

Law, Crime and English Society, 1660–1830

edited by

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1 Introduction

Norma Landau

This volume is a tribute to John Beattie, whose work is fundamental to the burgeoning study of crime and the courts in early modern England, and whose enthusiastic interest in the work of his fellow historians is one of the attractions of eighteenth-century English history. On his retirement, John's current students and colleagues at the University of Toronto published a *Festschrift* in his honour.¹ This is therefore the second volume dedicated to John. Of the contributors to this volume, some were John's students as undergraduates, others his graduate students, and all enjoy his friendship. John is an extraordinary scholar: not only acute, persistent, and insightful in his own work, but generous in giving his time, advice, and aid to others. John's work has made our work better; his presence has enhanced our enjoyment of our work. This volume is one way in which we say 'thank you'.

The chapters in this volume develop themes raised by John Beattie's second and third books, *Crime and the courts in England, 1660–1800* and *Policing and punishment in London, 1660–1750*.² The foundation of both books is analysis of the charges of felonious conduct brought before Quarter Sessions, Assizes, and the Old Bailey (London and Middlesex's Assizes), and the way in which these courts dealt with these allegations. The evidential core of the books are the allegations themselves – charges presented according to the dictates of legal formulae, written on dirty strips in a now obsolete hand, and annotated with the scribbled Latin shorthand of the court's clerks as they recorded the court's verdict and sentence on each allegation.³

Mastery and analysis of such records is in itself a formidable achievement – an achievement prognosticated by Beattie's first book, *The English*

¹ G. Smith, A. May and S. Devereaux, *Criminal justice in the old world and the new* (Toronto, 1998).

² J. M. Beattie, *Crime and the courts in England, 1660–1800* (Princeton, 1986), and *Policing and punishment in London, 1660–1750: urban crime and the limits of terror* (Oxford, 2001).

³ For problems intrinsic to analysis of indictments, see J. M. Beattie, 'Towards a study of crime in eighteenth-century England: a note on indictments', in P. Fritz and D. Williams, eds., *The triumph of culture* (Toronto, 1972).

*court in the reign of George I.*⁴ This book, on George I's household, like Beattie's two later books on the criminal courts, is founded on arcane documents, in this case household accounts, which Beattie uses to delineate the way in which the king's household functioned. As in his later work, Beattie here uses analysis of administration as a means of posing questions resonating beyond administrative structure. This book examines the distribution and nature of the court's patronage, an issue central to the debate about the early Hanoverian constitution. So, too, in ways foreshadowing Beattie's analysis of the administration of the criminal law, his analysis of the administration of the household disclosed something quite unexpected: George I's efforts to make his court the centre of political life when he could not rely on his son to fulfil the monarch's role as social centre of England's politics.⁵ Beattie thereby revealed that a cliché which had shaped depiction of early Hanoverian politics – that George I was interested neither in England nor its throne – was simply wrong. As Beattie demonstrated, George I took an active part in England's political life; and this reassessment of the first Hanoverian monarch's political role, coupled with Beattie's analysis of the functioning and importance of the royal court, is a major contribution to current depictions of English politics.

Beattie's second and third books examine another variety of royal court – the criminal courts. Like his book on the royal household, these too delineate the way in which a court works, the ways in which it changed, and the ways in which both functions and their change reveal the structures and stresses of the society it governed. Beattie's work has brought a new perspective to the study of the eighteenth-century criminal law, a subject whose study had been defined by Sir Leon Radzinowicz's *A history of English criminal law*.⁶ This distinguished work was the first to give an extended historical analysis of the criminal law that went beyond the statute law, and it did so by looking at opinion about the law and its administration. As one would therefore expect, Radzinowicz's *History* is a masterful orchestration of voices criticizing the criminal law, declaring it corrupt, ineffective, illogical, asystematic, arbitrary, antithetic to the ends of justice, and therefore in need of drastic reform.

Such an emphasis was highly compatible with what Butterfield termed the 'Whig interpretation' of English history,⁷ an interpretation that shaped

⁴ (Cambridge, 1967).

⁵ See also J. M. Beattie, 'The court of George I in English politics', *English Historical Review*, vol. 81 (1966).

⁶ Sir L. Radzinowicz, *A history of English criminal law and its administration from 1750*, vols. I–IV (London, 1948–68), vol. V with R. Hood (London, 1986).

⁷ Sir H. Butterfield, *The Whig interpretation of history* (London, 1931).

the historiography of eighteenth-century England until the middle of the twentieth century. The Whig interpretation's thrust was analysis of the evolution of English progress, and as Radzinowicz's first sentence proclaimed, he was heir to this tradition: 'Lord Macaulay's generalisation that the history of England is the history of progress is as true of the criminal law as of the other social institutions of which it is a part.'⁸ Radzinowicz began his delineation of the progress of the criminal law in the mid-eighteenth century, a choice which when combined with his Whiggish proclivity branded the eighteenth-century criminal law as interesting chiefly for the scope it provided for reform. Here again Radzinowicz's analysis accorded with that of the Whig interpretation, in which the eighteenth century featured as a hiatus in the story of English progress, an era possessing the political structures which, as the nineteenth century showed, could be the engine of progress, but which were employed in a manner corrupting both the structures and those who ran them. Since, in the Whigs' view, the English had the structures requisite for good government but did not use those structures as they would be used in the nineteenth century, then it could be assumed that much of what a later era considered good government simply did not appear in eighteenth-century England.

