



1984

The Criminal Prosecution in England and its Historians

Douglas Hay

Osgoode Hall Law School of York University, dhay@osgoode.yorku.ca

Source Publication:

The Modern Law Review. Volume 47, Number 1 (1984), p. 1-29.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

Hay, Douglas. "The Criminal Prosecution in England and its Historians." *The Modern Law Review* 47.1 (1984): 1-29.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

THE CRIMINAL PROSECUTION IN ENGLAND AND ITS HISTORIANS¹



FOR many historians with no particular expertise in the matter, the doctrines of The Law rather resemble an impressive range of mountains. They loom over the social landscape in every period of the past in which historians labour, and they are undeniably important. The Law Mountains are said (by those who claim to know) profoundly to affect the intellectual climate of an age. The frontier between state and civil society apparently runs somewhere along the line of their peaks. Finally, one of the recognised professional duties of historians is to track every movement of a tiny group of very important people. A surprising number turn out to be lawyers, often from an elite climbing club called The Bar. Many of these men have achieved, in past centuries, a spectacular degree of upward mobility (itself of interest to historians) through mastering the peculiar techniques necessary to scale the slopes of the Law Mountains. We watch in astonishment, from the ground, as our subjects make their way up one or another commanding height of Law (and equally, of social station).

But for most historians, that is about as close as we get. We do not know much about the mountains, even less how to climb them ourselves. Occasionally one of us will try to track the route of one of those lawyer-mountaineers whom we usually watch from the ground. It quickly becomes apparent that even a short walk in the Law Mountains may require an intense, if improvised, course in technique.² And to get to the objective quickly (the

imperative for all legal climbers) one cannot linger *en route* to ponder the origin of the range, or to wonder at curious rock formations and admire the goats. But that is what the historian will want to do: understand the origins of the mountains, their stratification, the forces that shaped them-and, incidentally, to admire the goats. If practising lawyers are competitive climbers at heart, most historians are contemplative geologists.

Historians tell a modern fable about the Law Mountains. It concerns an historian-geologist who asked a lawyer-climber what he knew about them. The lawyer's answer was (of course), "Because they are there."³ "But," persisted the historian, "how did they get there? Why are some aspects so precipitous, others so gentle? What's *inside* the Law Mountains?" The lawyer missed the point. "We have manuals that show all the feasible routes, graded according to difficulty. (Indeed, even each assault by members of The Bar is assessed by our most distinguished older members.) And our Mait-land Club (few of whom actually climb the Mountains) can show you reports on the main routes from past centuries, and incidentally relate some marvellous tales about great men like Coke and Mansfield who pioneered some of the best ones. Things *have* changed a lot recently. Fellow-Servant Chimney, very popular in the nine-teenth century, is now impassable. And a whole party was lost in 1924, in a rockslide started by a silly beggar named Campbell. It quite changed this face of Old Felony."⁴

The historian, perhaps unwisely, stopped listening, and many decades ago organised his fellows to tackle the Law Mountains in a less sporting way. We are tunnelling. The computerised MOLE⁵ chews through parchment-paper conglomerates like butter, and Old Felony in particular, which is not much bigger than Snowdon, will be thoroughly honeycombed in the next 50 years or so.⁶ As the archives are sounded, the patterns found in the records of the

hundreds of thousands of past cases for which records survive have called forth two kinds of explanations which, although related, deal with issues of different scale.

The first group of tentative explanations concerns the relationship between the surface prominences of doctrine and the vast bulk of actual litigation decided in the past. It runs two ways. In one direction, how far can doctrinal developments be explained in terms of practical imperatives presented in repeated instances before the courts, rather than simply by an evolution of earlier doctrine? In the other, how far are peculiarities of structure in the mass of litigation explicable by purely legal imperatives, whether of doctrine or administration? The detailed research into the mass of past cases has also generated a second group of explanations, directed to answering rather different questions. To continue the metaphor briefly before abandoning it: what relationship do the Law Mountains bear to theories of plate tectonics? What wider, converging social forces (imperatives of the state, religious belief, purposes of different classes) threw up these heaps of parchment and paper, made litigation so much more voluminous in some eras than others, and gave it distinctive structures? For as we tunnel through we find remarkable changes in the origins of cases, in their incidence, and in their disposition, even within the last few centuries. In recent years those patterns have been much considered by historians interested in both wider social forces and the law.

