Part III  Resolutions
Between *Bushel's Case* and the late eighteenth century the English criminal jury trial underwent little significant change. The first great watershed in the history of trial practice was the development in Tudor times of a formal prosecution; the second was the increasing recourse to counsel and the development of a true law of evidence in the late eighteenth and early nineteenth centuries. Perhaps the modern trial took shape only in the middle decades of the nineteenth century, the point at which our present story ends. But if one searches in vain for dramatic change in trial procedure, the eighteenth century does reveal developments both in the role of the criminal trial and the way in which contemporaries thought about the jury. These two developments were related, and it is mainly the history of that relationship that Part III addresses. There are many strands to the history of jury trial, 1689–1800, too many certainly to outline here. But the main ones can be set forth briefly.

The eighteenth century saw a consolidation and rationalization of the age-old practices that characterized the administration of the criminal law generally and the role of the trial jury in particular. Building on developments of the preceding century, authorities brought jury practices further under control even as they conceded the principle of the inviolability of the general verdict. Although jury trial itself changed little, the context of the trial altered significantly as authorities elaborated on the practical approach to penology that had emerged almost accidentally in the sixteenth and seventeenth centuries. The "selection" of offenders by Crown, bench, and jury for one or another level of punishment became a complex and, at times, an awe-inspiring ritual. Authorities were all the readier to share the power of mitigation with juries in a system in which most of the beneficiaries of mitigation suffered some substantial punishment.

As the jury’s role in this evolving system of mitigation became formalized, and in a sense tamed, that role expanded accordingly; but the jury was now more than ever just one part of the system, and the scope of its role in practice depended increasingly upon surrounding institutions and procedures. So intrinsic was the jury to the officially sponsored process of mitigation that many contemporary observers were either
confused as to whether the judge or jury was in control or wrongly concluded that the latter was the dominant of the two. As we shall see, what contemporaries—especially those who wrote about the law or took an active part in political debate—thought about the jury was of great importance. We cannot always tell when they are exaggerating to make a point or are simply seeing what they want to see, but it would be wrong to dismiss their depiction of the jury as purely polemical. They provide evidence of the contemporary understanding of the role and power of the criminal trial jury.

Largely as a result of the reception of the Enlightenment tradition of penology, some jurists and publicists began to criticize (albeit, often in terms long employed in England) the prevailing administration of the criminal law. Their writings reveal certain distinctively English habits of thought that may have blunted the force of the reformers’ message: English reformers attempted to combine criticism of what they perceived as ad hoc jury-based mitigation with endorsement of the long-standing constitutional role of the jury as a bulwark against tyranny.

Moreover, as we shall see in Chapter 8, about the same time that doubts arose concerning jury mitigation in common felonies, the jury emerged as central in the debate over the law of seditious libel. In this important noncapital, political offense the jury’s role had been limited by legal construction, and this limitation was attacked by pro-jury writers as contrary to the English constitution and to the purpose of jury trial as a protector of fundamental liberties. Authorities who had accepted and encouraged jury-based mitigation in common-run felonies were hard pressed to explain limitations upon the jury in political cases. In 1792, the limitations were removed by a statute guaranteeing the general verdict in seditious libel cases, but stating little in express terms about how juries ought to employ the powers the general verdict conferred.

In the long run, the tradition of jury adherence to the letter of the law was a product of the mounting campaign for legal reform. That campaign, briefly surveyed by way of conclusion in Chapter 9, saw the repeal of many of the capital felony statutes and the development of notions of legal certainty and of theories of deterrence that undermined the arguments for jury-based mitigation. Not that such jury behavior came to a sudden and complete termination. It remained (and still remains), but was practiced far less frequently. When legal reform through a (perceived) democratic process dismantled much of the capital law of felony that had been created seven centuries before, jury deference to the letter of the law in criminal cases became standard practice for the first time in English history.

The eighteenth-century criminal trial has recently been described so thoroughly and so well that only a brisk and derivative summary will be
necessary in this chapter.\textsuperscript{1} Of course there were, as there had always been, many different kinds of crimes and, hence, many different contexts for criminal trials in the eighteenth century. We shall pay most attention to theft, by far the most common offense tried at the eighteenth-century assizes. Not only was theft common, but mitigation of the capital sanction for theft was both commonplace and the subject of commentary in trial accounts, pardon records, and the professional and lay literature of the day. Mitigation of the law of homicide continued, though it was less often commented upon. As we shall see in the following chapter, much of the attention to jury behavior in the diminishing number of homicide trials arose from the political offense of seditious libel, not out of routine felonies. Suffice it to say that we are here mainly concerned with extremely common and open mitigation of the law, practices which juries by and large did not hide from themselves, the bench, or society at large. These instances of mitigation were easily separated from cases in which there was substantial doubt about the level of offense that had been proved in court, for they were quite evidently simple rejections of the prescribed sanction.

We shall also leave aside such obvious instances of nullification (even where the facts were clear) as that practiced in prosecutions for rape and infanticide. These cases, though important, were relatively rare and had little visible impact upon widespread attitudes toward jury practices. However, the attitudes toward jury behavior that were shaped by trials for property crimes may have influenced social views toward such practices in other kinds of cases. In this sense, I am dealing very broadly with the phenomenon of jury intervention. But this suggestion remains tentative; the important differences among offenses, and among attitudes toward them, require much further study.

The phenomenon of jury-based mitigation that I discuss was of particular importance because of its visibility, especially to those who commented upon jury behavior. It framed the issue for later generations who depended upon the works of London reformers and polemicists. In the countryside there were, doubtless, other traditions. Jury repudiation of the law as it applied to poachers and the like was an important aspect of contemporary culture, as were attempts by the government to pack and influence juries before whom such offenders were brought to trial. Many common-run cases thus took on the form of "political" prosecutions, at least in the understanding of much of the population. The impact of these prosecutions on contemporary views regarding the jury is difficult to trace, though some historians have made important headway. Suffice it to say that the absence of these episodes from my account in part reflects the fact that the attitudes they engendered were infrequently assimilated into contemporary accounts of the jury and in part reflects the limitations of my study.

Section I of this chapter summarizes the changes in criminal administration that variously affected the continuing practice of jury-based intervention in felony cases. In section II, I elaborate upon the jury's role, but mainly upon the contemporary understanding of that role. Those topics are further discussed from a different angle in section III, which analyzes the criticism of selective enforcement by some reform-minded publicists in the latter half of the eighteenth century. Section IV puts the developments discussed in this essay in perspective and suggests the ways in which one might interpret both the acquiescence of authorities in the prevailing system of criminal administration and the mounting attack on that system.

I

Trial procedure in the eighteenth century still bore a close resemblance to the model sketched in the sixteenth century by Thomas Smith. The most distinctive aspects of trial were the defendant's self-representation in full sight of the jury and the presentation of witness testimony largely ungoverned by rules of admissibility. The most dramatic moments of trial were those of relatively unmediated confrontation between the accuser, who still bore the expense and responsibility of setting forth the case for the prosecution, and the accused, who, until late in the century only occasionally had the advantage of counsel.\(^2\) The judge remained in the

\(^2\) As late as 1771, William Eden could still say of the trial: "[T]he whole examination is rather in the nature of a discussion between the parties, than of a prosecution against an undefended, oppressed individual." *Principles of Penal Law* (London, 1771), p. 219. For
foreground, putting his own questions; he had no reservations about revealing his point of view. As in the past, the judge’s directions to the jury were brief, but pointed and leading, if not coercive. Also as in the past, the jurors, drawn mainly from the artisans, tradesmen, and small farmers who composed the lower-middling ranks of society, deliberated briefly and reached verdicts that largely accorded with the views of the bench.

There were of course some changes which, although mostly minor, may have influenced the outcome of some cases. Thus, it appears the Crown set out its entire case through the private prosecutor and his witnesses before the defendant spoke, so that any argument between accused and accusers came relatively late in the trial. Moreover, in the early eighteenth century the judge played an even more active role than before in questioning the defendant on the basis of evidence presented in open court. The bench also gave increasingly more complex instructions, as rudiments of the law of evidence took shape and as the increasing use of witnesses produced more evidence upon which to comment. Finally, development of rules of evidence see Beattie, *Crime and the Courts*, ch. 8. For discussion of the emergence of defense counsel in routine felony cases see idem; Langbein, “Criminal Trial before the Lawyers,” pp. 307-14.


4. Beattie (*Crime and the Courts*, ch. 8) analyzed the social and economic status of jurors at the Surrey assizes. I have drawn here upon his study, which is the only analysis of eighteenth-century jury composition I have seen. Other studies of this sort are now being undertaken; they are, I believe, unlikely to alter Beattie’s conclusions significantly. Beattie’s findings suggest that jury composition—which is not to say jury attitudes or the judge-jury relationship—had not substantially changed since the late seventeenth century. Beattie also argues, however (idem), that the jury qualification statute of 1730 (Stat. 3 Geo. 2, c. 25) was intended to insure a steadier flow of jurors from the lower-middling groups in society. Jury service became a more respectable activity (a response, perhaps, to the upgrading of the grand jury); the Crown relied on fewer, hence more experienced persons, individuals drawn from the higher ranks of the very large class of persons that remained the target of summons for trial jury service.

5. Baker, “Criminal Courts and Procedure,” p. 38. Although the older form of altercation continued in some instances, the characterization here represents the main trend. This is reflected in the trial accounts known as The Old Bailey Sessions Papers (*O.B.S.P.*). For most of the eighteenth century, these accounts were formally entitled, *The Proceedings of the Sessions of the Peace, and Oyer and Terminer, for the City of London and the County of Middlesex*. Nearly complete runs of the *O.B.S.P.* are in the British Library and the Library of the Guildhall, London. Langbein, “Criminal Trial before the Lawyers,” pp. 267-72, describes these trial accounts. Similar patterns are evidenced in the records of Surrey assizes for this period. See Beattie, *Crime and the Courts*, ch. 8. Practice in and near London may in some respects have differed from practice elsewhere, but it is likely that the changes I have noted fairly rapidly became general throughout England.

6. I base this statement on a review of the *O.B.S.P.* for the eighteenth and early nineteenth centuries. Langbein is now working on the rise of the law of evidence and its effects on trial procedure and on judge-jury relations.
juries in the late decades of the seventeenth century heard a large number of cases before retiring; thereafter, at least on some circuits, they deliberated after each case, and often they did not actually retire.7

Some of these developments may have made the jurors’ task more difficult. Although the production of evidence was more organized, the separation of accusation and denial meant that testimony that went unanswered may have been either forgotten or given too much weight.8 Then, too, the open “altercation” of an earlier day, while putting some defendants so much on the defensive that their nervousness counted too heavily against them, may have at least revealed telling emotions that now remained hidden. And though the increasing diffuseness of testimony may have been mitigated by the judge’s commentary,9 judges had for long commented upon the evidence; more witness testimony meant more commentary for the jury to digest. By the same token some jurors obviously had trouble keeping straight the complex array of defendants, evidence, rebuttals, and commentary put before them.10 As a result the most experienced jurors, probably including the foreman, exercised significant influence over their fellow jurors in the brief discussion of each case.11 But these differences in practice were subtle; there is no reason to believe that they initiated or reflected a new era in the history of trial by jury.12

If the eighteenth-century felony trial differed from that of two centuries before, it was because changes external to trial procedure had a palpable


8. For a description of standard trial practice see The Complete Juryman: or, A Compendium of the Laws relating to Jurors (London, 1752), p. 158. The prosecutors first examined the witnesses produced against the defendant, then the defendant cross-examined them; the defendant next examined his own witnesses and the prosecutors cross-examined them.


10. Beattie found that in Surrey although the same jury heard a half dozen (or so) cases, verdicts were rendered after each case. Crime and the Courts, ch. 8.

11. Beattie (idem) states that typically one panel of about fifteen jurors handled all the cases at eighteenth century Surrey assizes. Several members of each dozen sworn to sit on a given case had served at a previous assize. One must consider, too, that jurors became “experienced” in the course of a single assize, after serving in many cases.

12. This view must remain tentative until the extant trial reports have been fully analyzed.
impact on the ways in which that procedure was employed and on the patterns of resolution that emerged from it. It is necessary to identify these changes before asking, in the following section, how the criminal trial jury functioned (and was thought to function) in practice.

Although the development of a formal law of evidence in criminal cases is difficult to discern before the late eighteenth century, judicial notions regarding both the nature of evidence and the appropriate standard for proof of guilt may have been changing in important ways over the course of the seventeenth century. It has been argued that seventeenth-century transformations in scientific theory affected juristic modes of thought, and these new conceptions are reflected not only in legal writings but also in judicial charges. These developments paralleled or followed the decline of the self-informing jury. It was the practice of judicial summing up of the evidence proffered by witnesses that provided the opportunity for the bench to comment upon the degree of certainty or probability that jurors must accord certain elements of testimony before finding the defendant guilty. More often than not the bench mainly stressed the weight that it itself accorded testimony, but its reasoning in this regard often was revealed in judicial recommendations to the jury.