While the interpretive tradition founded by Sir Lewis Namier challenged the Whig depiction of eighteenth-century political institutions, it too provided an historiographical environment congenial to Radzinowicz's presentation. Namier devoted his histories to demonstrations that the eighteenth-century constitution and its political structures differed fundamentally from those characterizing the politics and constitution of the next two centuries.⁹ As a result, he focused on those activities and episodes which Whig historians had cited as prime examples of the age's corruption, evaluating them in a light quite different from that brought by the Whigs, but not directing attention to eighteenth-century governmental activities neglected in Whig historiography's depiction of the need for reform. While Namierite historiography therefore presents eighteenth-century England as governed through structures fundamentally different from those of the Victorian era and adequate for its needs, it does so by assigning different values to the Whig depiction of a government that did little rather than by presenting evidence of hitherto neglected governmental activity. Since Radzinowicz presents the eighteenth-century criminal law as a striking example of the ineffective and minimal

⁸ Radzinowicz, *History of English criminal law*, vol. I, p. ix.

⁹ Sir L. B. Namier, *England in the age of the American revolution* (2nd edn, London, 1963); Sir L. B. Namier, *The structure of politics at the accession of George III* (rev. edn, London, 1957).

government of eighteenth-century England, a new view of that law would also provide a new perspective on eighteenth-century England.

Beattie's work provides just such a new view. Rather than measuring the eighteenth-century criminal law against modern expectations of law, Beattie instead presents the criminal law as contemporaries thought it worked. As a result, features of the law which to modern eyes, as to reformers, seem inefficacious, illogical and arbitrary appear in Beattie's analysis as integral to its system. According to Beattie, the major goal of eighteenth-century criminal law was deterrence. And so Parliament enacted what later ages would christen 'the bloody code' – over 200 laws decreeing that the penalty for acts detailed in these laws was death. However, as Beattie states, effective deterrence demands not hundreds of hangings, but instead a relatively few terrifying examples of the awe-inspiring power of the law. Therefore, judges and jurors had to select those to be sent to the gallows from among those indicted for capital crimes. In so doing, they made decisions which later ages would deride as arbitrary and illogical: judges secured the monarch's pardon for a large proportion of the capitally convicted; juries routinely convicted defendants of a lesser offence, and so a less severely punished offence, than that for which a defendant was indicted, and they did so even when it was manifestly clear that the defendant had indeed committed the offence for which he had originally been indicted. Beattie's interpretation therefore transforms the judge and jury's seemingly illogical and arbitrary decisions into rational choices made within a system demanding that they make such choices.¹⁰ Indeed, as he shows, features of the eighteenth-century criminal trial which to modern eyes appear absurdly unfair functioned so as to aid judge and jury in making these decisions. So, for example, the rule that defendants defend themselves, that they use lawyers to address points of law only, meant that judge and jury could assess the character of defendants and the way they responded to the charges against them. When, in the early nineteenth century, Parliament replaced the bloody code with a penal regime emphasizing not deterrence but instead the reformation of criminals through imprisonment, judge and jury no longer selected from among all convicts those suitable for exemplary death, and the eighteenth-century trial lost its rationale. In its turn, that trial was by 1836 replaced with a new structure, a structure featuring the combat of lawyers.¹¹ As is evident,

¹⁰ For an analysis showing that, when recommending pardons for those convicted of capital crimes, judges used criteria similar to those used today, see P. King, 'Decision makers and decision-making in the English criminal law, 1750–1800', *Historical Journal*, vol. 27 (1984).

¹¹ For eighteenth-century trials, see: J. M. Beattie, 'Crime and the courts in Surrey', in J. S. Cockburn, ed., *Crime in England, 1550–1800* (London, 1977); Beattie, *Crime and*

Beattie's analysis integrates punishment – and so the bloody code and its change – with both the court's decisions and its structures for making decisions.¹²

In examining punishments for criminal offences, Beattie necessarily engages with statute law and Parliament, and so with the artifacts and institution traditionally presented as the defining structures of English history. Since Beattie presents a new interpretation of the punishment of offenders in later Stuart and Hanoverian England, his interpretation challenges both Whig and Namierite characterizations of eighteenth-century government. According to the standard interpretations, the bloody code was acquired in a fit of absence of mind, enacted by a parliament uninterested in debating any of the numerous extensions of the death penalty it so placidly approved.¹³ In contrast, Beattie's analysis of the sentences inflicted upon those convicted at Quarter Sessions and Assizes shows that there was continual experimentation with punishment in later Stuart England, as judges and juries searched for a punishment less dire than hanging which would nonetheless deter crime. Eventually, England's governors found such a punishment in transportation. In Beattie's analysis, the Transportation Act of 1718 therefore emerges as the logical culmination of several decades of thought about punishment and its consequences, thought hitherto unrecognized because its record was the courts' action rather than the pamphlets and publications of parliamentary debates which reveal later eras' concerns about public policy. So, too, Beattie's presentation provides a context both for the courts' actions and for the enactment of major parts of the bloody code. As he shows, both the Transportation Act and early eighteenth-century legislation extending capital punishment to theft by servants, to shoplifting and theft from stables and warehouses, and to all varieties of house-breaking can be traced to pressure brought by the City of London on Parliament to deal more effectively with metropolitan crime. Indeed, Beattie identifies the Recorder of London as the member of Parliament who devised