What follows is not a review of that literature, but an attempt to explain (with a few examples) what some historians are about. The examples are taken from the criminal law in the period 1750-1850, and from prosecution in particular, because that is what I know best, and also because Old Felony (and its twin peak Misdemeanour) have been disproportionately the site of work by

historians, like myself, who are not lawyers.⁷ If I emphasise questions or sources which are less familiar to lawyers, and perhaps also to some historians whose main concern is with doctrine, there is a reason. It is to suggest, first, that the new social and intellectual history of the law is not irrelevant to doctrine-rather the opposite. Secondly, some of the larger hypotheses-those about plate tectonics-are of central importance for any intellectually respectable understanding of law itself, and prompt some reflections about why lawyers and historians may have such different views of the Mountains.

II

When Sir James Fitzjames Stephen wrote his *History of the Criminal Law of England* (1883) he based his account of trials on the highly atypical *State Trials*: atypical because they often concerned treason (with different procedural rules from felony), committed very often by powerful people, and tried in circumstances in which counsel, judges, and prisoners felt heavy pressure from government. Until recently we had little sense of the evolution of the ordinary criminal trial from the time of Sir George Jeffries (not to speak of the dark ages before that) until well into the nineteenth century. By greatly expanding the scope of research to printed records of more ordinary criminal trials, and through exploring the manuscript records of the courts and the private papers of J.P.s and others, not only the trial but also the preliminaries to indictment are becoming much better understood. Much is still contentious, but some things are clear. The role of the private prosecutor was overwhelmingly important in practice as well as in theory until well into the nineteenth century, even after the introduction of the "new" police in some areas. Private Associations for the Prosecution of Felons were extremely widespread, numbering perhaps 1,000 in

the country as a whole by the mid-nineteenth century, although they seem to have been of particular interest to manufacturers and tradesmen, especially in the period of their first rapid growth in the eighteenth century. Discretion in framing the charge seems to have been widely extended to prosecutors, without much interference by justices in spite of the Marian committal statutes. Eighteenth-century trials are shown to have been extremely rapid by modern standards-10 or 20 serious felonies in a day at times, with verdicts returned quickly by experienced jurymen who worked closely with very active judges, a necessity when so few criminal cases (apart from poaching and a few other offences of largely rural significance) were heard summarily. Moreover, the eighteenth-century trial revolved to a great extent around assessments of character. The subsequent growth of a body of evidentiary rules, almost certainly the direct result of the growth of a defence bar, had significantly changed the nature of the jury trial by the early nineteenth century. A necessarily congruent development, given the enormous increase in indictable offences from 1815 (and probably the increasing time taken by a trial), was the eventual extension of summary hearings on a very wide scale. From being the epitome of English criminal law in the eighteenth century, the jury trial became the little-used symbol of it in the nineteenth.

The role of juries changed too. In the eighteenth century, petty jury verdicts (and prosecutorial activity) underwent significant shifts in response to wider economic conditions and associated changes in the character of crime. Moreover, longer-term changes in the structure of punishments during the period in which the main capital statutes were repealed in the early nineteenth century, and the increasing participation of police and stipendiary magistrates in the period 1750 to

1850, greatly increased the conviction rate (from 50 to 80 per cent.) and reduced the incidence of committals not resulting in trial (from 20 to 10 per cent.). Finally, many of the innovations effected through legislation, such as the Trials for Felony Act (1836) and Sir John Jervis's Act regulating preliminary proceedings (1848)⁸ now appear to be legislative endorsements of longer-term developments rather than unexampled innovations. They also appear, like so many other changes in criminal law in the early nineteenth century (and contrasting with its stasis in the eighteenth) to be intimately involved in party differences and wider concerns in English society. Thus the 1836 Act eventuated in part from long debates about the humanity and justice of English law, including the argument about capital punishment. The 1848 Act in part reflected widespread criticism, professional and political, of the rural Tory lay bench. Both Acts also undoubtedly reached the statute book partly as a result of a phenomenal increase in the size of the legal profession, in the 1830s and 1840s. A great increase in legal journalism, often critical of the *status quo*, and expressive of a desire to introduce the values of self-conscious professionalism to every aspect of prosecution and trial, had much influence on Parliament.

