at 291-99.

74. See 481 U.S. at 309-10 & n.30.

75. See 481 U.S. at 297.

76. 481 U.S. at 313 (citation omitted).

77. For critiques of the *McCleskey* holding, see, e.g., WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 135-63 (1991); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 158 (1987-88).

discretion only slightly. Furthermore, most of the post-*Furman* statutes require the sentencer to make the ultimate death penalty decision by weighing the aggravating factors or circumstances against the mitigating ones, leaving it to the sentencer to decide exactly what weight each factor should be given. Thus, despite the guidelines, the sentencing authority still has vast discretion to make what is essentially a moral judgment. The new statutes have simply not altered the sentencer's role in a way that would be expected to curb the effect of racial prejudice.⁷⁸

D. *An Impossible Task Made Worse?*

This Part has suggested that certain features of American culture, law, and judicial procedure deeply flaw the contemporary system of capital punishment and prevent its fair and rational administration. There is, however, another possibility, which is that the difficulty lies much deeper. In 1971, less than one year before the decision in *Furman*, Justice Harlan argued that it is a task "beyond present human ability" "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express those characteristics in language which can be fairly understood and applied by the sentencing authority."⁷⁹ Justice Harlan's opinion suggests that much of the post-*Furman* effort to regulate the death penalty was doomed to failure, and indeed may have made things worse. Perhaps "the death penalty *cannot* be rationalized, however hard and in good faith we try,"⁸⁰ because of "the inevitably unsystematic, irreducibly personal moral elements of the choice to administer the death penalty."⁸¹ As Robert Weisberg has explained:

The "problem" of capital punishment is a simple two fold truth: Capital punishment is at once the best and worst subject for legal rules. The state's decision to kill is so serious, and the cost of error so high, that we feel impelled to discipline the human power of the death sentence with rational legal rules. Yet a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.⁸²

If we accept this view of the problem, there is reason to think that the efforts of the past two decades to guide the discretion of juries in capital sentencing and to articulate the legal rules gov-

78. WHITE, *supra* note 77, at 137-38. For a review of the evidence of jury bias in death penalty cases, a discussion of the mechanisms by which such bias might affect the sentencing process, and an effort to measure empirically the relationship between support for the death penalty and racial bias, see RUSSELL, *supra* note 67.

79. *McGautha v. California*, 402 U.S. 183, 204 (1971).

80. *Steiker & Steiker, supra* note 48, at 413.

81. *Id.* at 412-13 (quoting Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 393).

82. Weisberg, *supra* note 81, at 308.

erning capital cases actually may have *increased* the arbitrariness in the system by deluding jurors and judges about the role they are expected to play, allowing them the illusion that the life and death decision they make is controlled fully by law.⁸³ Indeed, the Capital Jury Project's initial research has found evidence that a significant percentage of capital jurors misunderstand their instructions, and do not perceive themselves as empowered and required to make the moral decision whether the state should execute another human being.⁸⁴ By the same token, the increasing complexity of the law of capital punishment may serve to distract judges from the "existential moment of moral perception"⁸⁵ that lies at the heart of the decision to impose — or to uphold the imposition of — the death penalty in an individual case. As Robert Weisberg has noted, judges and other professional actors in legal institutions "rely on doctrine to reassure themselves that the sanctions they inflict follow inevitably from the demands of neutral, disinterested legal principles, rather than from their own choice and power."⁸⁶

CONCLUSION

Although Gatrell does not radically shift our understanding of criminal law and reactions to it during the period from the end of the eighteenth century through the abolition of public hanging, he has written an often affecting narrative. Even those put off by its tendentious presentation will find themselves moved by the stories of the poor and powerless, condemned to die an ignominious death for what were often petty crimes, adjudicated in a haphazard fashion, and appealed in a process that was little better than arbitrary. Gatrell's account strips away our defenses and forces us to look at the sordid reality of both the process and the event. What emerges in our thoughts may be no more coherent than the reactions of the scaffold crowd, but there is no denying its emotional impact. This emotional book may shift our understanding only in marginal ways, but it works more powerfully on our emotions. After reading this book it is difficult to feel indifferent to the announcement that on January 25, 1996, Delaware hanged someone for the first time in fifty years.⁸⁷ But having permitted ourselves an emotional involve-

83. See Steiker & Steiker, *supra* note 48, at 413 (noting Robert Weisberg's analogy to the Milgram experiment, in which subjects in a psychological study followed the instructions they were given, to impose — albeit reluctantly — very painful electrical shocks on other subjects).

84. See *supra* notes 63-64.

85. Weisberg, *supra* note 81, at 353.

86. Weisberg, *supra* note 81, at 384-85.

87. See the comments of Edmund Lyons, attorney for William Bailey, the man hanged. "I found the process medieval. I found it barbaric. The most chilling thing was the two

ment with a capital code now safely buried, it becomes impossible not to worry about the analogous problems that infect our own.

fellows up on the platform with Bill with hoods on their heads." Cable News Network, Inc., Show: News 5:41 am ET, January 25, 1996, 11:30 Eastern Time, Transcript No. 1296-2.