the courts, chaps. 7 and 8; J. M. Beattie, 'Scales of justice: defence counsel and the English criminal trial in the eighteenth and nineteenth centuries', *Law and History Review*, vol. 9 (1991); Beattie, *Policing and punishment*, chap. 6; J. H. Langbein, 'The criminal trial before the lawyers', *University of Chicago Law Review*, vol. 45 (1978); J. H. Langbein, 'Shaping the eighteenth-century criminal trial: a view from the Ryder sources', *University of Chicago Law Review*, vol. 50 (1983); J. H. Langbein, 'The prosecutorial origins of defence counsel in the eighteenth century: the appearance of solicitors', *Cambridge Law Journal*, vol. 58 (2000).

¹² J. Innes and J. Styles, 'The crime wave: recent writing on crime and criminal justice in eighteenth-century England', in A. Wilson, ed., *Rethinking social history: English society 1570–1920 and its interpretation* (Manchester, 1993), pp. 233–9.

¹³ Radzinowicz, *History of English criminal law*, vol. I, p. 35; W. H. Lecky, *England in the eighteenth century*, new edn, vol. VII (New York, 1903), p. 320.

and ensured both passage and implementation of the Transportation Act.¹⁴

Such discovery of the thought, motivation and agency animating eighteenth-century legislation constitutes a new view both of early eighteenth-century England and of the course of eighteenth-century English history. Traditionally, the early eighteenth century was ‘pudding time’, the era in which the complacent victors of seventeenth-century battles enjoyed their supremacy while forgetting their principles, an era characterized by ‘the sullen torpor of the Jacobite sympathisers, and the cynical acquiescence in evil of the Walpolean Whigs’, and so an era whose elite’s behaviour was contrasted to the ‘heightened sense’ of social responsibility exhibited in the later eighteenth century, when the banner of reform was raised aloft and the way prepared for the triumphs of the nineteenth century.¹⁵ In contrast, Beattie has presented an early eighteenth century interested and active in the concerns supposedly characteristic only of later eras, concerns heretofore hidden because of the ways in which this society’s courts, its uses of its courts and of Parliament, and its concepts of the use of courts and the law differed from those of later eras. The chapters in this volume build on Beattie’s insights.

Law-making and the state

Two chapters build upon Beattie’s contribution to current investigation of the making of law in eighteenth-century England, and a third reflects upon the law as both bulwark and barrier to the power of the state. Given both Whig and Namierite depictions of eighteenth-century politics and the constitution, it is not surprising that, until relatively recently, historians have devoted little attention to laws enacted in the eighteenth century. After all, even contemporaries found Parliament uninteresting. According to Henry Fox, ‘A bird might build her nest in the Speaker’s chair, or in his peruke. There won’t be a debate that can disturb her.’¹⁶ Nor have historians found the legislation which Parliament did pass either impressive or effective. The Webbs, who wrote the definitive depiction of eighteenth-century local government, thought the laws passed by eighteenth-century

¹⁴ J. M. Beattie, ‘The cabinet and the management of death at Tyburn after the revolution of 1688’, in L. Schwoerer, ed., *The revolution of 1688–89: changing perspectives* (Cambridge, 1992); J. M. Beattie, ‘London crime and the making of the “bloody code”, 1689–1718’, in L. Davison et al., eds., *Stilling the grumbling hive: the response to social and economic problems in England, 1689–1750* (Stroud and New York, 1992); Beattie, *Policing and punishment*, chaps. 7, 8, 9.

¹⁵ S. and B. Webb, *English local government from the revolution to the municipal corporations act*, vol. I, *The parish and the county* (London, 1908), p. 364.

¹⁶ R. Pares, *King George III and the politicians* (London, 1953), p. 4.

Parliaments ‘had next to no effect on the way in which the country was governed in practice’.¹⁷ Beattie’s work, revealing the thought and experimentation buttressing eighteenth-century penal legislation, and the quite evident effect that legislation had on courts’ trials, verdicts and sentences, has therefore made a major contribution to new interpretations of law-making in eighteenth-century England.