The greatest changes in prosecution practice occurred in the period between 1815 and the mid-1850s, when there was both the most spectacular increase in prosecution levels since the seventeenth century, and the sharpest expression of social division in English society since the same period. Both made the wider connotations of criminal law, particularly in the eyes of a nascent working class, of prime concern to the classes represented in Parliament and on the bench. And throughout the period, many significant changes in substantive law and practice were conditioned in large part by the sheer pressure of numbers on the administrative machinery of justice, whether during the interruption of

transportation during the American revolutionary war, peace-time explosions of indictment levels, or the rapid secular rise in prosecutions in the first part of the nineteenth century. By the 1860s, in contrast, a long secular decline in prosecution levels to the end of the century settled the main outlines of Victorian criminal justice as solidly as the walls of the new prisons and the newly respectable image of the British bobby.

If changes in the law were closely connected with the incidence of prosecution, both were shaped by much wider social forces. We are led, in other words, from a consideration of the reciprocal relationships of doctrine and litigation to a consideration of English society in this period. Not all accounts of the history of prosecution, or of the law and crime in general, attempt to describe those larger dimensions of the context of law. I think it essential to do so. A history which does not inquire behind the legal process leads too easily to the doubtful generalization that attitudes to crime, and hence to much of the law, have changed little if at all for centuries. One of the largest questions concerns the different meanings that the criminal law has for the different classes making up the social order, differing interpretations that obtained in even those periods when stability rather than rapid change seemed to characterise the criminal law.

III

Many historians and other scholars have implicitly described the legitimacy and authority of the criminal law as largely unproblematic. To use Stanley Diamond's dichotomy (advanced in a wider argument), this explanation (what I shall call Argument A), portrays law as a double institutionalisation of customary or popular norms, a replication of pre-existing or consubstantial social values, with perhaps a few awkward gaps between the law on the books and social practice

and belief.⁹ Where gaps exist, they are successively eliminated through "reform." One suspects that for many English writers, this has been especially true of England. Although the process is never quite complete, the criminal law, according to Radzinowicz, "has always been sensitive to the needs and aspirations of the English people, and it has continuously changed under the impact of the predominant opinion of the day."¹⁰ Very few have been inclined to suggest (as did Diamond himself in Argument B) that in many societies state law instead is the imposition of a conquering class or a ruling class on a population that either formerly enjoyed its own customary law, or continued to adhere to customary mores as long as it could. In either of the latter cases state law is an imposition, but a progressively more powerful one, that cannibalises custom, remaking it and redefining it (when not obliterating it) in the process. More recently, Lenman and Parker have argued that something like this happened in Western Europe, including England, over the last thousand years.¹¹

The problem with both these views of the criminal law, even if applied only to two centuries, is not simply that they are very large arguments about law for which different historians will advance many different standards of proof, kinds of evidence, chronologies. It is that they are very large arguments about not only what was law, but also about its relation to social belief and practice through whole societies over extended periods of time. And the empirical evidence that should be brought to bear to test such generalisations, even for the criminal law alone, does not lie easily to hand. Not only were large parts of the population, including those most subject to prosecutions, not much given to publishing or otherwise recording their thoughts (a problem acknowledged by all historians). There

is also the problem that those who did write for posterity (the enlightened agents of legal change in the first view, the imposers of law in the second) left far from unproblematic comments. In dealing with such a highly political issue as law, one so charged with generating and enforcing moral meanings, one so crucial (or so they believed) to the existing social order, they usually gave a limited range of answers about the purposes of the criminal law and admitted to the existence of only a limited range of questions. To frustrate us further, they often, perhaps usually, were not conscious of the fact that they thought within such limits, precisely because they did so.

The result is that beliefs about law in different social classes, and the way those beliefs entered into the relations between those able to create and use law and those largely excluded from doing so, are very difficult to recover. It is easy but highly misleading to construct a version of the first side of Diamond's dichotomy (A: "law expresses social norms") by relying on an imputation of motive and belief (usually borrowed from literate contemporaries, or the political prejudices of the historian) to the great majority of the population for whom evidence is sparse. And it is easy but highly misleading to construct a version of the second argument (B: "ruling classes impose law") by simply citing substantive criminal law without showing how it was used, or what personal, class and societal needs it met or failed to meet.