We have seen that the Restoration bench sometimes invoked the principle of verdict according to conscience. This principle took a variety of forms. It is hard to discern in it reference to a specific standard of proof, but clearly it carried the implications that jurors must act upon their own beliefs and that they must be fully satisfied that their beliefs were supported by the great weight of the testimony. Scroggs invoked the principle when he himself doubted the evidence; Rawles invoked it in the course of exhorting jurors to assess all the evidence, not just those elements or facts that the bench ruled appropriate for determination by the jury. These were special circumstances, of course, but they contrib-

13. Shapiro, *Probability and Certainty in Seventeenth-Century England*, ch. 5; see also Shapiro, “Theories of Knowledge and English Juries” (paper read at the American Historical Association Convention, Dec., 1984). I am grateful to Professor Shapiro for allowing me to cite her paper. Shapiro argues: “The traditional ‘satisfied conscience’ standard had initially been a rather vague notion employed because the jury was on oath. It became the vessel into which was poured the new learning about criteria for evaluating facts and testimony. ‘Satisfied conscience’ gradually became synonymous with rational belief” (p. 8). Shapiro identifies the new standard (“satisfied belief”) with the “beyond reasonable doubt” standard (p. 12) that was frequently employed in the late eighteenth century; “[i]ts introduction caused no comment, precisely because it was consistent with notions of ‘belief,’ ‘satisfied conscience,’ and ‘moral certainty’ as employed in and out of the courtroom” since the seventeenth century (p. 13).


15. See above, Chapter 6, text at nn. 201-4.
uted to a perspective on fact-finding that eighteenth-century concern with rules of evidence—hear-say and the like—greatly enhanced.

We cannot know the impact of these developments on jury fact-finding in routine cases. Probably they counted for something in important political cases, especially in the light of statutory reference to "credible" testimony in cases of treason. But the concern among jurists with scientific assessment of evidence may have made itself felt more generally. Judges as well as juries had long been inclined to mitigate the law of sanctions in many capital cases. As we shall see, eighteenth-century legislation greatly increased the scope of offenses for which death was at least a potential sanction, thereby expanding the universe of cases subject to the process of selection of the worst offenders. Eighteenth-century commentators often remarked upon the tendency of the bench to advise jurors that conviction of capital felony required something close to absolute certainty of guilt. An extremely high standard of proof (which was a very important source of the traditional presumption of innocence) was one—though only one—of the devices that were central to the regime of mitigation.

There were, then, several sources for the increasing concern with the standard of proof, the last-mentioned being the oldest and the most significant. Restoration advances in scientific theory can't be discounted, but they should be seen as having provided a more modern intellectual approach to longstanding practice. Their impact upon the emerging law of evidence is palpable, but it was nonetheless indirect, making itself felt via the catalysts of politics and, most important, the administration of a criminal law based upon mercy as well as terror.

From 1671, judges were precluded from actually coercing jurors to return a conviction. For a time some judges may have broken the spirit, if not the letter, of the ruling in Bushel's Case, but for the most part straightforward coercion disappeared from the English courts. Strictly speaking, the ruling directly altered trial practice in only a negative sense—something only occasionally done, or even threatened, was no longer allowed. Indirectly, however, the constraints imposed by Bushel's Case may have altered practice by intensifying the bench's inclination to apply more subtle forms of influence at every point in the trial.

Although the petty jury remained relatively uncontrolled, the grand jury did not. By the mid-eighteenth century it was finding true bills in 85

17. See below, nn. 58-59 and accompanying text.
18. See above, Chapter 6, section IV.
19. See Langbein, "Criminal Trial before the Lawyers," passim.
to 90 percent of all capital cases. These figures no doubt reflected the development of the prosecution and especially of pretrial examinations. The evidence that a case existed against the accused was usually too strong for the grand jury to return an ignoramus; the commotion over the packing of grand juries during the Restoration represented a momentary turnabout in highly charged political cases long after the grand jury had, from the Crown's point of view, come to be "reliable" in common-run felonies. The benefit of the doubt went to the prosecution at the grand jury stage. Lay prosecutors possessed greater powers than before, once their complaints were moved before the justices. A sincere-sounding accusation was bound to go a long way. False accusations, whether malicious or merely mistaken, were now less effectively filtered. Although the grand jury might undervalue goods in order to indict a suspect for only petty larceny, in general it is fair to say that if the community was going to play a significant role, increasingly it would have to play it at a later stage.

At the very moment that relatively pro forma grand jury proceedings were placing greater strain on postindictment institutions of mitigation, the scope of capital felony was expanding. Most of the new laws concerned the taking or destruction of property; many of them did little more than remove the right to benefit of clergy for offenses that had long before been capital at common law. The genesis of this legislation is little understood, but some of its effects are well known. The capital statutes empowered property owners, small as well as large, to put at risk the lives of ever greater numbers of Englishmen. These laws may have increased


21. For an important study of developments in mid-eighteenth-century pretrial policing and prosecutorial practices see Langbein, "Shaping the Eighteenth Century Criminal Trial."

22. See above, Chapter 6, n. 225 and accompanying text. Beattie (Crime and the Courts, ch. 8) shows that this episode had the effect of upgrading the status of grand jurors.

23. Accusations made under oath had to go forward from the magistrate for grand jury consideration; by the mid-eighteenth century, magistrates exercised discretion regarding accusations not made under oath. See Beattie, Crime and the Courts, ch. 2.

24. This development has its roots in the sixteenth-century statutes limiting eligibility for benefit of clergy. See above, Chapter 4, text at nn. 42–50.

25. See e.g. E. P. Thompson, Whigs and Hunters (New York, 1975), for a study of one such act, The Waltham Black Act [Stat. 9 Geo. 1, c. 22 (1723)].

the problems of enforcement by further burdening already overbusy courts and swelling the numbers of those who were ultimately punished at less than the prescribed level of sanction. Also, in a more subtle way, the new statutes occasionally influenced the criminal trial: judges were required to interpret the statutes, and this was sometimes reflected in the length and technicality of judicial charges. Frequently the bench sought to confine the statutes, so that narrow construction of the criminal law became a common form of mitigation.27

Even more pronounced was the rapid increase in the practice of undervaluation of stolen property. Medieval in origin, and common enough in Tudor-Stuart times, undervaluation became a major form of resolution during the eighteenth century.28 Its prominence resulted from the coincidence of the multiplication of capital statutes for property offenses, many of which precluded clergy except in cases of minor theft, and the creation of a new lesser sanction, transportation. Transportation had been in use episodically from around 1600, but not until the early eighteenth century was it statutorily prescribed for a wide range of offenses.29 Very soon it became a catchall for most of those defendants who had committed capital theft but whom the Crown, bench, or jury desired to spare. In effect, transportation had come largely to replace clergy (in the form of branding and discharge), serving both as a prescribed sanction and as a safety valve where mercy was deemed appropriate.30


28. See the figures in Beattie, “Crime and the Courts in Surrey,” pp. 175–79. “Partial verdicts,” where a verdict of guilty on the indictment as framed would have meant death unless bench or Crown interceded, involved characterizing the value of the goods stolen as less than twelve pence (petty larceny) or as more than twelve pence but less than whatever amount the relevant statute prescribed as the threshold for capital felony. (It might also involve characterizing the circumstances of the offense in such a way as, e.g., to convert a burglary into clergyable larceny). See also Jerome Hall, Theft, Law and Society (2nd ed., New York, 1952), pp. 139–41; Radzinowicz, History of Criminal Law, 1:94–97.

29. Stat. 4 Geo. 1. c. 11 (1718). The statute allowed the bench to sentence convicts to transportation for seven years in cases of clergyable felony and petty larceny. See Beattie, “Crime and the Courts,” p. 158; Cockburn, History of English Assizes, p. 130; Langbein, Torture and the Law of Proof (Chicago, 1977), pp. 39–44, and works cited in accompanying notes. See also Beattie, Crime and the Courts, ch. 10, for an excellent account of the pre-1718 experiments with transportation and the legislative history of the statute. Beattie’s work on the history of punishment, 1660–1800, constitutes a major step forward in the history of the administration of the criminal law.

30. Beattie (Crime and the Courts, ch. 10) points out that before transportation came into general use juries were urged to convict of petty larceny, for which the punishment was
By the middle decades of the eighteenth century the apparatus for sifting defendants tried on capital charges—a process that Beattie aptly characterizes as one of "selection"—had become fairly complex. Some defendants were acquitted outright; others were convicted, condemned, and hanged because of the seriousness of their offenses and "as a terror to others." Many capital defendants were saved by undervaluation or a "finding" of simple larceny instead of burglary (either on the jury's own action or because of judicial advice to the jury), and thus were convicted of an offense for which transportation or whipping were the prescribed sanctions. Still others, having been convicted of a capital offense, looked to the bench for relief. Of these, a very few were saved by appeal and retrial, or by a legal ruling, the verdict notwithstanding, by King's Bench or by the trial court itself. Many more were granted judicial reprieves, thus securing time to petition the king for mercy in the form either of pardon on condition of transportation or of outright pardon. The bench played an important role regarding these posttrial petitions. At the close of every session the judges sent to the Council or Home Office letters containing the names of those they thought ought to be spared.

whipping, rather than simple grand larceny, which was clergyable. Thus what appears to be greater mercy was in fact conviction of the lesser offense that carried the harsher punishment. After passage of the 1718 transportation statute, recourse to petty larceny declined and conviction for simple grand larceny became more common.


32. See e.g. SP 37/5, fol. 98v-99 (1766), Mr. Justice Perrott's letter to the Council recommending a convict not be saved: "I beg leave to certify that the law upon which this man was indicted had for its object the protection and security of the industrious poor who are obliged to labour for their bread abroad and are therefore daily liable to be stripped of all their honest labour has furnished them with and once stripped of that are little able to replace it. An act founded upon such principles I thought should not become a dead letter but that an example should be made as a terror to others and to give a very valuable part of his majesty's subjects that protection and security intended by the law." See also Bernard de Mandeville, An Enquiry into the Causes of the Frequent Executions at Tyburn (London, 1725), p. 36: "[I]t is not the death of those poor souls that is chiefly aimed at in executions, but the terror we would have it strike in others of the same loose principles"; Henry Fielding, An Enquiry into the Causes of the late increase of Robbers, etc. (London, 1751), p. 264: "The terror of the example is the only thing proposed, and one man is sacrificed to the preservation of thousands. . . . If therefore the terror of this example is removed (as it certainly is by frequent pardons) the design of the law is rendered totally ineffectual"; Sir Samuel Romilly, below, n. 120 and accompanying text.


34. This was a continuation, and expansion, of a procedure that dates from at least the sixteenth century. In the eighteenth century, judges are mentioned frequently in State Papers (e.g. SP 36/113, fol. 5, 15, 78). After the mid-1780s, these circuit letters are grouped in the Home Office records (e.g. HO 6, 2/23; 4/23; 7/15; 12/58). For discussion of judicial requests for pardons see below, nn. 48-53 and accompanying text. For a detailed discussion of pardon procedure and practice see Beattie, Crime and the Courts, ch. 9.
Frequently the judges received requests from the Council or Home Office for supporting data, both in the cases that the judges had moved and in others moved by the defendant or by his employer, friends, or kin. In many of these latter cases, the trial judge recommended against clemency, which presumably doomed the defendant.

The jury was only one of several sources of mitigation, and even then many of its merciful verdicts were encouraged—practically commanded—by the bench. But it was more active in this regard than it had been since medieval times, and much of the mitigation it practiced had taken on a kind of legitimacy it had not possessed before. There was now more law and more prosecution, and thus greater reliance on jury or postverdict determination of whether someone who had committed a nominally capital offense actually ought to hang. The trend was not new, but frequency of practice conditioned concepts of legitimacy, and these concepts in turn shaped society's understanding of the eighteenth-century criminal trial.

II

Although there can be no doubt that the jury was one of many institutions of mitigation, it is difficult to determine the degree of independence jurors had, or believed they had, in reaching verdicts of a discretionary nature. Langbein has shown that long after Bushel's Case the bench retained a number of devices that assured it control over the jury. The bench commented on the evidence and embodied such commentary in instructions that sometimes read like recommendations. The bench could withdraw a case before it went to the jury in order to allow time for the gathering of more and better evidence; its sense of timing in this regard was relatively acute because there was now more frequent exchange between judge and jury, or between jury and trial participants, that revealed the jury's view of the case. The jury might be made to disclose its reasons for finding for or against the defendant, and the judge could send the jury back for further discussion if he thought the reasons insufficiently grounded on the evidence presented. Thus the bench

35. See e.g. SP 36/115, fol. 24; SP 36/116, fol. 105.
36. Langbein, "Criminal Trial before the Lawyers," pp. 284–87. See also H. Misson, Memoirs and Observations in his Travels over England (London, trans. 1719; written 1698), p. 328: "[O]ne of the judges makes a discourse upon all that has been said, recapitulates the discourses pro and con, weighs and considers all things, draws his conclusions, and declares to the jury, that conformably to the laws of the country they ought to bring it in so and so."
37. Langbein, "Criminal Trial before the Lawyers," pp. 287–89.
38. See O.B.S.P., passim.
39. Langbein, "Criminal Trial before the Lawyers," pp. 289–96. In a few early modern
possessed the means for achieving practical control of juries. Had judges employed those means frequently, the tradition of jury independence in common-run felonies would have diminished substantially. In fact, as Langbein would agree, only the first device—comment on the evidence, containing strong hints of the judge’s view of the appropriate outcome—was a common feature of eighteenth-century criminal trials. To a significant degree, however, judicial comment allowed the bench to achieve the modest control it felt necessary and appropriate to exercise. For there was, in any case, little area of real disagreement between judge and jury over the outcome of most trials.