These new interpretations build on Sheila Lambert’s and Peter Thomas’ analyses of the way in which eighteenth-century Parliaments organized themselves so as to pass legislation, analyses arguing that such organization was very effective. The proof, as Julian Hoppit, John Styles and Joanna Innes have shown, is the legislation itself: there was a lot of it, and that in itself was new. In the 203 years from 1485 to 1688, excluding 1642 to 1660 (the era of civil war and Commonwealth), Parliament passed almost 2,700 acts. In contrast, in the 112 years from 1689 to 1801, Parliament passed over 13,600 acts.¹⁸ Some of this legislation was, in effect, experiments in correcting or supplementing the machinery of government, and so introduced new ideas into English law.¹⁹ Since neither these acts nor most of the more general eighteenth-century statutes dealing with social policy were sponsored by the government or by political parties, it is evident that the political process generating legislation in the eighteenth century differed from that in later and even to some extent in earlier eras. Indeed, this lack of association between eighteenth-century legislation and both the executive and the parties is one reason why historians had not incorporated it into their depictions of eighteenth-century England.

How then was such legislation generated and passed? In an earlier article, Joanna Innes showed how private members of Parliament, who were the sponsors of most eighteenth-century general legislation affecting social policy, formulated this legislation and ensured that Parliament and the political elite discussed it.²⁰ That article presented eighteenth-century legislation as seen from Parliament. Her chapter here presents

¹⁷ J. Innes, ‘Parliament and the shaping of eighteenth-century English social policy’, *Transactions of the Royal Historical Society*, 5th series, vol. XL (1990), p. 65.

¹⁸ S. Lambert, *Bills and Acts* (Cambridge, 1971); P. D. G. Thomas, *The House of Commons in the eighteenth century* (Oxford, 1971); J. Hoppit, J. Innes and J. Styles, ‘Project report: towards a history of parliamentary legislation 1660–1800’, *Parliamentary History*, vol. 13 (1994), p. 313; J. Hoppit, ‘Patterns of parliamentary legislation, 1660–1800’, *Historical Journal*, vol. 39 (1996), p. 109. See also J. Innes, ‘The local acts of a national Parliament: Parliament’s role in sanctioning local action in eighteenth-century Britain’, *Parliamentary History*, vol. 17 (1998); J. Hoppit and J. Innes, ‘Introduction’, in J. Hoppit, ed., *Failed legislation, 1660–1800* (London and Rio Grande, 1997).

¹⁹ Sir W. Holdsworth, *A history of English law*, vol. XI (London, 1938), pp. 323–4; P. Langford, *Public life and the propertied Englishman, 1689–1793* (Oxford, 1991), chap. 3.

²⁰ Innes, ‘Parliament and the shaping of eighteenth-century English social policy’.

the enactment of eighteenth-century legislation as seen from the localities. Innes' chapter follows the first factory act from its bases both in measures adopted by Lancashire's justices of the peace and in campaigns of reforming societies to Sir Robert Peel's sponsorship of a bill reflecting the justices' and societies' concerns, and to that bill's enactment. As she reveals, the first factory act rested upon extended discussion of and experimentation in regulating the employment of apprentices. It therefore challenges depictions of the characteristics differentiating Hanoverian from Victorian legislation. According to one influential argument, one reason why Victorian legislation was effective and Hanoverian legislation ineffective was that Hanoverian legislation was the product of a relatively autonomic and unconsidered response to emergencies.²¹ However, as Innes reveals, the first factory act was by no means a panicked response to an emergency. Her chapter is therefore an example of the ways in which depictions of eighteenth-century government which attend to the way it worked, depictions such as Beattie's, are altering historians' assessments both of the eighteenth century and of the eras to which it has been contrasted.²²

Like Innes' chapter, Randall McGowen's examines legislation. While Innes analyzes legislation on social policy, a type of legislation which traditional accounts of the period neglect, McGowen analyzes that legislation which traditional accounts recognize and deride. McGowen's chapter examines eighteenth-century legislation on forgery, legislation which comprises a substantial part of the bloody code. McGowen has written on the statute under which most prosecutions for forgery were brought.²³ That statute, 2 George II c. 25, enacted in 1729, pertained to the forgery of monetary instruments which could be issued by private individuals. However, as McGowen states, while the vast majority of eighteenth-century prosecutions for forgery were brought under that 1729 statute, there was much more and earlier legislation decreeing that

²¹ O. MacDonagh, 'The nineteenth-century revolution in government: a reappraisal', *Historical Journal*, vol. 1 (1958), p. 58. While MacDonagh's characterization of the nature of the impetus for the construction of the nineteenth-century regulatory state has been the subject of much debate, his characterization of pre-Victorian legislation has been little discussed. For some of the work defining the debate, see the essays in P. Stansky, ed., *The Victorian revolution in government* (New York, 1973), and J. Hart, 'Nineteenth-century social reform: a Tory interpretation of history', in M. W. Flinn and T. C. Smout, eds., *Essays in social history* (Oxford, 1974).

²² For example, for an argument that the innovations of early nineteenth-century government should not be attributed, as has been supposed, to an influential class of businessmen and professionals, but instead to the same elite which dominated later eighteenth-century government, see P. Harling and P. Mandler, 'From "fiscal-military" state to laissez-faire state, 1760–1850', *Journal of British Studies*, vol. 32 (1993).