When we turn to eighteenth-century England, we find widespread popular beliefs that certain customs were the embodiment of legality (in rights over land, in artisanal practice, in wage payment, in the organisation of marketing foodstuffs). All were increasingly under pressure from the law of the state but by no means dead. Parts of state law in all these areas (but always in particular

instances) moved from a partial recognition of some custom, often through increasingly narrow judicial definition, to legislative extinction. Often this evolution met with strong popular resistance, in particular cases, at particular times. One must start, I think, with the assumption that state law and popular belief shared important areas of agreement but also important areas of disagreement, and try to chart both. And because those conflicts so often surfaced in the criminal law (for reasons to which I shall return) any account that hopes to explain the history of doctrine or administration cannot ignore the social beliefs and practices that surrounded the law in action.

Broadly, there have been a number of paths by which historians have tried to approach the relationship between state law and the belief of different classes. Three seem to me to be the most important. One has been to examine the records of the courts statistically to find out who was in fact using the law, for what ends, and to what extent. A second has been to study legal proceedings for their wider social meanings for the class that administered the law, and in particular to illuminate the means by which an often intuitive but sometimes overtly conscious orchestration of legal proceedings was addressed to popular perceptions in the inculcation of a common standard of justice. A third has been to try to reconstruct popular attitudes to particular practices on which state law had (or developed) other definitions, and their reciprocal influences. At many points in the development of criminal law and prosecution over this period of two or three centuries, changes will only be fully understood when all three are taken into account.

The most striking first finding from statistical analysis of prosecutions is that for much of this period the total level of activity was very low indeed. Although the court records surviving from the eighteenth century are voluminous

enough to present research problems, it appears that rates of prosecution were markedly lower than in either the seventeenth or the nineteenth centuries. Clearly, most Englishmen and women took their disputes to fora other than the courts of the state. In minor civil cases they had a network of local courts (still little understood), including courts of requests, in which lay adjudicators could dispense with most of the procedural problems of the common law. And in both civil and criminal matters they frequently had recourse to other laymen. One such man, a Quaker, recorded in the autobiography he wrote for his family that in over 40 years there had been no formal litigation in his parish, but that he had settled over 600 disputes. We occasionally find scattered references to other occasions when Justices of the Peace, whose mediating role in misdemeanours was well established, exacted public apologies, sometimes on their knees, from transgressors whom the community condemned. Where popular condemnation was less likely (as in game cases) extorted apologies were more likely to be printed in the press. One tentative conclusion, then, is that particularly in the eighteenth century, the costs, uncertainties (given the acquittal rate) and punishments of the criminal law encouraged even more of an abstention from state law than in other periods.

The statistical examination of past criminal prosecutions has also shown, in some areas of the country in the eighteenth century, and in national totals for the nineteenth, that prosecutions for theft (the greatest part of crime) were closely related to larger economic changes, notably the rapid price changes for foodstuffs that were the consequence of dearth, and the effects on employment of export markets, the trade cycle, wars, conscription, and the massive demobilisation of troops. Each of these has been given much greater specificity than before, and one general conclusion that emerges is that the pressure of

poverty can be more closely related to the incidence of crime than was suggested in early studies, flawed by considering too few of several simultaneously operating causes. In some periods, however short, it seems likely that large proportions of the labouring poor experienced both sudden destitution, and a suddenly increased possibility of feeling the direct effects of the criminal law. A *dissensus* of popular norms and law seems a likely result. Against such evidence can be constructed a "legitimacy index" based on the social class of prosecutors. Although historians disagree on the reliability of the sources, and on the meaning of the raw figures, as many as a fifth in theft cases in both the eighteenth and nineteenth centuries were what were called "the labouring poor" in the earlier period, "working men, operatives and labourers" in the later. They were underrepresented as prosecutors, however, compared to other classes, and much commonly appeared in court as defendants. The significance of their use of the criminal law, whether as an instrumental recourse for the recovery of stolen goods, the mounting of vexatious proceedings, or for other ends, will not be adequately known until the sociology of more cases is also known to us.

An important issue in the nineteenth century is whether more working-class complainants had recourse to the courts as prosecution increasingly fell into the hands of the police. The difficulty of disentangling the actions of complainants from the actions of the police (who in the first half of the nineteenth century were accused of fomenting many vexatious and malicious prosecutions in some jurisdictions) has yet to be resolved. Our findings about the role of the police in prosecutions in the nineteenth century are still, surprisingly, not very far advanced. Surprising, because there is a new and extensive literature on police organisation, on the creation of new forces between 1829 and the 1850s, and on

popular responses to them. There are important differences in response: a smooth transition from the old parish constabulary in some areas, violent working-class resistance in others, especially in the north of England, where it was believed (as was the case) that the new police were meant to implement the harsh aims of the Poor Law Amendment Act of 1834. There are temporal changes as well, including a recurrence of violence against the police in the 1860s and 1870s, probably due to the use of constables in deterring applicants for poor relief, and in tightening up licensing hours. In the early 1870s it was estimated that every Metropolitan police officer would on average be injured once every two years.