In light of the power that the bench possessed to control the jury, it is striking to consider the actual fate of defendants. Acquittal and conviction rates varied from decade to decade and from place to place, but Beattie’s figures for Surrey, 1736–53, would seem a typical set of jury verdicts.40 Beattie found that defendants charged with capital property crimes were treated, in roughly equal numbers, in one of three ways. One third were found guilty of the capital charge; one third were acquitted; and one third were convicted on a lesser, or “partial,” charge, e.g., either petty larceny or simple (noncapital) grand larceny. Of those found guilty of the capital charge, only one half were hanged; the remainder were pardoned on condition of being transported. Of those granted partial verdicts, 85 percent were transported. The remainder were whipped or imprisoned, or were discharged after successfully claiming benefit of clergy. Thus, of the total tried for capital property offenses, some 15–20 percent were hanged, at least 40 percent were ordered to be transported, and perhaps 40 percent were not punished at all beyond pretrial incarceration and any posttrial stigma that might have attached.

If there was a trend across the entire period, it was toward fewer actual executions, fewer outright acquittals, and more transportations (followed later in the century by more terms of imprisonment at hard labor). The assumption that offenders ought to be punished and reformed became more general; the willingness to take life long remained constant, then trials the judges accepted the jury’s verdict of acquittal and urged a surviving kinsman to appeal the suspect. See Ernst, “Moribund Appeal of Death,” pp. 177–80.

40. Beattie, “Crime and the Courts in Surrey,” pp. 179–81. See also Beattie’s Crime and the Courts, which contains far more complete statistical tables than those he has previously published. In his book, Beattie details the fluctuations and long-term changes in the patterns of resolutions. He links these to specific events, prevailing social perceptions of crime, and changes in attitudes toward treatment of human beings. Beattie also demonstrates that the figures varied substantially as between the “old” (more serious) capital offenses and the “new” (less serious ones). See Beattie, Crime and the Courts, ch. 9 and table 9.4. Langbein’s figures for mid-century Old Bailey cases are similar (“Albion’s Fatal Flaws,” p. 106).
dramatically receded. Although in percentage terms no more individuals were executed in the early eighteenth century than in earlier times—the 20 percent figure remains the typical figure across the half-dozen centuries we have studied—the alternative sanction, transportation, was considerably more punishing than the alternative sanctions resorted to in the past, pardons and clergy.

The new regime of mitigation must be distinguished in yet another way from its predecessors. In the medieval period, property crimes at the capital level might be reported as petty larceny by the grand jury, pardoned before trial, or mitigated through acquittal by the trial jury. It is difficult to determine what percentage of the many trial jury acquittals were in the nature of merciful verdicts. There is little indication that the medieval bench encouraged merciful acquittals; such verdicts remained hidden and, at most, tolerated. In the later Middle Ages, the grand jury was brought under greater control, but pretrial pardons were plentiful and benefit of clergy was extended to an ever larger number of persons, reducing the number of cases in which the jury’s verdict was of great importance. The sixteenth-century statutes removing many property crimes from benefit of clergy brought the jury once again to the fore: the practice of undervaluing goods or of convicting the defendant of a form of theft that was still clergyable became far more common than it had been in the medieval period. The jury could preclude capital punishment without granting a full acquittal, though not entirely at will since the bench might still exercise its power to deny that the defendant was truly literate. As we have seen, the bench often encouraged jury undervaluations (and other forms of “partial” verdicts) and thus helped to initiate the practice that came to dominate jury trials by the eighteenth century.

Although this practice had increased in the late sixteenth and early seventeenth centuries, it was the statutory provision for transportation in many property offenses that made it standard form after 1718. The novelty, of course, lay in the creation of a largely jury-administered scheme of mitigation that was legitimated both by the complicity of the bench and by the reality of some substantial punishment for those who were its beneficiaries.

Within this evolving scheme of mitigation numerous factors induced acquittals and partial verdicts. Judicial recommendations to the jury often, though by no means always, were based on the quantum of evidence against the accused. The bench demanded that proof be virtually absolute before the jury convicted at a capital level. Where such proof

41. See above, Chapter 2, section II.
42. See above, Chapter 4, text at n. 176.
43. See below, nn. 58–59 and accompanying text. Judges frequently reprieved defendants.
was lacking the bench recommended a form of mitigation that was "principled," i.e., in accordance with the evidence that had been adduced, but its recommendations in this regard were virtually always also conditioned by prevailing notions regarding the seriousness of the offense or its assessment of the character of the defendant. In many instances, neither judge nor jury was disposed to give full expression to a newly minted capital law. In others, the law itself was not nullified, but a defendant who had stolen only marginally more than the threshold amount was treated in the same way as one who had stolen just a little less. The circumstances surrounding the defendant's act were also taken into account. Although the earliest statutes precluding clergy singled out accompanying circumstances that society had long considered especially heinous, many later ones did not; some of these latter statutes merely lowered the capital amount in offenses that did not involve physical threat or assault. In prosecutions under such statutes evidence regarding surrounding circumstances became critical—not for the purpose of exonerating the defendant entirely, but for treating him mercifully.

Almost inevitably many partial verdicts were the result of a combination of circumstantial considerations and considerations touching the defendant's background and character. Character witnesses played a complicated and significant role. At trial their purpose was to exonerate the defendant, to testify that he was of such good reputation that he could not be presumed to have committed the offense with which he was charged. In their charges to juries, judges may have treated such testimony mainly in this regard, but witnesses served also to support the defendant's plea for mercy after conviction. Juries may have had difficulty keeping these different roles separate, and it is even possible that the behavior of the bench encouraged the jury to confuse them. Judges counseled partial verdicts on the basis of such testimony even when it was clear that the defendant had committed the act in question. Moreover, the bench did so not only where the offense was trivial but also in more serious cases where the witnesses testified that the defendant was of good

they believed ought not to have been convicted on the evidence. And see e.g. SP 36/113, fol. 121: because "the whole [case] depending upon one single witness," the judge recommended commutation to transportation for fourteen years (1751); SP 36/115, fol. 34: "because the evidence was not sufficient in law to convict him of the offence," the judge recommended transportation for fourteen years (1751); see also HO 47/5, no. 5: because of the "great doubt thrown on this case . . . perhaps [the defendants] should be transported to some place with a more favorable climate than their present destination of Africa" (1786).

I am grateful to Elizabeth Clark for this last reference. 44. See Beattie, Crime and the Courts, ch. 9; Langbein, "Shaping the Eighteenth-Century Criminal Trial," pp. 26-30.


character or had been in straitened circumstances or misled by others. Although juries sometimes convicted with a recommendation for mercy, the bench did not always attempt entirely to sever the question of guilt from the matter of appropriate sanction by first securing a conviction and then undertaking to exercise mercy judicially. In practice, the bench did not seek a monopoly over the practice of mitigation. Rather, it tolerated and implicitly legitimated the age-old jury practice of mitigation without always setting clear standards for the jury regarding the weight to be given to any of a number of considerations that paraded as evidence. Assessment of guilt by the jury, as well as consideration of postsentence reprieve by the bench, was frequently made into a test, in the most general sense, of the defendant’s just deserts.

The specific considerations upon which a given jury acted when it acquitted a defendant or rendered a partial verdict on other than strictly legally prescribed grounds are seldom revealed to the reader of extant trial accounts. Some conclusions about typical reasons for mitigation can of course be drawn. Mitigation was common, for instance, where the evidence was not “absolute,” or where the defendant had stolen little more than the capital amount. (Some offenses were so systematically treated as though they were not capital that the interesting question is not, Why were most such offenders spared? but, Why were the very few unlucky ones singled out?) The details of mitigating circumstances and the constituents of “good character,” however, often remain unclear. One is forced to extrapolate from letters and petitions in cases where the defendant had been condemned, but where judge, jury, or others urged

47. Beattie, “Crime and the Courts in Surrey,” pp. 171-73. In his excellent synopsis Beattie does not focus on the jury’s perspective and perhaps understates the degree to which jury acquittals and partial verdicts were impressionistic and based on a mixture of motives that not even the jurors themselves were pressed to sort out.

48. See e.g. SP 36/113, fol. 76 (1750): Mr. Justice Burnet’s report to Council: “The jury found the prisoner guilty but at the same time desired that I would represent him as an object of mercy upon condition of transportation”; SP 36/113, fol. 78: Michael Foster wrote: “The jury recommended [the convict] to mercy, and I reprieved him”; SP 36/116, fol. 150 (1751): “The jury after the business of the day was over came in a body to the bar and recommended the prisoner to mercy, out of regard to his youth.”

49. The intermixing of different kinds of reasons for extending mercy at the postconviction stage is reflected in a letter to the Council from Mr. Newton Ikin, recommending mercy for a convict who foiled a conspiracy to murder his gaoler [evidently while waiting for a reprieve after being sentenced to hang]: “These facts may possibly have some weight if Mr. Perrott [Baron and Judge] which it is expected he will, should make an unfavorable report to his majesty, for he refused the sheriff the favor of a reprieve for [the defendant]. His sentence I find to be generally thought severe, as the burglary was not positively proved, and the felony he was convicted of was no more than a cotton handkerchief of a very small value.” SP 37/5, fol. 88 (1766). (Perrott did recommend carrying out the sentence, apparently without knowing these additional details. See SP 37/5, fols. 98v–99).
commutation and/or pardon. It is necessary to proceed with caution, for matters thought relevant to postconviction clemency were not necessarily persuasive with juries charged with finding the truth (or the just resolution) in the first place.

Although most of the extant petitions for pardons and commutations date from the later eighteenth and early nineteenth centuries, they were abundant enough by the 1550s to indicate that the range of reasons for which pardons were granted remained fairly constant from the mid-sixteenth to the mid-nineteenth century. Judges' letters in support of pardons often cite the petitions of the defendant's minister or substantial neighbors. To have the support of respectable members of the community to which the convict would ultimately return must have counted for a great deal. It is not possible to determine how often the jurors had known the views of such persons at the time of their deliberation. Drawn from the county, though not necessarily from the hundred where the offense occurred, some jurors may have known of the defendant's reputation, and we must assume that juries took this kind of knowledge into account in at least some cases resulting in mitigated verdicts.

From judges' letters it is apparent that in addition to the nature of the offense itself, good character and previous behavior, youthfulness, submissiveness upon arrest, and evident remorsefulness weighed heavily both with them and with juries. The sentence that most beneficiaries of

50. See above, Chapter 4, n. 163 and accompanying text. This subject requires further study. Although the stated reasons for pardons remained relatively constant, social attitudes toward mercy must have changed over time. For a study of the Puritan ideas that informed much social thinking about the role of mercy see Herrup, "Common Peace," ch. 6. See also my comments below, Chapter 9.

51. E.g. SP 36/113, fol. 5 (1750): Thomas Birch, J., requested a free pardon for one convicted of stealing a calf, because of "favorable circumstances" at the trial and because he received a petition from the "minister, church wardens, overseers and principal inhabitants of the parish wherein he resided"; SP 36/113, fol. 15 (1750): Mr. Baron Legge seeks a free pardon for a defendant on whose behalf he "received a petition for principal inhabitants of the parish wherein she resided"; SP 36/116, fol. 32 (1750): Mr. William Noel, Chief Justice of Chester, sought commutation for a defendant for whom the prosecutor and many of the defendant's neighbors spoke; SP 36/116, fol. 306: Sir Martin Wright (judge of King's Bench) received a petition from "diverse of the better sort of the inhabitants of Drayton, in Shropshire" that the defendant "may dwell amongst her neighbours again."

52. See above, Chapter 6, section IV, for discussion of the role of out-of-court information. The argument for the jury's right to a noncoerced verdict was based in part on out-of-court knowledge of the defendant's reputation. Although those making the argument probably meant that this kind of knowledge was relevant to the question of guilt or innocence, we have seen that the trial process confused this question with the question of the appropriate punishment.

53. E.g. SP 36/113, fol. 9 (1750): youth "and other favourable circumstances," including stealing goods "of no considerable value," making no resistance, confessing immediately; HO 47/6, nos. 1 (1787): youth, and because prosecutor had recovered his sheep; 2 (1787):
jury-based mitigation received was transportation for seven years (in lieu of execution or transportation for fourteen years); substantial evidence of good character and of likelihood of reform must have seemed sufficient justification for one of the standard lesser sanctions. Perhaps it was the moderate quality of mitigation that led the bench to accept what was in any case inevitable, and to share openly its power of commutation with the jury. Whatever the reasons, the acceptance of shared powers of mitigation was of the greatest importance. It demonstrates that the criminal trial jury was still a social morality play over which officials exercised only a partial control. It also revealed that judge and jury, though they may have represented different social strata and different attitudes toward criminal behavior, generally acted in tandem, not one against the other.54 In the administration of the law regarding common-

54. This is evidenced also by jury verdicts in cases where no partial verdict was possible (e.g., sheep stealing). The jury had either to convict of the capital offense or acquit altogether. In such cases, juries convicted with great frequency, probably knowing in many such cases that the bench was going to reprieve the defendant and recommend a pardon on condition of transportation. Beattie, *Crime and the Courts*, ch. 9. In some cases, however, the jury ignored judicial recommendations for mercy. The judge felt bound to honor their
run felonies, everything conspired to the creation of an integrated fact-finding, law-applying, and sentencing process.