²³ R. McGowen, 'From pillory to gallows: the punishment of forgery in the age of the financial revolution', *Past and Present*, no. 165 (1999).

death be the punishment for other types of forgery. That legislation, constituting the bulk of eighteenth-century legislation on forgery and so a prime example of what reformers decried as the illogic of the bloody code, is the legislation McGowen's chapter here examines. As he shows, that legislation was neither illogical nor the automatic response of legislators in an increasingly capitalist economy to the problems of capital. It was, instead, the way in which the nation's governors and those who administered the central government's departments attempted to protect the financial instruments which the government issued as it conducted the nation's business. This legislation can therefore be presented as evidence of the later Stuart state's expansion, increasing power, and unprecedented autonomy.²⁴ Such legislation therefore gives substance to the forebodings of civic humanist critics of the later Stuart and Hanoverian state, who feared that the state's influence and its basis in the illusory world of financial credit would extirpate their liberty.²⁵

Nonetheless, while the state presented in Beattie's work and the new depictions of law-making with which it is associated is a more effective state than that in Whig and Namierite presentations, this more effective state was constrained by its own instrument; as Nicholas Rogers' chapter shows, it was constrained by law.²⁶ No task was more central to the role assumed by eighteenth-century central government than the provision of the means and forces necessary for fighting its wars, and that task was highly demanding. When the state went to war, the central government had to recruit a very large number of men very quickly. For example, during the Seven Years' War, the central government had speedily to enlarge its peacetime navy of 9,797 men to a force of 81,929.²⁷ To do so, it used its power of impressment, the power accorded it under the common law to take civilian seamen and force them to man the navy's ships. Law therefore reinforced the power of the state; but as Rogers shows, eighteenth-century Englishmen also used the law to fend off the press. Rogers has surveyed the opposition to impressment elsewhere.²⁸ Here he focuses on the ways in which the law was considered to restrain the

²⁴ J. Brewer, *Sinews of power* (Cambridge, Mass., 1988); J. Brewer, 'The eighteenth-century British state: contexts and issues', in L. Stone, ed., *The imperial state at war: Britain from 1689 to 1815* (London and New York, 1994).

²⁵ J. G. A. Pocock, *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition* (Princeton, 1975), chap. 13.

²⁶ For reflections on the law's constraints upon the elite, see E. P. Thompson, *Whigs and hunters: the origins of the Black Act* (New York, 1975), pp. 258–69.

²⁷ N. A. M. Rodger, *The wooden world: an anatomy of the Georgian navy* (London, 1986), p. 386.

²⁸ N. Rogers, 'Liberty road: opposition to impressment in Britain during the American War of Independence', in C. Howell and R. J. Twomey, eds., *Jack Tar in history: essays in the history of maritime life and labour* (Fredericton, New Brunswick, 1991).

press and on the ways in which it actually did constrain the press. Rogers' chapter therefore illustrates the extent to which this state, and indeed this society, was imbricated in law. As he shows, magistrates hampered the operations of the press, and the extent to which magistrates' actions deviated from those formally assigned them by law and government is one theme of the chapters in this volume. So, too, Rogers reveals the ways in which pressed men and their employers turned the criminal law against the press gangs, while using habeas corpus, parliamentary statute, and even the law of debt to release some men from the navy's holds. Clearly, sailors and their employers both knew and used the law, and the permeation of law throughout English society is another of this volume's themes.

The working of the courts

As Rogers' chapter emphasizes, the eighteenth-century English state worked through the courts. The working of the courts was therefore central to the state, a feature of eighteenth-century England which highlights the importance of Beattie's analysis of the way in which the criminal courts worked. Beattie has analyzed the institution of innovations designed to secure offenders and bring them before the courts – from the development of street lighting, to the eighteenth-century policing of the City of London, to the activities of thief-takers.²⁹ Similarly, he has analyzed the process of the courts, from the charges laid against an offender before a magistrate, to the indictments laid before a grand jury, to trial before a petty jury, to verdict, sentence and punishment.³⁰ Two chapters in this volume analyze one crucial component of this judicial system – the magistrates.

English justices of the peace were unique in early modern Europe, for it was England's idiosyncrasy to lodge the powers of both judiciary and intendency in their hands.³¹ England's justices therefore wielded both administrative and judicial powers. They did so within a state which allocated responsibility for acting and even initiating action on a wide range of tasks to local governments – to county justices, borough magistrates, parish vestries, and parish officers. In theory, the action of these local governments, and in some instances even their lack of action, was regulated by law. In some cases, that regulation was effective. For example, eighteenth-century courts clearly determined which of two parishes, each

²⁹ Beattie, *Policing and punishment*, chaps. 3, 4, 5.

³⁰ *ibid.*, chap. 2; Beattie, *Crime and the courts*.