Contemporary observers depicted the role of the criminal trial jury largely in the terms we have set forth. Professional and lay writers on the law and legal institutions well understood the importance of the element of mitigation in the administration of the criminal law. They were not, however, wholly in agreement either on the factors that most often led juries to mitigate or on the degree to which juries acted on their own rather than taking their lead from the bench. Moreover, some of them did not view the process of mitigation as a carefully managed "selection" but viewed it rather as an unruly flight from the horrors of the sentence to the gallows. For this reason, among others, many observers doubted that a system of jury-based mitigation was a virtue; indeed, as we shall see, beginning early in the eighteenth century there was increasing criticism of a system of criminal administration that depended heavily upon this aspect of the jury's role.

In most eighteenth-century descriptions of the routine felony trial the judge looms large. Even foreign observers, who were mainly curious about the role of the English jury, were impressed by the care that the bench took in questioning witnesses and the defendant, in taking notes on all testimony, and in summing up the evidence for the jury. Contemporary accounts confirm the impression left by the *Old Bailey Sessions Papers* that the bench dominated proceedings, but they do not suggest that judges frequently brought pressure to bear on the jury. Rather, the judge reviewed the evidence thoroughly in open court, leaving little doubt of his own conclusions and making recommendations to the jury. Observers thought that these recommendations carried great weight, partly because of the intrinsic authority of the bench and partly because of the reasonableness and thoroughness of judicial summations. Some contemporaries, especially foreign observers, who tended to idealize the English criminal trial, asserted that the jury remained free to reach its own conclusions, implying that the bench rarely questioned jurors closely or sent them back to reconsider their first verdict. But even they conceded that juries typically agreed with the bench. The routine felony trial in very nearly all accounts was characterized by a harmonious judge-jury rela-

E.g. HO 47/6, no. 12 (1787).


56. Misson, *Memoirs and Observations*, p. 328. See also above, n. 9 and accompanying text. For an important study of one (probably typical) judge's practice see Langbein, "Shaping the Eighteenth-Century Criminal Trial," pp. 26–30 and accompanying notes.
tionship. Neither the judge nor the jury was a nullity; both were active and central institutions despite the fact that the judge was the partner that led.\textsuperscript{57}

We have seen that most defendants were either acquitted or awarded a partial verdict. Judicial leadership, it appears, involved frequent recommendations that the jury not convict the defendant of a capital offense. Although it is clear that judges and juries took the kind of offense committed into account, contemporary writers have surprisingly little to say about judicial treatment of different kinds of offenses. For lay writers especially, the most important factor in acquittals and partial verdicts was the very high threshold of proof that the court required for conviction of a capital offense.\textsuperscript{58} The bench, it was asserted, seized upon every possible weakness in the testimony against the accused, even mere technicalities, to save the defendant's life.\textsuperscript{59} The jury was urged to take the greatest care in assessing testimony where life was at stake, and, according to contemporaries, this is precisely what juries did. All parties to the system of justice, often including the complainant, strained to find some pretext on which to avoid the ultimate sanction of capital punishment.

It is ironic that many contemporaries counted close and impartial scrutiny by judge and jury as a hallmark of English justice, for there were as yet few formal rules of evidence. In much the same way, the frequent recourse to judicial reprieves hid the absence of a formal system of appeal.\textsuperscript{60} The death penalty drove the bench and jury to find informal substitutes for what the legal system lacked and perhaps thus delayed the

\textsuperscript{57} Misson, Memoirs and Observations, p. 329: "[W]ithout being under the least restraint to keep to the conclusions of the judge that has harrangued them"; de la Rochefoucauld, A Frenchman in England, p. 126. But see Grosley, A Tour to London, p. 146, who concluded that the judge thinks he dominates and the jury thinks it does: "The juries, on the contrary, maintain that the whole procedure in all its branches is referred to them; that the judge assists merely that his presence may awe the witnesses and the prisoner with respect, and to assist the jury by his experience and knowledge of the law. This competition, and the rivalship which it occasions, rendering both judges and juries equally alert, put the law in the place of man."

\textsuperscript{58} William Paley, Principles of Moral and Political Philosophy (London, 1785), pp. 550–51. See also B. L. Muralt, Letters describing the Characters and Customs of the English and French (London, trans. 1726; written 1694, published 1725), p. 71. Muralt noted that some people were "condemned for small matters, and others are easily acquitted at the same time that seem to be much more guilty" (i.e., are suspected of a more serious offense). This, he said, was because the English "don't determine anything but on the clearest proofs, without any regard to probability."

\textsuperscript{59} F. Lacombe, Observations sur Londres et ses Environs (London, 1777), p. 69.

\textsuperscript{60} See A Treatise on the Right of Juries (London, 1771), p. 42: "The good sense and liberal feeling of the law . . . cannot be enough admired: It impowers juries to acquit absolutely, but reduces and softens their power to convict, by enabling the Crown in its mercy to withhold punishment."
development of formal institutions. As a result of the way things worked in practice, some observers underestimated the degree to which the framework of protections surrounding the defendant was manipulated in accordance with the defendant’s offense, bearing, and background. English criminal justice was not mainly a matter of the application of abstract rules. The threshold of proof required for capital punishment was flexible, subject to being heightened in given instances.

It is possible that in many instances where the defendant’s character or offense was the real reason for the extension of mercy, judge and jury rationalized the verdict in terms of the “weakness” of evidence adduced against the defendant, of the possibility that the testimony against him was inspired by hope of reward, or of a real or alleged departure by authorities from the formal requirements of the law. Authorities may thus have hidden both from themselves as well as from some contemporaries the degree to which mercy resulted from abhorrence of the death penalty or from considerations of character or offense. But these nonformal considerations were, in fact, both significant and noticed. Moreover, they were understood as requiring a substantial degree of discretion on the part of the jury. Judicial recommendations were not seen as “directions”; even when the jury was following the lead of the bench it was seen as assimilating the judicial inclination to mitigate the rigors of the law to its own independent process of deliberation.

At one level this process of deliberation had been purged largely of out-of-court evidence: by the eighteenth century, if not earlier, it may have been deemed inappropriate for jurors to take such knowledge into account. At another level, however, consideration of the defendant’s reputation and character involved an assessment that might be thought of as community based. At the very moment that the jury was losing its right to be self-informing, authorities were continuing to acquiesce in the jury’s right to apply standards that could be characterized as not entirely accessible to the bench. As we shall see, the persistence even in this truncated form of the tradition of the self-informing jury strengthened the


62. Misson (Memoirs and Observations, p. 329) thought the judicial recommendations for commutation were based on whether the defendant was “more or less guilty.”

63. English law reform writers were especially attentive to the role of these factors in the mitigation of the law. See below, section III.

64. Beattie (Crime and the Courts, ch. 8) notes that jurors at Surrey assizes sometimes had actual knowledge of events and were allowed to make use of it. See also Langbein, “Criminal Trial before the Lawyers,” pp. 298–99, n. 105.
hand of jury proponents in the late-eighteenth-century debate over the law of seditious libel.

Although contemporaries understood that trial juries frequently intervened to save the defendant’s life, their discussion of jury behavior reveals the complexity of the system of trial by jury and the varying conclusions that might be drawn regarding the way in which that system worked. Some writers viewed the jury as an appendage of the bench, but most saw it as far more independent. Most writers thought that jury verdicts were influenced mainly by the evidence, but many understood the importance of the offense, and the defendant’s character and reputation. All of these considerations were influential, given the general resistance to convict at a capital level all but the worst offenders. Although most contemporaries understood this, they did not always take care to separate these factors. Even when juries did convict, they often did so with (perhaps because of) the knowledge that the defendant’s life would or might be spared. Many contemporaries may have missed this point and thus failed to consider whether the jury in such cases doubted that it had the right to intervene or simply preferred to leave the ultimate decision to the bench.

The general impression that the lay and professional writings of the eighteenth century convey is that juries were willing to punish but not often to condemn men and women who came from walks of life that were different, but not totally removed from their own.Jurors may have identified with the perspective of authorities, but, as many contemporaries saw it, they often also identified with the defendant. Observers did not see jurors as constantly drawn in one direction or the other, perhaps because the bench was similarly disinclined to enforce the law to its fullest and at least appeared to adopt standards close to those of persons from the ranks from which jurors were drawn. Judge and jury, it was widely believed, shared both point of view and the age-old right and duty to mitigate the law.

III

The practical approach to penology that we have described was the end product of a dialectical process set in motion centuries before. The trial jury’s systematic nullification of the law of capital sanctions was gradually accommodated by authorities through doctrinal and institutional changes, some—though only some—of which were conscious responses to the relatively benign sort of jury-based intervention that we have been tracing in this chapter. As authorities tightened their control of juries in cases where they felt something substantial was at stake and developed a set of relatively severe noncapital sanctions for the general run of cases, they
not only acquiesced in, but even encouraged, jury participation in the selection of offenders for one or another level of punishment.

The result of this historical development was a scheme of selective enforcement in which the jury played a significant role. Had juries, however, adhered from the outset to the rules of law, a system of selective enforcement might nonetheless have resulted. Given the needs of politics, the attack on capital punishment, and the recognition that the able-bodied could be put to good use, the English might have adopted a Crown-based Continental-style system of pardon and commutation. As it in fact evolved, the English system of penology, wherein the jury was an important participant, was more visible, more complex, and perhaps less consistent in its resolutions than its French or Italian counterparts. But it probably reflected the attitudes of a larger part of society and induced a more widespread belief that the entire system of criminal administration was just.

Whatever degree of public support the English scheme of selective enforcement enjoyed, it nonetheless met with significant criticism over the course of the eighteenth and early nineteenth centuries. The criticism intensified in the last decades of the century due largely to the influence of Cesare Beccaria's work, *On Crimes and Punishments*, first published in English in 1767.65 The central principles of Beccaria's attack on Continental systems of criminal justice are too familiar to require detailed discussion. Popularizing the ideas of earlier and more original Continental writers,66 Beccaria argued for moderate and proportional punishments that were both humane and capable of being systematically enforced. Certainty of punishment, he held, was the best deterrent to crime:67 prospective offenders should not be encouraged to suppose they could escape punishment through the extension of mercy. Beccaria took an absolutist position, leaving virtually no room for the power of pardon.68 Punishment, he believed, ought to be prompt69 and ought to bear a rational relationship to the nature of the offense,70 but in no case was it to be capital.71 Though on this last point some Continental reformers

disagreed with Beccaria, his tract, generally speaking, fairly captured and transmitted their views to English shores.

Continental penological views of the late eighteenth century influenced but were not perfectly replicated in the emerging critique of the English system. For some English reformers, the Continental principles were especially attractive because of the open and seemingly ad hoc character of selective enforcement in their own country. At the same time, however, these reformers held a conception of justice to which some degree of jury discretion was integral. The English version of the new penology reveals just how complicated a role the jury had come to play in English legal and political culture. In what follows I shall examine the initial English reception of the new penology and suggest the ways in which longstanding English practices affected that reception. I shall also contrast the English reformers to the principal defenders of the status quo, who agreed with the reformers only in their criticism of prevailing jury practices, and in their view that whatever mitigation was to be practiced ought to be centered mainly in the Crown.

The reformers to whose work we shall pay greatest attention were not necessarily typical in their criticism of the jury. Their understanding of jury practices, and of the impact of those practices on the administration of the criminal law, rested mainly on their familiarity with the trials at urban assizes of a seemingly endless parade of suspected thieves and slayers. They were influenced by their perception of a rising crime rate and a growing criminal class. Their view, in short, was a view from the center. The reformers' criticism was blunted, however, by their adherence to two positions that enjoyed wide social agreement. First, many reformers believed that the severity of the law of sanctions was a principal source of the problems afflicting the administration of the criminal law. Jury mitigation, they perceived, was an inevitable response to that severity; until sanctions were reformed mitigation would be both common and in accord with humane principles.

It proved difficult for reformers to write about the prevailing system without giving support, pro tem, to some of the practices to which they were in fact opposed. Second, for most reformers there was an important conflict between their belief that jury mitigation played havoc with a rational system of criminal law and their faith in residual powers of nullification as a safeguard against

72 Hay ("Property, Authority and the Criminal Law," pp. 54-55) has pointed out that London "had a highly transient population, and a large body of disorderly and parasitic poor," and that "instruments of control there were weaker, in part because the class relationships that fostered deference were [weaker] ... Equally, judicial mercy in London was more often a bureaucratic lottery than a convincing expression of paternalism." This may help account for the reformers' criticism of what seemed to some of them a nearly random process of selection.
executive and judicial tyranny. (It is the exploration of these jury-related themes that distinguishes my treatment of the eighteenth-century reform tradition from that of earlier scholars, e.g., Sir Leon Radzinowicz.) As we shall see in this chapter and the one that follows, the contradictions inherent in both politics and the administration of criminal law in the eighteenth century were mirrored in the academic legal literature of the period.

The major reform writings and the responses to them may be aligned as follows. In the years around 1770, William Blackstone, William Eden, and Henry Dagge produced pioneering works on penal reform. All of these writers were influenced by Beccaria, whose concern had been with the law regarding common-run felonies. Though all three reflected some understanding of the constitutional-safeguard role of the jury, only Dagge clearly (and favorably) responded to the uproar over the jury in seditious libel cases and to the agitation of the Wilkites in the late 1760s. A decade later Manasseh Dawes, influenced by both Blackstone and the philosophical writings of Joseph Priestley that appeared in the late 1770s, added a variation on the Beccarian themes. Dawes argued for reform of the law of sanctions, urging that death be replaced by imprisonment at useful labor. He dwelled on the causes of criminal behavior, striking at points a modern note. Interestingly, his work showed no attention to the seditious libel crisis and to the defense of the jury in that context that he was to make two years later (1784) in the wake of the trial of the Dean of St. Asaph. In the mid-1780s William Paley and Martin Madan published very different defenses of the law of sanctions that criticized jury-based mitigation of the law in common-run felonies. Taken together, these two works challenged the early penal reform movement. The voice of the future, however, was heard in the first work of Samuel Romilly, who replied in 1786 to Madan’s discourse. Romilly called for reform of the kind for which the adherents of Beccaria had called. Like most of the other reform writers, Romilly devoted nearly all his attention to the traditional felonies, and little to the problem of the jury in political cases, this despite the fact that just two years earlier Romilly had written a powerful defense of the role of the jury in seditious libel cases.

Although all of these writers—proponents and opponents of reform—opposed jury mitigation, at least at its contemporary levels, they nonetheless reflected widely divergent perspectives on the system of criminal law in general. Because these commentators on jury practices built upon one another, we shall examine them separately and chronologically, even at the risk of repetition on points where they were in substantial accord. Before turning to these seven important late-eighteenth-century legal writers, however, we must take account of Henry Fielding’s two mid-
century tracts. Fielding foreshadowed the later writers, especially in his ambivalence about the role of the criminal trial jury.

Fielding's 1751 *Enquiry* into the causes of what he perceived to be a recent increase in criminal activity attacked jury mitigation of "two excellent Acts of Parliament" regarding pilfering and like offenses. By valuing goods at less than a shilling, the jury leaves the thief "ordinarily to be whipped," so that he returns immediately to his trade. As a result, "the jury are perjured, the public highly injured . . . that two miscreants [principal and accessory] may laugh at their prosecutors, and at the law." Criminals thus "are ever lying in wait to destroy and ensnare the honest part of mankind, and to betray them by means of their own goodness." They take advantage of the "passion of love or benevolence," the "only human passion that is in itself simply and absolutely good." Fielding preached against naivete, against what he took to be a misplaced generosity of spirit; he extolled the virtues of mercy in the abstract, but scorned the sudden accesses of compassion that blinded men to the real effects of merciful verdicts in criminal cases.

The tone of the *Enquiry* is harsh and angry. It has the feel of a complaint from the front lines, penned by a magistrate attempting to deal with what he took to be a national crime wave. In only the narrowest sense was it a penal reform tract. Far from criticizing capital sanctions, Fielding insisted upon adherence to the rules of the system. Though Fielding's endorsement of the "terror of examples" to deter would-be offenders seems to sanction some degree of selective enforcement, the principal argument of the *Enquiry* is that failure to prosecute and refusal to convict were both unlawful and unwise. To the extent that the tract foreshadowed later commentary on the jury, it bore a closer resemblance to Madan's call for rigorous enforcement of existing laws than to the writings of Beccaria's


74. Fielding, *An Enquiry*, p. 73.

75. Ibid., pp. 106-8. Fielding refers here to too-merciful prosecutors, but he clearly means also to characterize too-merciful jurors.

76. See also Samuel Johnson, *The Rambler*, no. 114 (London, April, 20, 1751): "[I]t may be observed, that all but murderers have, at their last hour, the common sensations of mankind pleading in their favour" (p. 4). "This scheme of invigorating the laws by relaxation, and exploiting wickedness by lenity, is so remote from common practice, that I might reasonably fear to expose it to the public, could it be supported only by my own observations" (p. 7).

77. Ibid., p. 120.
disciples or to Paley’s defense of the regime of selective enforcement of the criminal law.

Fielding’s 1753 Proposal was written in an altogether different vein. It was an original reform tract, reminiscent of Interregnum reform writings, and a significant addition to the early eighteenth-century English literature that counseled use of the workhouse for persons convicted of petty theft. Though limited in scope by its attention to petty theft, and to first offenders at that, Fielding’s argument was informed by a series of insights that were shared by the later reformers. His central purpose was to argue for sentences to the workhouse, instead of gaol, for first offenders. In the main, his tract was frankly utilitarian. Like mid-seventeenth-century reform writers, Fielding saw little purpose in simple and brutal incarceration. He portrayed the prospective defendant as one who awaits trial in the worst of circumstances, unable to support himself and his family, prey to the wretches of society. Sentencing the convict to gaol only made matters worse. Fielding believed that the existing system produced hardened criminals and induced juries to acquit defendants who deserved some punishment and who required—to use a modern term—rehabilitation.

The themes of mercy, fairness, deterrence, and social utility were woven into a logical and compelling argument. The accused, Fielding observed, must await trial in gaol no matter how “trifling” his offense or how much he is an “object of mercy.” “If he be acquitted on his trial, as he often is by the mercy of the jury, against clear and positive evidence, he is again turned loose among the community with all the disadvantages I have mentioned above.” If he is convicted, whipped, and gaol ed, so much the worse: “What must be the situation of this wretch I need not mention; such in truth it is, that his second theft is in reality less criminal than the first. This was perhaps choice; but that will be necessity.” Transportation of pilferers, made possible by a recent Act, offered little improvement:

81. Idem.
82. Ibid., pp. 71–72.
This, though probably it may be real mercy, has such an appearance of extreme severity, that few judges are willing to inflict such a punishment on such an offense. But if it should be in the interest of a wretch in these circumstances, to be banished from a country where he must steal or starve, it is scarce the interest of the public to lose every year a great number of such able hands. By the means I have proposed, it seems to me, that the offender will receive a punishment proportionable to his offence; he and his family may be preserved from utter ruin, and an able member, instead of being entirely lost to the public, will be rendered more useful to it than he was before.  

Fielding's prescription for reform was clear enough, but what were his views regarding mitigation in the unreformed present? Were judges and juries to apply the letter of the law to the "wretches" and "objects of mercy" who came before them? One might suppose that the Fielding who in 1751 opposed merciful verdicts in capital cases opposed them in noncapital cases of petty larceny in 1753. This is not necessarily so. Fielding might have believed that perpetrators of more serious offenses deserved the strongest possible punishment but that those who committed "trifling" ones deserved very little punishment at all. All one can say is that the Proposal reflects recognition that such verdicts were inevitable in "trifling" cases and that Fielding found it difficult to deny that they were just. Fielding's tracts signaled a revival of English penal reform writing. They carried forward Interregnum ideas, adding to them the insights of an experienced London magistrate. But they also revealed the tensions that characterized the late-eighteenth-century English reform tracts.  

Blackstone's final volume of his Commentaries on the Laws of England, Of Public Wrongs, contained the first analysis of the administration of the criminal law written after the publication in England of Beccaria's influential work. Blackstone admired the Continental reform tradition, and Of Public Wrongs attempts to assimilate that tradition to the common-law world, sometimes pretending that English institutions already conformed to the reformist ideal and sometimes justifying the obvious and seemingly important dissimilarities between them. Blackstone accepted Beccaria's principles of justice and deterrence based upon a law of sanctions that was humane and applied with certainty. Blackstone also understood the role that English juries played in common-run felonies. He simultaneously acquiesced in a substantial amount of jury-based mitigation of the criminal law and counseled reforms that

83. Ibid., p. 72.  
85. Ibid., pp. 16–17.
would greatly lessen the need for such practices.\textsuperscript{86}

The great bulk of jury mitigation practice involved the rendering of partial verdicts in offenses against property. Blackstone argued that undervaluation was largely a response to inflation, which had brought more and more goods within the scope of capital felony statutes. This was a kind of "pious perjury" that achieved justice by preventing unforeseen economic forces from condemning to death persons whom the legislature had not specifically said ought to be hanged.\textsuperscript{87} Blackstone knew, however, that juries went beyond this form of mitigation, that they were merciful in a far wider range of cases; he was more cautious in his condonation of these practices, but it is clear that he believed they accorded with natural justice. Much of the law of capital sanctions was wrong as a matter of justice and policy; reform—in the form of repeal—was required, and until it came about one had both to understand and to accept the mitigating role of legal institutions.\textsuperscript{88}

But as an advocate of reform Blackstone did not go so far as Beccaria, who argued that a rational law of sanctions would dissolve the necessity for a power of pardon. Blackstone believed that there would always be a need for that power; moreover, he inherited a view of monarchy from which the pardon power was inseparable. For Blackstone, the goal was partly to reduce the frequency with which pardons were granted, but mainly to centralize the pardon power in the Crown. Blackstone understood Beccaria's argument regarding deterrence, but seems not to have accepted the notion that \textit{any} decrease in certainty of punishment, whatever its source, had to be paid for in decreased deterrence.

Blackstone focused on a distinctively English problem that Beccaria did not have to address: the dangers inherent in dispersed powers of mitigation.\textsuperscript{89} For Beccaria, the villain was mitigation itself, not a particular institution of mitigation. While necessarily more complicated than that of the Continental reformer, Blackstone's argument was also internally contradictory. He sought to justify the English system even as he called for its reform. Thus he sought at times to argue that all power of mitigation was in fact centered in the Crown.\textsuperscript{90} But he was well aware of the truth: political control, certainty of the law, consistency of treatment of offenders were all sacrificed under an English administration of law that

\textsuperscript{86} Ibid., 18–19, 239, 354.

\textsuperscript{87} Ibid., p. 239.

\textsuperscript{88} Thomas A. Green, "Introduction" to \textit{ibid.}, pp. ix–xi.

\textsuperscript{89} Ibid., pp. 18–19.

\textsuperscript{90} Ibid., p. 390. Blackstone asserted that "the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter." Blackstone knew that such practices were common despite the possibility of royal pardon. See above, n. 88.
corrected for its potential inhumanity through ad hoc and variously situated institutions of mitigation.

Blackstone understood that the problems besetting English criminal justice could be resolved only through fundamental change in the manner in which all the institutions of the criminal law functioned. Change could not come piecemeal; it would have to begin with the law of sanctions, but the effects of that change would have to radiate throughout the entire system. Until sanctions were reformed the jury would remain an institution of mitigation, playing a role akin to the one it had historically played in the English constitution of accommodating the rules of law to the Englishman’s sense of natural justice. The jury was a guardian against inhumanity as well as against tyranny. As a corollary, whatever reforms were undertaken regarding sanctions for common-run felonies, the jury would have to retain the ultimate power in order to guard against episodes of legal abuse in more overtly political cases. There were, of course, costs involved in the use of juries, but these Blackstone characterized as “inconveniences.” Better to educate Englishmen to serve as jurors in a system that required of them wisdom and some knowledge of the law, restraint but a sense of justice, than to eliminate the jury in order to avoid potential or even present abuses.

Blackstone shared his contemporaries’ view that much criminal activity resulted from social conditions, and he was prominent among the early proponents of prison reform who argued that current incarceration practices only made offenders more dangerous. Characteristically, however, he shied away from the conclusion that poverty or exposure to vice and to evil companions stripped one of a truly free will. That conclusion (for which he provided no logical rebuttal) he regarded as dangerous to the public order. Poverty, he asserted, ought not to ground a defense of involuntarism or of necessity, especially in cases of theft of food or clothing, for property would then be rendered insecure by the alleged wants of others, “of which wants no man can possibly be an adequate judge, but the party himself who pleads them.” Blackstone resolved the problem by invoking the power of the Crown “to soften the

91. Ibid., pp. 343-44: “[S]ince in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another. . . . So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate.”

92. Ibid., p. 344.


94. For Blackstone’s contribution to the movement for imprisonment at hard labor see Beattie, Crime and the Courts, ch. 11.

95. Blackstone, Commentaries, 4:32.
law, and to extend mercy in cases of peculiar hardship.”96 But as he doubtless realized, in practice juries daily served to help resolve this very dilemma.

William Eden also recognized the complexity of the role of the criminal trial jury.97 Like Beccaria, he focused clearly on the problem of deterrence, echoing the Italian’s message through his borrowings from Blackstone’s terminology. Eden’s analysis of the property-crime problem that afflicted late-eighteenth-century England is a classic formulation of the Continental reform theory. The source of the problem was, he said, “national prosperity.” “Sensibility sleeps in the lap of luxury; and the legislator is contented to secure his own selfish enjoyments, by subjecting his fellow citizens to the miseries of a dungeon, and the horrors of an ignominious death.”98 Increased wealth brought increased selfishness and increasingly harsh laws to protect that wealth; it magnified one aspect of human nature, but it did not transform human nature entirely: “Still however [the legislator] feels a tacit disapprobation of the laws, which he has enacted; and even, when injured, [he] hesitates to bring the offender to justice. He knows that the punishment is disproportionate to the offense.”99 Nor did it blind the propertied to reality: “[O]r at least, if humanity be obliterated by interest, [the legislator] foresees, that the punishment cannot be inflicted, without raising the indignation of society against the accuser.” The result, then, follows Beccaria’s diagnosis closely:

The delinquent therefore is discharged without prosecution: he repeats the crime under the expectation of repeated mercy. . . . It is a property inseparable from harsh laws, that they are neither regular, nor expeditious in their execution; consequently, that they flatter the hope of impunity, and, equally injurious to the society and the criminal, tend to the fatal multiplication both of crimes and of punishments.100

Eden argued that the existing system of criminal law emerged fortuitously, for the anger that generated new capital legislation gave way to the natural instincts of compassion when it came time to apply the law to

96. *Idem.* Blackstone was at his most internally inconsistent on this issue. After asserting that a defense of necessity would be unmanageable and dangerous, Blackstone stated: “In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature.” Subsequently, he pointed to the power of pardon, which he suggested gave relief in rare instances.


individual suspects. As a result, the system of penology actually encouraged criminal behavior. There are hints of this in Blackstone, but Eden made the point with force. Thereafter, virtually all reform writers charged that mitigation, though preferable to mass executions, was partly responsible for the crisis in criminal law.