³¹ S. Hindle, *The state and social change in early modern England, c. 1550–1640* (Basingstoke, 2000), p. 30, and for a discussion of the imbrication of law in state and society, chap. 1.

attempting to avoid responsibility for the welfare of a poor person, was responsible for that poor person. To be effective, such a system of regulation required litigants ready and able to bring their opponents to court, as were these parishes. However, as Douglas Hay's chapter here suggests, it was a rare litigant who would enter a contest with a powerful justice. Hay has, in an earlier essay, analyzed the ways in which eighteenth-century criminal courts projected themselves as the awe-inspiring mask for the elite's rule.³² Here he uses the heretofore unexplored records of King's Bench, the court determining criminal charges against justices and appeals against their decisions, to demonstrate that the elite, when acting as justices of the peace, were little constrained by that legal institution which according to contemporary rhetoric ensured that they did not abuse their power.

Hay's chapter focuses on a rural justice, and rural justices were the eighteenth century's icons of civic virtue and responsibility. Norma Landau has examined change in the image of that ideal rural justice.³³ Here she examines that justice's antithesis, the age's emblem of the perversion of local magistracy: the trading justices of Middlesex and Westminster. In showing that the Quarter Sessions of both Middlesex and Westminster found it necessary to create procedures supplemental to those available at common law for correcting erring justices, Landau's chapter reinforces Hay's argument as to the inadequacy of the law's control of justices. At the same time, she also suggests that, when local governors competed against each other, they might well turn to the law to restrain their opponent. Hay's and Landau's differing presentations of the extent to which justices were unrestrained by law are therefore founded on differing estimates of the cohesion of England's local elites. Quite probably, the rise and then decline of party altered the extent to which local governors throughout England thought it appropriate to use the courts against their rivals. Unlike justices elsewhere in England, the justices of metropolitan London were throughout the eighteenth century riven by a second and different competition – that for judicial business and its profits; and such competition produced justices who used the court of Quarter Sessions against their opponents. In emphasizing the extent to which contemporaries perceived the trading justices as associating business with magistracy and vilified them because of that association, Landau argues that, in some appreciable part, the trading justices' unsavoury reputation rested not on what they did but on the way in which contemporary thought categorized their activity. So, Landau's chapter, like Hay's, presents a legal

³² D. Hay, 'Property, authority and the criminal law', in D. Hay *et al.*, eds., *Albion's fatal tree: crime and society in eighteenth-century England* (London, 1975).

³³ N. Landau, *The justices of the peace, 1679–1760* (Berkeley, 1984), chap. 11.

system tangentially related to the rhetoric used both to denounce and glorify it.

Whether the legal system actually worked as its rhetoric proclaimed is the central question of Peter King's chapter. King tackles a problem raised in response to John Beattie's first publication on crime, 'The pattern of crime in England, 1660–1800', an article that delineated the fluctuation in indictments for the felonious taking of property, relating those fluctuations, especially short-term fluctuations, to changes in the cost of living.³⁴ That article aroused such interest in the potential for understanding 'the long eighteenth century' through study of its crime that historians initiated a continuing debate as to the extent to which change in the number of indictments preferred in England's courts reflected change in the number of crimes actually committed.³⁵ Beattie has continued to examine change in the level of indictments, analyzing its relation to change both in structures for prosecution and in the incentives for prosecution, while arguing that short-term change in the level of indictments is a strong indication of change in the number of crimes that were actually committed.³⁶ In this, he has been supported by Douglas Hay, who showed how the difference in numbers and types of crime indicted in time of war from that in time of peace could be attributed to a legal system whose indictments did fluctuate in accord with fluctuations in crime.³⁷ Part of Hay's argument rests on the correlation of fluctuations of wartime indictments with fluctuations in the cost of living. In response, King has questioned the bases for these correlations.³⁸ In his chapter here, he questions the extent to which the decline in indictments that occurred during England's wars reflects decline in crime.

Meanwhile, Beattie, having begun that debate about indictments, has raised another argument emphasizing their importance. Even if change in the number of indictments did not reflect change in the crimes actually committed, change in the number of indictments had a profound effect on contemporary perceptions of levels of crime. Increase in the numbers of those indicted, especially in London, persuaded London's rulers and members of Parliament that the nation needed to take action against crime – action typified by laws increasing the penalties for criminal offences and instituting new punishments for criminal offences.³⁹ Beattie's argument therefore integrates what happened in England's criminal

³⁴ *Past and Present*, no. 62 (1974).

³⁵ That debate is summarized in Innes and Styles, 'Crime wave', pp. 208–15.

³⁶ Beattie, *Crime and the courts*, p. 264.

³⁷ D. Hay, 'War, dearth and theft in the eighteenth century: the record of the English courts', *Past and Present*, no. 95 (1982).

³⁸ P. King, *Crime, justice, and discretion in England, 1740–1820* (Oxford, 2000), pp. 145–52.

³⁹ See especially Beattie, *Policing and punishment*, pp. 45–73, and chaps. 7, 8, 9.

courts into presentation of that responsive and effective state now being portrayed by historians of Hanoverian England.

Law and society

In linking Parliament to the work of the criminal courts, Beattie has made it strikingly apparent that those courts were not located in precincts hermetically sealed from English society. Indeed, Beattie has been a pioneer in using the records of the criminal courts to illuminate structures and processes basic to English society, not only showing the relation of fluctuations in criminal indictments to fluctuations in the cost of living, but also, for example, showing the ways in which indictments of women reflect upon women's roles and opportunities in eighteenth-century England.⁴⁰ While Beattie has examined the ways in which English society affected its law courts, four chapters in this volume examine the imbrication of English law in English society.

Donna Andrew has written on the English duel – an illegal, quasi-private and lethal ritual used by members of the elite to defend their honour.⁴¹ Here she writes about the publication of apologies in newspapers – an extra-legal and public shaming ritual used by those with some standing, however slight, to proclaim their maintenance of that standing when their standing was attacked. Like indictments, these too reflect women's position in eighteenth-century England. As in seventeenth-century New England, relatively few women issued public apologies, perhaps because, as in seventeenth-century New England, women's public voice was muted.⁴² So, too, English law shaped these apologies. Andrew has found that almost two-thirds of the apologies were related to some type of legal proceeding, a finding which gives specificity to

⁴⁰ See especially, J. M. Beattie, 'The criminality of women in eighteenth-century England', *Journal of Social History*, vol. 8 (1975); Beattie, 'London crime and the making of the "bloody code"'; J. M. Beattie, 'Women, crime and inequality in eighteenth-century London', in J. Hagan and R. D. Person, eds., *Crime and Inequality* (Stanford, 1995); Beattie, *Policing and punishment*, pp. 63–72, 336–8, 356–7.

⁴¹ D. Andrew, 'The code of honour and its critics: the opposition to duelling in England, 1700–1850', *Social History*, vol. 5 (1980).

⁴² J. Kamensky, *Governing the tongue: the politics of speech in early New England* (New York, 1997), pp. 133–5, and more generally pp. 128–42. However, it does seem that there are several differences distinguishing the use of these apologies in seventeenth-century New England from that in eighteenth-century England, most especially the frequency with which legal action gave rise to such apologies. Eighteenth-century London and its metropolitan area each year generated hundreds of indictments for non-felonious offences, thousands of recognizances issued on complaint of wrongdoing, and untold numbers both of civil suits for various types of damages and of cases brought before a variety of summary courts: an amount of litigation much greater than that producing the ten to fifty apologies published each year.

Simon Roberts' contention that 'arbitration grows up in the shadow of adjudication rather than the other way round'.⁴³ The imbrication of law in what may otherwise appear as an unmediated and so undistorted record of minor wrongdoing is also apparent in the configuration of the offences generating these public apologies. For instance, since the common law restricted suits against defamers to those who harmed their victims' pockets,⁴⁴ it seems likely that it was this common law definition of defamation that produced apologists more likely to apologize for defamation of business than sexual conduct. That the law shaped even the extra-legal published apology suggests the extent to which law permeated this society.

Ruth Paley's chapter is evidence of the extent to which the English based their national identity on their law. As Innes' chapter demonstrates, the eighteenth-century courts were fora for debate on issues of public policy, and the press disseminated the judges' determination of these issues throughout the land.⁴⁵ No issue could be more central to English identity than the foundation of their freedom in their law, and that was the issue at the heart of *Somerset v. Stewart*, a case in which Lord Chief Justice Mansfield had to decide whether James Somerset, who had been brought to England as a slave, could be sent to Jamaica to be sold. Mansfield decided that Somerset could not be forcibly sent out of England, and ever since, his decision has been cited as evidence of the liberty intrinsic to England and its law. According to his nineteenth-century biographer, 'Lord Mansfield first established the grand doctrine that the air of England is too pure to be breathed by a slave.'⁴⁶ Although Mansfield insisted that his judgment was confined to the question of whether a master could send a slave out of England, an insistence corroborated by subsequent studies of his decision,⁴⁷ scholars persist in attempting to show that the decision reached beyond that narrowly defined question, a persistence which in itself is testimony to the importance of the common law to English identity. Paley uses the King's Bench records of a case that never proceeded to a final judgment, and so to legal reports

⁴³ S. Roberts, 'The study of dispute: anthropological perspectives', in J. Bossy, ed., *Disputes and settlements: law and human relations in the west* (Cambridge, 1983), p. 17.

⁴⁴ J. H. Baker, *An introduction to English legal history*, 3rd edn (London, 1990), p. 503. Those who had been defamed as committing criminal offences, unfit for their calling, or carriers of certain infectious diseases could sue without proving damage.

⁴⁵ J. Innes, 'Origins of the factory acts', in this volume, text at nn. 53–5. See also D. Hay, 'The state and the market in 1800: Lord Kenyon and Mr Waddington', *Past and Present*, no. 162 (1999), pp. 105, 158.

⁴⁶ Lord John Campbell, *The lives of the Chief Justices*, 3 vols. (1849–57; reprint Freeport, New York, 1971), vol. II, p. 418.

⁴⁷ Baker, *Introduction to English legal history*, p. 542. On Mansfield as a legal reformer, see D. Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), chap. 5.

and newspaper accounts of the judges' decision, to distinguish the judges' and therefore English law's view of *Somerset* from that both of eighteenth-century popular opinion and of the latest attempts to demonstrate that Mansfield abolished slavery in England.