The role of the jury as a mitigator of the law raised a number of problems, and the more Eden pursued them the more he shifted his attention from the question of deterrence to other considerations of justice. First, he criticized the practice of basing capital felony on the monetary value of stolen goods. Since money was "in its nature ... of fluctuating value," to base punishment of the offender on such value is to make "adjudication of the law ... vague and uncertain."101

Turning to the jury's role, Eden observed that "the impulses of benevolence are opposed to the obligations of religion": jurors were "taught to trifle with their oaths, and to call such trifling 'a kind of pious perjury.'"

In fact, upon trials of larcenies so limited, it is commonly found to be the chief anxiety both of judges and of jurors, to reduce the crime below its real predicament, by reducing the conviction below the value affixed by law. Such an anxiety is the natural consequences of laws, which, by an absurd distinction, make a trivial difference between two sums the criterion of capital crime.102

Unlike Blackstone, who placed the emphasis on "pious" rather than on "perjury," Eden criticized the practice of mitigation for the confusion it produced in the minds of the mitigators. He, too, was concerned with a kind of incoherence, but not so much a legal or political as a moral incoherence.

Trifling with laws and lives: the business of sorting out those who deserved to hang from those who did not appeared very different to Eden than it did to many of his contemporaries. Nevertheless, Eden took a liberal view of jury fact-finding in some kinds of cases. He defended the jury's indisputable, unquestionable right to acquit the person accused, if, in their private opinions, they disbelieve the accusers; or if in their consciences, they think, however erroneously, that the fact partakes not of that degree, or species of criminality, with which it is charged in the indictment.103

The first instance mentioned—if the jurors "disbelieve the accusers"—is in line with all contemporary analysis and comes as no surprise. The

101. Ibid., p. 268.
102. Ibid., pp. 268-69.
103. Ibid., p. 153.
second basis for acquittal is of greater interest. Eden's formulation is ambiguous. He might have meant: if the jurors find that the fact required by law was not committed; if so he stated no more than a commonplace. But more likely he meant: if the jurors decide that the fact the law considers criminal is not really criminal, for, he continued, jury trial is a nullity unless jurors may determine "the criminality or innocence of the intention, the legality or illegality of the fact." 104

Eden was aware that the jury's power to go outside judicial instructions had long been the subject of debate, especially in the context of cases wherein the government had a political interest. He cited the relevant passages in Blackstone, Hale, and Foster, and concluded: "When wise and good men differ upon points of great constitutional importance," humbler folk like himself should await the outcome. But, he added (bringing the discussion back to his own central concern), it was

a certain truth, that the political liberty of every individual bears a proportion to the security given by the laws to the innocency of his conduct; which security decreases, in proportion to the multiplication of penalties, the uncertainty of penal laws, and the irregularity of trials. 105

Thus Eden remained ambiguous regarding the limits of fact-finding. He attempted to treat jury law-finding as appropriate only in exceptional cases and to minimize the conflict between traditional English jury law-finding theory and the overriding principles of the new penology. Certainty, he believed, was not only crucial to deterrence but was indispensable for justice. All members of society had a right to know what was criminal and to what degree it was so. To announce that certain crimes were capital but then to punish various commissions of them at different levels was to invite injustice. No one would be certain beforehand what his punishment would be; arbitrary decisions would abound. Eden apparently believed that reform of the penal laws would so reduce the need for jury mitigation that one might approve of occasional instances of jury-based intervention without endorsing principles that interfered with human liberty. Eden thus bridged Beccaria and Blackstone in a particularly effective way. And it would be to his *Principles of the Criminal Law* perhaps more than to the *Commentaries* that early nineteenth-century reformers would look for guidance. 106

Nearly forgotten, on the other hand, was Henry Dagge, whose *Considerations on Criminal Law* was published in 1772, one year after Eden's

104. Ibid., p. 154.
105. Ibid., p. 158.
106. See below, Chapter 9, section I.
work and three after Blackstone’s. Reflecting the growing concern over the political role of juries, Dagge’s book does not directly confront the problem of jury mitigation in common-run felonies. But Dagge was not unaware of the issue: he began by lauding Eden, who dwelled upon it, and he supported Eden’s reform ideas. His main contribution was his strong support for the establishment of penal institutions that would inculcate moral virtues. Dagge repeated Eden’s—and through Eden, Beccaria’s—argument that men will shrink from enforcing a strict law and that the end result will be an increase in crime and criminals. Legislators, he asserted, ought not to forget that “criminals are their fellow-creatures,” the products of social inequality and degradation. Laws ought to be aimed at improving man’s lot, and so improving man, not at doing away with men led astray. But this social determinism theme, which had surfaced in Fielding’s Proposal, remained largely buried in Dagge’s work. Like Blackstone, Dagge entertained a vision of human behavior that differed perhaps from earlier more strictly moral approaches, but in the end he resisted the ideas that a later, more scientific age could not. Others, like Dawes, were to develop them further in the next few decades. For Dagge it was an important but subordinate argument: one ought to encourage compassion for the offender, who was often the product of his environment, and take account of that fact in the criminal law.

Dagge’s work reveals the dilemma implicit in the work of other reform writers. Dagge did not criticize jury mitigation in common-run felonies, but his endorsement of Eden suggests that he saw the dangers in such practices. At the same time the thrust of Dagge’s section on juries was a forceful statement favoring substantial jury law-finding powers. Blackstone and Eden had recognized the virtues of the jury’s power tonullify political prosecutions should there be a return to tyranny. Dagge made the point with far greater emphasis, drawing upon the history of civil society and English legal institutions to establish the advantages of the judgment of a jury of twelve common men over that of one man of the robe. For him, the threat of intentional or unintentional judicial misreading of the law was the overriding concern: juries, he argued, must supply constant vigilance. As the seditious libel controversy heightened, the problems of jury mitigation, law reform, and the constitutional and legal balance of powers drew closer together. Dagge perhaps saw the

108. Ibid., p. xix.
109. Ibid., p. xxvi.
110. Ibid., pp. 123–36.
111. See below, Chapter 8, text at nn. 72–74.
larger constitutional issues more clearly than Blackstone or Eden, but he failed to explain how the jury would play a more modest role in one area while remaining the dominant constitutional safeguard in the other.

Dagge’s concern with the social origins of criminal behavior reflected an insight that virtually all reformers shared. At some level, the view that social conditions bred or at least encouraged criminal behavior was commonplace in the eighteenth century. Not a few of the petitions for pardons stressed the conditions that led the convict astray; if these notions were current among the secular and religious officials who drafted the petitions, they were no doubt current among those who, in their role as jurors, mitigated the severity of the law. Then as now, nearly all who held such views also believed that men freely willed their own actions. By and large the reformers shared this dualistic view of human behavior.

Manasseh Dawes was among the more single-minded and eloquent of the deterministic reformers. In *An Essay on Crimes and Punishments*, published in 1782, Dawes castigated lawyers for their failure to understand the most basic principles of human behavior and heaped scorn upon the prevailing concepts of punishment. Lawyers, wrote Dawes, “talk of the necessity of punishment, while they know little of the cause of those actions for which they would have it inflicted.” “Criminals do not offend so much from choice, as from misery and want of sentiment.” Dawes adhered to “the principles of philosophical necessity,” according to which:

[A]ll actions are effects of some cause in the mind; and man being free, he has a self-determining power governed by consideration and judgment, which precede his volition, and direct it; all actions necessarily follow their causes, or volitions; and as they cannot be otherwise than they are, when committed, it ought to be, and is the duty of society to form the minds of individuals, so that they may detest what is constituted bad by law.

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116. *Ibid.*, p. 40. See also *ibid.*, p. 155. “[The] principle of philosophical necessity . . . admits, that although the actions of men, when committed, cannot be otherwise than they are, yet . . . their future may.” A possible effect of a certain act may be to punish the actor; this, in turn, may deter others who would otherwise have committed the same act.
Dawes contrasted the theory of "philosophical necessity" to "fatalism or predestination, which supposes all things come to pass in spite of man." Man possesses a will, and his actions flow from that will, though that will is shaped by forces (ultimately by God) external to man. Although Dawes's theory of human freedom was murky, his analysis of the cause of criminal behavior was clear enough:

[C]riminals suffer eventually for the inevitable effects of certain causes which influence their moral conduct: let a gang of thieves, for example, teach an ignorant boy, that by certain methods of breaking a house, or personal robberies, he will succeed in his end, and be undiscovered, and he will listen to the instruction, and turn thief, in the hope of escaping detection, not being convicted if taken or tried; the mitigation of his sentence, the death of his prosecutor, a flaw in his indictment, or a pardon: the crime to him appears harmless; his study is to avoid the laws, which with him is the only iniquity.

Dawes's program of reform involved moral instruction. But by implication it also countenanced reform of the administration of the criminal law. Although mercy was an appropriate response owing to the ultimate blamelessness of criminal offenders, it was also one of the conditions that engendered criminal behavior. In his own way, Dawes associated himself with the critique of the administration of criminal law that Blackstone, Eden, and Dagge set forth and that derived, ultimately, from the reception of Beccaria's work. And like the English writers who preceded him, Dawes argued that, pending reform either of human nature or of the law of sanctions, mercy—whatever its contributory costs—was appropriate.

117. Idem.

118. Dawes seems to have adopted a view of free will similar to that defended by Jonathan Edwards thirty years before in A Careful and Strict Enquiry into the Modern Prevailing Notions of that Freedom of Will, which is supposed to be essential to Moral Agency, Virtue and Vice, Reward and Punishment, Praise and Blame (Boston, 1754). But Dawes at times took a more sombre view: "[I]s it not a hardship to inflict a punishment for what must and will happen? or is it a justifiable effect of our living in society, that some of us should be cut off from it, because we cannot be otherwise than we are?" In his earlier work, Philosophical Considerations (London, 1780), Dawes asserted that "nature punishes us . . . by conferring the power of punishment upon us, at the moment of our creation, in the faculty of reflection. Thus man may be a free agent respecting himself, but not so in respect to the great author of nature. . . . If [man is] ignorant and bad, the cause may be traced in the faults of his education, productive of moral actions, injurious to himself and others. The future actions of one moral agent, may be made wise and virtuous, from an abhorrence of the perils attendant on the past actions of another." Thus the purpose and virtues of punishment (pp. 38–39). And again, in his An Essay on Intellectual Liberty (London, 1780), Dawes spoke of "the sacrifice of moral criminals, who became victims to laws for the welfare of society" (p. 10).

Men of sense will compassionate all human and social offenders, lament their offences, and sigh over the unhappy cause of them;—they will look upon the wretched prisoner, perhaps half naked and starved, amputated or maimed, ill educated or destitute of taste, and grieve over his condition; regretting some hidden defect in the criminal constitution or civil government, and reluctantly give him up to a punishment, which vagrant liberty had prepared him for, against the inmost desire of his heart; they will not be contented that he has offended, but they will examine why; and tracing the cause, be disposed to forgive an effect, which it was impossible to avoid; and thus feeling the force and power of the mind, they will sparingly punish the man for what the mind only was deficient in producing.  

Unlike his predecessors, however, Dawes did not dwell on the question of which institution was the most appropriate mitigator. More philosopher than lawyer, Dawes commented on human nature and the responses to it of “men of sense,” be they prosecutors, grand jurors, trial jurors, judges, or monarchs. His readers cannot have doubted that jurors, like the others who possessed the power to dispense mercy, were not only part of the problem but for the time being part of its solution.

William Paley’s famous defense of the English system of criminal justice was no more supportive of jury-based mitigation than were the reformers’ tracts. Indeed, the jury was virtually the only aspect of the status quo that Paley criticized. Paley argued in favor of both capital statutes and very selective enforcement, but he believed that enforcement ought to be exclusively in the Crown. Like Blackstone, Paley saw the dangers of dispersed powers of mitigation. The two differed on the reform issue: for Blackstone, the need for mercy ought to be reduced to a minimum; for Paley, the need for mercy was an important aspect of a just and rational criminal law.

Paley praised the English system as one that “assigns capital punishment to many kinds of offenses, but inflicts it only upon a few examples of each kind.” He rejected, however, the view of Eden that this system of penology was unpremeditated. The laws, Paley believed, were designed to be enforced selectively; the ends of deterrence and rational decision making dictated the form of penology that actually prevailed.

120. Ibid., pp. 3–4.
121. Paley, Principles of Moral and Political Philosophy (1785). The substance of this work was drawn from lectures given at Cambridge at least as early as 1770. Paley may have been responding in part to Beccaria and Blackstone. See Radzinowicz, History of English Criminal Law, 1:248, n. 63. Beattie (Crime and the Courts, ch. 12) argues persuasively that Paley’s work represents a response to the critics of the late 1760s and early 1770s rather than a response to the post-American Revolution crime wave of the mid-1780s.
123. Ibid., p. 531.
The pardoning system saved nine of every ten who had been convicted. This was as it should be, for

the selection of proper objects for capital punishment principally depends upon circumstances, which, however easy to perceive in each particular case, after the crime is committed, it is impossible to enumerate or define beforehand.\textsuperscript{124}

Paley challenged every claim of the new penology. He agreed that English law "sweeps into the net every crime," and that, of those swept in, "a small proportion of each class are singled out." The law makes "examples," he said: "By this expedient few actually suffer death, whilst the dread and danger of it hang over the crimes of many."\textsuperscript{125} Everything that Beccaria and his followers asserted was wrong with the English system Paley asserted was right. Everything, that is, save for jury discretion.