Like Paley, Barbara Shapiro also demonstrates the importance of English law to English culture. Shapiro has published extensively on early modern concepts of proof.⁴⁸ In her chapter here she demonstrates that, in the later seventeenth and early eighteenth centuries, theologians imported the law's concept of 'fact' and the law's concepts of the evaluation of witnesses into their proofs of their theological contentions. As Shapiro notes, both 'fact' and 'witnessing' are constructs central to current debates in the history of early modern science, in large part because of the work of Steven Shapin and Simon Schaffer.⁴⁹ Shapin and Schaffer have drawn attention to the centrality in the scientific revolution of the establishment of a community that accepted its members' reports of their tests of the natural world as 'fact'. This nascent scientific community therefore had to decide the bases for determining who was a credible witness, a person whose report authenticated an experience as a fact. According to Shapin and Schaffer, the criteria determining scientific credibility were borrowed from current codes of conduct – codes of honour and civility, codes which therefore excluded all but the elite and their clients from scientific discourse. Shapiro's chapter is part of her argument against this contention. She argues that, from the mid-sixteenth to the early eighteenth centuries, the English reoriented their thought, in natural philosophy as well as in other spheres, so as to focus on proven natural phenomenon, and in so doing they took their concept of determination of fact from English law. English law was unique in its procedural separation of determination of law, a task it allocated to judges, from determination of fact, a task it allocated to lay juries. As Beattie has shown, members of the English petty jury, the jury which determined whether a defendant had committed the offence with which he was charged, were not members of the elite.⁵⁰ So,

⁴⁸ B. J. Shapiro, *Probability and certainty in seventeenth-century England: a study of the relationships between natural science, religion, history, law and literature* (Princeton, 1983); B. J. Shapiro, *'Beyond reasonable doubt' and 'probable cause': historical perspectives on the Anglo-American law of evidence* (Berkeley, 1991); B. J. Shapiro, *A culture of fact, England, 1550–1720* (Ithaca and London, 2000).

⁴⁹ S. Shapin and S. Schaffer, *Leviathan and the air-pump: Hobbes, Boyle and the experimental life* (Princeton, 1985); S. Shapin, *The scientific revolution* (Chicago and London, 1996).

⁵⁰ J. M. Beattie, 'London jurors in the 1690s', in J. S. Cockburn and T. A. Green, eds., *Twelve good men and true: the English criminal trial jury, 1200–1800* (Princeton, 1988). See also, all in Cockburn and Green, *Twelve good men: P. G. Lawson, 'The composition and behaviour of Hertfordshire juries, 1573–1624'; J. S. Cockburn, 'Twelve silly men? The trial jury at Assizes, 1560–1670'; S. K. Roberts, 'Juries and the middling sort: recruitment and performance at Devon Quarter Sessions, 1649–1670'; P. J. R. King,*

Shapiro argues, the permeation of English legal culture into other realms of thought, illustrated here by English theologians' appeal to the common law's standards of proof, disseminated legal culture's assumption that the ability to report and determine fact was by no means restricted to the elite, and that assumption became a foundation of English empiricism.⁵¹

Like Shapiro, David Lieberman examines the spread of legal thought beyond the courtroom. Lieberman has elsewhere examined eighteenth-century concepts of the respective roles of Parliament and the courts in amending law so that it addressed contemporary concerns. As he has noted, Blackstone addressed his *Commentaries*, the great classic of English legal thought, to England's legislators, for Blackstone aimed at enlightening their vision of the law which their legislation altered, usually for the worse.⁵² While Blackstone's achievement has been presented as an elegant assemblage of contemporary platitudes, Lieberman here shows how much conceptual work Blackstone had to do: to convert the procedural distinction in English law between 'civil' and 'criminal' into a distinction basic to substantive law; and to convert the distinction between 'public' and 'private' into a distinction delineating the structures of English law. As he argues, since Blackstone's purpose was to present a structure making English law apprehensible to non-professionals, he regarded the categories he used to describe it and the associations he hypothesized among them as provisional. Nonetheless, even Blackstone's most vehement critics adopted these categories, making them essential to English jurisprudence. In showing that legal thought structured so as to appeal to laymen became the foundation of the legal thought of legal professionals, Lieberman's chapter demonstrates the continuous and immediate interplay of English law and English society. In so doing, his chapter provides the complement in the realm of legal thought to John Beattie's work on the activity of the courts. For Beattie has revealed the continuous interplay among what happened in England's criminal courts, its Parliament, and its society's understanding of crime and punishment.

“Illiterate plebians, easily misled”: jury composition, experience and behaviour in Essex, 1735–1815”; D. Hay, ‘The class composition of the palladium of liberty: trial jurors in the eighteenth century’.

⁵¹ Shapiro, *Culture of fact*, especially p. 218.

⁵² Lieberman, *The province of legislation determined*; D. Lieberman, ‘Blackstone's science of legislation’, *Journal of British Studies*, vol. 27 (1988). I want to take this opportunity to thank Professor Lieberman for his interesting discussions of, and references relevant to, the questions provoked by his essay.