Juries, Paley asserted, were too cautious, gave too many too much benefit of the doubt:

I apprehend much harm to have been done to the community, by the over-strained scrupulousness, or weak timidity of juries, which demands often such proof of a prisoner's guilt as the nature and secrecy of his crime scarce possibly admit of; and which holds it part of a safe conscience not to condemn any man, whilst there exists the minutest possibility of his innocence. Any story they may happen to have heard or read . . . is enough, in their minds, to found an acquittal upon . . . [T]o reject such proof, from an insinuation of uncertainty that belongs to all human affairs . . . counteracts the case, and damps the activity of government: it holds out public encouragement to villany, by confessing the impossibility of bringing villains to justice; and that species of encouragement, which, as has been just now observed, the minds of such men are most apt to entertain and dwell upon.\textsuperscript{126}

Paley understated the degree to which jurors were actually motivated by the character of the defendant or the nature of his act. In fact, jurors took into account the very considerations that Paley thought the Crown ought to take into account. Paley's real complaint was that jury-based mitigation resulted from consideration at the verdict stage of matters relevant to the question of the appropriate sentence. The jury, he believed, created the problem of inconsistent treatment of offenders: not only assessment of guilt but also degree of punishment depended in each case on the sympathies and inclinations of a new jury.

\textsuperscript{124} Ibid., p. 532.
\textsuperscript{125} Ibid., p. 533.
\textsuperscript{126} Ibid., pp. 550–51.
Paley, however, agreed with the reformers on the end of punishment—the prevention of crime. Indeed, he considered himself a reformer who sought to make a good system work even more efficiently. Paley's stress on prevention led him to conclude that severity of punishment ought to be determined by difficulty of discovery and conviction, not by elusive notions of the defendant's guilt. Crimes that were common, hard to prevent, and equally difficult to prosecute ought to be very severely punished—that the offender had taken a small amount surreptitiously, rather than openly robbed his victim of a large sum, suggested he ought to be punished more, not less, severely. Paley left questions of conscience and guilt to God's judgment: man lacked the omniscience required to see into the defendant's mind. Small wonder that Paley had little patience with jury discretion and instead took great pains to found his discretionary system on a regularized, formal, and consistent procedure of Crown-based mitigation.

If Paley shared with the anti-discretion reformers reservations about the jury in common-run felony cases, he also shared with them strong approbation of the jury's ultimate constitutional independence. Like Dagge, Paley viewed the judge and jury as checks upon one another; the judge instructs the jury, but the jury applies law to fact according to its understanding.

In proportion to the acknowledged excellency of this mode of trial, every deviation from it ought to be watched with vigilance, and adopted by the legislature with caution. Summary convictions before justices of the peace, especially for offenses against the game laws; courts of conscience; extending the jurisdiction of courts of equity; urging too far the distinction between questions of law and questions of fact, are all so many infringements upon this great charter of public safety.

Paley appears to have seen the contradictions inherent in the different roles that he thought the jury ought to be called upon to play. He may even have understood that a jury with secured powers of nullification of tyrannous laws was a jury that could not be controlled easily in common-run cases. There were, however, some risks he believed worth running, for in his view definitions of institutional roles could never be precise in a just political system.

The second major defense of the English law of crimes was embodied in Martin Madan's Thoughts on Executive Justice, a tract that reflected concern with the increase of crime in the mid-1780s and impatience with

127. Ibid., pp. 527-31.
128. Ibid., pp. 504-5.
the penal reform writers of the preceding decade. Madan openly criticized the ethic of merciful verdicts, judgments, and sentences, and exhorted judges and juries to apply the law as it stood. It was "fashionable with many, to find great fault with the number or severity of" the criminal laws; for his part, however, he deemed that the country had been served well by them:

I may say, that the legislature has from time to time been assiduous in meeting crimes, as they have arisen, with wholesome laws; but those, whose duty and office it is to administer the laws, have now, for many years, been preferring their own feelings as men, to the duty which they owe the public as magistrates.

Madan likened judicial reprieves to the hated and abandoned suspending power exercised by the later Stuarts. The pardon power was in the Crown and was intended to be used judiciously, not wantonly. There were cases wherein the bench could reprieve: where it thought the jury was malicious, or the evidence insufficient, or where postconviction testimony warranted a reversal. In most cases, however, the judge should invoke, not vitiate, the rigors of the law.

Madan's famous description of the judge doing his awesome duty bears repeating:

[The judge] then, in the most pathetic terms, exhorts the unhappy convicts, to consider well how best to employ the little space that yet remains between that moment and the grave—he acquaints them with the certainty of speedy death, and consequently with the necessity of speedy repentance—and on this theme he may so deliver himself, as not only to melt the wretches at the bar into contrition, but the whole auditory into the deepest concern. Tears express their feelings—and many of the most thoughtless among them may, for the rest of their lives, be preserved from thinking lightly of the first steps to vice. . . .

The dreadful sentence is now pronounced—every heart shakes with terror. The almost fainting criminals are taken from the bar—the crowd retires—each to his several home . . . the day of execution arrives—the wretches are led forth to suffer, and exhibit a spectacle . . . the whole country feels a lasting benefit.

129. Martin Madan, *Thoughts on Executive Justice* (2nd ed., London, 1785; orig. published 1784). Madan's work was published a year before Paley's, but Paley's was probably conceived substantially earlier than it was published. See above, n. 121. For a pathbreaking analysis of the relationship between the reform tradition and the fluctuations in real (and perceived) rates of crime, 1750-1800, see Beattie, *Crime and the Courts*, chs. 11-12.


131. Ibid., p. 48.

132. Ibid., pp. 28-30. For a remarkable insight into the "day of execution" and some
Equally imposing is Madan’s description of what typically happens at trial, and how in his view the ends of justice are frustrated by misplaced sentiment:

But perhaps [the defendant] happens to be young—it appears to be his first offense—he has, before the fact which is proved against him, had a good character—he was drawn in by others—was in liquor—or some other circumstances of the like kind strikes the minds of the jury; they forget their oath . . . and take upon themselves to acquit the prisoner, against all fact and truth. This I have so often seen, that I cannot forbear the mention of it. The judge, on this occasion, usually takes little further notice of the matter, than to congratulate the prisoner on his “narrow escape” and to tell him that “he has had a very merciful jury.”

Such juries, Madan concluded, found “according to their feelings, but against their oath.” And if they could falsely acquit they might also falsely convict—Madan did not repeat at this point that the bench might in the latter case reprieve the defendant and recommend that he receive a royal pardon.

Madan was not entirely opposed to reform of the law. He recognized that laws that were too severe—i.e., undermined the principle of deterrence—required revision. The problem, of course, was to design an appropriate test of enforceability. Madan refused to accept the practices current among bench and jurors in his own day as the proper test. He sought instead to convince those who served in these institutions of their duty, but “duty” was an ambiguous concept. At what point did unwillingness to convict of a capital offense or carry out the sentence not conflict with duty? Why were not all statutes that were seldom enforced ipso facto in need of reform? Madan sought to avoid this problem by vesting mercy in the Crown. Judge and jury, he believed, were too close to the condemned, whose pitiful condition overwhelmed the imagination and left no room for the rational administration of justice. The novelty and power of Madan’s approach lay in its royalism and its indifference to the balance of power between judge and jury, either in common-run or in political cases. Having disregarded the need for safeguards against a tyrannical bench, Madan was virtually the only writer of his time who did not advert to the dilemma posed by the jury’s duty to preserve the fundamental liberties.


133. Madan, Thoughts on Executive Justice, pp. 137–38.
134. Ibid., p. 138.
135. Ibid., pp. 132–33.
Madan's tract provoked Samuel Romilly to write his first work on reform of sanctions, *Observations on . . . Thoughts on Executive Justice*, a tract that brought the reformist position back into clear focus.\(^{136}\) According to Romilly, Madan's theory failed on a number of grounds, beginning with its avoidance of reality: prevention of crime could not "possibly be attained by the mere terror of punishment";\(^ {137}\) more executions would lead to fewer convictions. One might call for enforcement, but it could not be had, "for jurors would easily quiet their consciences upon a perjury which was the means of preventing murder."\(^ {138}\) Moreover, Madan's assumption that the legislature intended fuller enforcement was unproven and intuitively wrong:

And indeed it is hardly possible to doubt, that the parliament had the clemency of the crown in its contemplation, when it passed all those modern statutes, by which new felonies are created; for that the legislators of an enlightened age, and of a nation boastful of its humanity, should punish the slightest offences with death, is not to be accounted for, but upon the supposition, that those punishments are only held out as a terror, and never intended to be inflicted but in the most aggravated cases.\(^ {139}\)

Romilly was far from an admirer of this legislative policy, which perhaps thanks to Paley's defense of existing penology\(^ {140}\) he saw more clearly than had Blackstone or Eden. The law, he said, was supposed to be reasonable in order that it could be known. Clearly those most likely to commit offenses were among those least likely to know the laws for which they might lose their lives. Unless law accorded with justice and morality, one could not hold all men to know it: "[N]o authority, however great, will

\(^{136}\) *Observations on a Late Publication* [by Martin Madan], intituled *Thoughts on Executive Justice* [by Sir Samuel Romilly, but published anonymously] (London, 1786). Romilly stated in his memoirs that Lord Lansdowne, who was among those "dazzled" by Madan's book, recommended that he "write something on the same subject. This, of course, induced me to look into the book; but I was so much shocked by the folly and inhumanity of it, that instead of enforcing the same arguments, I sat down to refute them." Lansdowne, Romilly stated, "highly approved" the result, but the tract "had so little success with the public, that not more than a hundred copies were sold." Sir Samuel Romilly, *Memoirs of the Life of Sir Samuel Romilly*, 3 vols. (London, 1840), vol. 1, pp. 89–90.


\(^{139}\) *Ibid.*, p. 82. See also Romilly, *Memoirs*, 1:370. Romilly asserted, in a letter to M. Dumont, that the Riot Act "was certainly never meant to be executed against all who should expose themselves to it; the only object was to hold out a terror; although it ought to have been foreseen that the circumstance of the law not being executed would prevent its inspiring terror." (Oct. 23, 1789).

\(^{140}\) *Observations on a Late Publication*, pp. 73–78.
ever be able to persuade mankind, that penal laws ought to constitute a
science merely of memory, and not of reason." Thus Romilly bitterly
attacked Madan's attempt to dress his theory of enforcement in the garb
of certainty to which Beccaria and his English adherents had appealed.

Romilly suggested that the rich, or society at large, bore some respon-
sibility for the crimes of the poor. Perhaps punishment ought to fall on the
better endowed in society; they, after all, were the "natural fathers and
guardians" of the poor. Not surprisingly, then, Romilly's condemna-
tion of the law of sanctions was coupled with a plea for an expanded and
enlightened use of incarceration to reform criminal offenders. He noted
that Blackstone and Eden had drafted a "plan for the punishment of
criminals" that was "wholly unobjectionable," characterizing it as "a
kind of asylum to that very large description of offenders, who are
rendered such by the defects of education, by pernicious connections, by
indigence, or by despair." Romilly also carried forward Fielding's
utilitarian argument for such an institution:

[W]hat it is that retards the execution of this excellent plan, it is not
easy to conjecture; for, though the expense of erecting the penitentiary
houses would be considerable, yet that is surely but a trifling object,
compared with the benefit which, as it should seem, must necessarily
result to the country from such an institution. And according to the
calculations which have been made upon the subject, when the houses
were once erected, the annual expense of maintaining them would be
more than defrayed by the earnings of the convicts.

Although it left little of Madan's tract unscathed, Romilly's argument
held little support for the tradition of merciful jury verdicts. Such verdicts
were inevitable, Romilly conceded, so long as the law of sanctions
remained unreformed. But with reform, jury mitigation would be
largely unnecessary and generally unwise. Conviction would lead to a
form of punishment that was both rational and humane. That was,
however, the argument of the future. For the time being the problem of the jury’s role as a constitutional safeguard remained to be worked out. A systematic solution to the problem of the jury in common-run felonies might have received the attention it deserved had the problem of such cases not been entangled with the larger constitutional crises in which, even in the eyes of its severest critics, the jury also played an important and controversial role. This is clear in the writings of Romilly who, two years before publication of the critique of Madan, had himself contributed to the debate over seditious libel:

Rigid, however, and I will add, tyrannical, as the law of libels is, nothing is to be dreaded from it while it is administered by the paternal hand of juries, who though they will never suffer it to be relaxed to the encouragement of defamation and licentiousness, will refrain and temper its harshness by their discretion and humanity.147

IV

We are still far from understanding how the criminal trial jury operated in the eighteenth century. The process by which juries reached agreement, the degree to which jurors followed the lead of the bench, and the extent to which jurors actually believed they were acting autonomously, all remain beyond our ken. But the history of jury trial is in part the history of contemporaries’ perceptions of the institution. We do know that many learned contemporaries believed that the jury was a powerful and at least semi-autonomous institution of mitigation. And more significantly, we can reasonably infer that most laymen believed that jury-based mitigation was a legitimate part of the administration of the criminal law. Authorities themselves seem to have encouraged this view of the jury. Even those jurists and lay publicists who questioned the wisdom of existing jury practices endorsed those practices so long as the prevailing law of sanctions remained intact. It remains, by way of conclusion, to reconsider how this view of the jury had come to be accepted and assimilated in a fashion that made it resistant to change.

From one perspective, the administration of the English criminal law, of which the jury was but one element, appears to have been a calculated and manipulated expression of the authority of what might be called the ruling classes.148 This view helps one to understand what has seemed a

147. Sir Samuel Romilly, A Fragment on the Constitutional Power and Duty of Juries upon Trials for Libels (London, 1784), p. 3. Romilly comments upon the tract in his Memoirs, 1:86–87. I have used the copy of Fragment that is in Houghton Library, Harvard University.

148. See Hay, “Property, Authority and the Criminal Law.” Hay does not argue that the
paradox in the criminal law of the eighteenth century: the multiplication of capital statutes alongside their fairly general nonenforcement. The argument holds that these statutes expressed the interests of the property classes and provided them with tools for protection of those interests. But it also recognizes the political and social difficulties that would have ensued from strict enforcement of the statutes and argues that the ruling elites had more to gain from only selective enforcement. These groups administered a program that combined terror with mercy. Nonenforcement was thus made to seem an aspect of justice and majesty, and it therefore also created a debt: England’s rulers continued to reap a harvest of deference from those they ruled. In those cases in which the law was applied to the fullest, the thesis runs, there was attention to justification: enforcement was characterized by “circumspection” and “delicacy.”

How accurate a view of the administration of the criminal law does this perspective afford? Certainly some contemporaries analyzed the administration of the law in these terms; for them this selective-enforcement theme became a rationalization for maintaining the status quo in the face of growing pressures for legal, and especially penal, reform. But their perspective was limited by their own social position; they perhaps failed to appreciate fully the point of view of those below them. No doubt the administration of the criminal law, and especially the practice of selective enforcement, emphasized the majesty of the law and engendered deference toward those who administered it. But these were incidents of a system that involved far more complex processes than solely the machinery of a ruling class or classes.

As we have seen, the selective enforcement of the law of felony resulted from the circumstances of the origins of that law. The Crown had always had to struggle to make its legal mandate effective. It had frequently complained about nonenforcement, announcing its own weakness while pleading for obedience. At the same time, English rulers had attempted to convert this weakness into strength through the use of pardons, benefit of clergy, and the pragmatic acceptance and even encouragement of merciful jury verdicts. If these devices underscored the beneficence and majesty of the law, they did not conceal from contem-

law was devised with these ends in mind or that all aspects of law enforcement were designed to take advantage of the class power inherent in the law. He is mainly concerned with the reasons for the reluctance of some of the ruling groups to reform the law.

149. Idem.

150. E.g. Paley, Principles of Moral and Political Philosophy, above, nn. 103 et seq. and accompanying text. See also above, n. 32 and contemporary writings cited therein. Some observers (e.g. Fielding) opposed pardons but favored the use of executions to strike terror. They were not clearly endorsing selective enforcement.

151. See above, Chapter 3.
porary the fact that literal enforcement of capital felony laws lay beyond the power of the Crown. In practice, enforcement was a matter of an accommodation in which, at one stage or another, many parties played important roles.152

If some property owners failed to prosecute their thieving tenants in hopes of strengthening the bonds of affection that flowed upward, others looked the other way knowing that prosecution, if it succeeded, would destroy those bonds and increase the numbers of the unemployed and of professional thieves.153 Still others may have doubted the success of prosecution altogether, for even propertied jurors could not be counted on to hang, or even to punish with severity, perpetrators of relatively minor offenses. We cannot be certain that grand juries would have followed the lead of prosecutors had capital punishment been resorted to with substantially greater frequency. For one thing, the testimony of witnesses might have been far harder to come by. Indeed, those suspected and captured in the first place were only a fraction of the total number who had broken a capital law, and that fraction might have been smaller still in a world of strict enforcement against all those taken and indicted.154

Mainly, of course, it was a matter of jury behavior that the Crown and bench had to accommodate. We have considered the circumstances that


154. See generally Beattie, Crime and the Courts. Beattie’s findings contain at least implicit support for the overall argument I am making.
made accommodation—with both loss of face and enhanced majesty—more attractive than literal enforcement through coercion of juries. There had always been a significant number of false accusations. Before the sixteenth century, authorities lacked the means to separate these from the cases involving trumped up verdicts. As the means of monitoring jury behavior developed, the bench employed its powers—usually, if not always, with success—to ensure the outcome of what it considered egregious cases. But pressures of time, the development of an enforceable, yet relatively severe lesser sanction (transportation), and the by-then powerful social expectations regarding both the role of the jury and the appropriate use of the gallows dissuaded legal officials from inducing capital verdicts much more often than they had in the past. Although by the eighteenth century the increase in property crimes and the sense of insecurity felt by the urban rich and rural propertied may have contributed to passage of legislation making more offenses capital, or making common-law mandates more explicit, there is little reason to believe that legislators imagined they were any more capable than their predecessors of strictly enforcing the law.

More than any other institution within the administration of criminal law, the trial jury reflected the limits of the power that authorities could bring to bear on those they ruled. Some juries could be effectively manipulated, or depended upon to deal harshly with property violations, but most jurors in most cases could be relied upon only insofar as authorities expected them to apply the law strictly in the cases that most of society itself thought especially serious. Authorities might derive benefit (in the form of respect for the law as well as outright deference) from jury-based intervention, perhaps the most prevalent form of selective enforcement, but the standards governing that process of selection were not theirs to set at will.

The choices were obvious. Law could be administered in summary fashion by a magistrate or according to the traditional mode of trial by judge and jury. Although Parliament increased the scope of offenses summarily triable by justices of the peace sitting without a jury, jury trial was maintained in all felonies, as much for widely shared notions of justice as for narrowly conceived reasons of politics. Of those brought to trial only some—by virtue of background, reputation, attitude toward authority, or the nature of the offense itself—deserved to die. That decision did not have to be made—and perhaps ought not to be made—unilaterally by a judge. The judge might steer the process when it reached the trial stage, leading the jurors, who, given the standards the bench

itself adopted, typically desired judicial leadership. The judge might comment upon the virtues of mercy and even, in some instances, go significantly beyond the jury in extending it. So far did the ruling elites adopt the posture of merciful law givers; so effectively did they make what may have been the best of a system in which enforcement was not commanded by the simple fiat of those elites, but depended upon and suited the views and interests of society generally.

From one perspective, the propertied classes created a network of laws they had no intention of fully enforcing; nonenforcement was itself a tool worth forging. From another, the law, at least at the capital level, was in fact "enforced," for the process of enforcement involved a multistage examination of the character and behavior of persons suspected of acts denominated felonies by common law or legislation. To state the law regarding capital offenses one had really to talk in terms of processes and resolutions. Not all felons deserved to be executed, but all (save for petty larcenists) were subject to a determination of whether they numbered among those who did. From this perspective, the law was not really mitigated, it was simply applied in the appropriate fashion. It was as though capital legislation read: persons who act in such a way are subject to death, transportation, imprisonment, or whipping, by determination of Crown, judge, and jury. The legal system as it was in fact devised, with its superabundant claims upon the lives of men, would have been intolerable had it not in practice accommodated the realities of contemporary social life, had it not reflected how far England's rulers, both in their brutality and their leniency, had adopted the standards and approaches to law enforcement of those they ruled.156

156. Hay ("Property, Authority and the Criminal Law," p. 61) asserts that "when we ask who controlled the criminal law, we see a familiar constellation: monarchy, aristocracy, gentry and, to a lesser extent, the great merchants. In numbers they were no more than 3 percent of the population." Hay says relatively little about juries. His argument is more plausible with respect to the summary powers of justices of the peace, the attitudes of members of Parliament, the disposition of those who administered the granting of royal pardons, and the language employed by judges when sentencing convicts to the gallows than it is with regard to either the behavior of trial jurors or the attitudes of the bench and the aristocracy generally toward that behavior. What Hay does say indicates he has mainly in mind juries in cases involving poaching and related offenses, where often landed jurors faced unpropertied defendants (See Langbein, "Albion's Fatal Flaws," pp. 107-08), though his remarks in "Poaching and the Game Laws in Cannock Chase" suggest that even in those cases jurors were not truly aligned with the propertied classes (pp. 189, 211). Hay might believe that those who "controlled the criminal law" controlled juries, or that juries typically sought to please (or at any rate not to displease) their social betters on the bench or in Parliament. [For an emphatic statement of this view see Peter Linebaugh, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein," unpublished paper (1984). I am grateful to Professor Linebaugh for allowing me to see his essay.] I have argued that while this was doubtless true in many cases, the standards that the
Maintaining the form of mitigation—of suspension of a blanket capital law—no doubt enhanced the authority and prestige of the ruling classes. It was a solution produced by history, both forced upon those classes and turned by them to their best advantage. But it was not without its costs. Sharing powers of mitigation meant defining jury trial in a certain way. Authorities first inherited and then enhanced an ethic of jury application of the law that they would not always find it easy to contain. The perpetuation of that ethic reflected the acquiescence of authorities in general social standards in common-run felony cases—so long, i.e., as those standards wore the stamp and ritual of official decision making—but it did not reflect a concurrence of opinion in other, more "political" cases. This, as we shall see, was to prove a critical problem in English governance. Moreover, there were other signs of unhappiness with the administration of a criminal law based upon dispersed powers of mitigation. There were some contemporaries who had begun to ask whether, after all, such an administration of law accorded with the best interests of society generally and of the propertied classes in particular.

The reform literature of the eighteenth century provides an important commentary upon the system. Read in conjunction with the trial descriptions of the more casual observers of the day, this literature suggests that many contemporaries viewed the criminal trial jury as relatively autonomous but not engaged in a struggle with the bench. But it also suggests that learned Englishmen exaggerated the degree of jury latitude that characterized everyday practice and underestimated the degree to which verdicts must have fit fairly settled and predictable patterns, patterns that mirrored not only the attitudes of the bench and of the common Englishmen who served as jurors but the expectations of most offenders.

Small ruling elite adopted were themselves in part a reflection of the attitudes of a very large part of society. This was true both with regard to substantive standards and with regard to the matter of who was permitted to apply those standards. One of the most powerful techniques of rulership was to allow even relatively lower-class juries to sort out (within limits) cases according to their own sense of justice. With regard to the administration of the criminal law in the eighteenth century, the concept of "control" (as I believe Hay would agree) must allow for this dialectical interplay of attitudes. At some point, certainly with regard to the use of the criminal trial jury, one might want to replace the word "control" with the word "management"—the management of the administration of criminal justice in a fashion that redounded to the benefit of both managers and managed. Very possibly, the managers enhanced their control over the managed as a by-product of the managers' acquiescence in such a system of criminal law. I elaborate upon this point in Chapter 9. See "Introduction," in Brewer and Styles, eds., *An Ungovernable People*, p. 19. The editors make the related point that society at large had access to use or to challenge many aspects of the legal system; this fact helped to convince society of the existence of the rule of law and "helped humbler men to reach a grudging accommodation with the more egregious aspects of the criminal process." I have stressed direct access to the system of criminal law itself.
Both the reformers and their critics failed to appreciate the extent to which judge and jury conditioned each other’s perspective and behavior within a legal culture that developed and applied its own informal rules of law in a relatively consistent fashion.

The reform literature also reveals several important contradictions inherent in prevailing attitudes toward crime, criminals, and the administration of the criminal law. First, as we have seen, contemporaries who favored reform of the law of capital sanctions and a concomitant reduction of the need for jury intervention tended to regard such intervention as both inevitable and just in the unreformed present. Their writings thus offered support to those seeking to justify jury-based intervention.

Moreover (and, ultimately, perhaps more important), many of the reform writers viewed criminal behavior as a product of social conditions, including among those conditions the existing administration of the criminal law. They coupled their support for reform of the law of sanctions with a call for rehabilitation. Reformers thus accepted one of the ideas implicit in contemporary social thought and in the prevailing system of commutation—the notion that much crime was socially caused—and, carrying that idea part way to its logical conclusion, they rejected both the manner in which the sentencing procedure was implemented and the principal form of treatment (transportation) of those offenders who were spared. But these writers also clung to a notion of free will and suggested by implication that it was for existing institutions to sort out the truly guilty from the great mass of relatively unfree offenders. Once again, in the decades preceding reform, the reformers provided a justification for age-old jury practices.

Finally, few reformers supposed that reform of sanctions would entirely remove the need for an ultimate right of jury intervention. Romilly had already written in defense of the jury in seditious libel cases when he turned his attention to the problem of sanctions in common-run felonies;157 Dawes produced a similar tract on seditious libel two years after the publication of his Essay on Crimes and Punishments.158 We shall see that Blackstone and others also—though in more moderate language—glorified the historical role of juries in political cases and suggested that the jury might again someday have to play a similar role. Though most of these later writers believed that the settlement of 1689 rendered unlikely a return to executive and judicial tyranny, they too offered a powerful argument for true nullification of the law to those contemporaries who thought such a turn of events had already come to pass. Perhaps as a

157. See above, n. 147 and accompanying text.
158. See below, Chapter 8, text at n. 58.
result, reform would come only after a political and legal crisis in which the virtues of an ultimate (though rarely resorted to) right of true jury law-finding were openly debated and widely accepted.