The statistics, then, are suggestive rather than conclusive about popular beliefs as reflected in use of the criminal law, both in the eighteenth century and in the nineteenth. The figures may, in the end, tell us more about middle-class fears: analysis of such "moral panics" as the "garrotting" episode of the early 1860s shows the way in which police responsiveness to Press opinion could readily yield an "increase" in serious crime. Some of the other, larger purposes which wealthier citizens saw in the criminal law can be tracked more easily in other sources.

One strongly-held belief was that private prosecution was an essential constitutional safeguard against possible executive tyranny, a belief which served to preserve in England the right of prosecution relatively unimpaired into the twentieth century.. It is also clear that those with property and those who administered the criminal law thought the courts most important for the inculcation of moral values, and a belief in English justice, in a working-class which they did not trust. In part this was to be done through attention to the theatre of justice. A judge at all sensitive to the social importance of law is likely to be acutely aware of this aspect of his work. Lord Devlin gave a modern

expression of it:

"The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community *the appearance is the more important of the two.*"¹²

That concern with sensitive vulgarisation of professional learning has its own history. The judicial attention to appearance, especially in acting as counsel for the undefended prisoner in this period, in pronouncing sentence of death, and in making proclamations of the justice and mercy of state law, are of central interest to the historian trying to gauge popular responses to the courts. A detailed history of prosecution is important here, particularly for noting contexts of social distress or widespread riot.¹ The chronology of the transition from the bullying which appears often to have been characteristic of the seventeenth-century bench, to the widely remarked benevolent neutrality of the Hanoverian and Victorian judiciary, is another aspect of the history of legal theatre. We must also look to the increasing disposition of cases to lay magistrates in the early nineteenth century, a process which some contemporaries, in the troubled 1830s and 1840s, believed greatly weakened working-class respect for state courts because of the casual moral brutality (literally Dickensian) characterising part of the lay bench. Many stipendiaries, on the other hand, appear to have been acutely aware that they were attempting to rebuild respect for the law, and some went so far as to pretend a civil jurisdiction they did not possess, in order to overawe oppressive

landlords or employers late with wages. In those areas of the country in which they also committed hundreds of workmen to prison in master and servant prosecutions, their success was still greater than when justices in the trade did so.

While the detailed symbolic histories of magistrates' courts are difficult to recover (although much work is being done), we know more about the importance attributed by upper-class opinion in the late eighteenth and early nineteenth centuries to the assizes and to their use of the death penalty. The repeal of capital punishment, often explained in terms of a disembodied humanitarianism (expressed in parliamentary debates and in the tenderness of juries and of prosecutors), now appears to have had more to do with developments in doctrinal thinking on the one hand, and overt political considerations, closely tied to a class analysis of English society, on the other. In doctrine, the rise of formalism in important areas of private law, remarked by historians on both sides of the Atlantic, was also part of the attack on the discretion which the judges increasingly had to exercise in selecting a few unfortunates among the condemned for actual execution, as death sentences increased with indictable crime but executions clearly could not. It seemed increasingly unacceptable to reformers like Romilly that no known rules, certainly no rules of law, governed the exercise of the pardon, when criminal procedure and a rapidly expanding law of evidence were observed rigorously in capital trials. The larger political conflict, as it is analysed in a recent account of the parliamentary debates on the capital statutes, was between two conceptions of proper authority, matching two distinct views of the dynamics of English society.¹⁴ On the one hand, Tories committed to the *status quo* of the eighteenth-century system deplored attacks on the capital statutes, which they argued were essential for making discriminating

use of the necessary terror of the law. On the other hand, their opponents (and for the most part, the political opposition in Parliament) castigated the erratic operation of the Royal Pardon, particularly under the Prince Regent, as a symbol of the arbitrary nature of aristocratic government. They also warned that far from holding a potentially revolutionary working class in awe, capital punishment would harden the moral sentiments of those already deprived: the state "which murdered, and so publicly, could expect little allegiance in return. Many of those arguments were recapitulated, briefly, in the debates which led to the effective end of public executions in the 1860's.

Finally, some of the most interesting work on the relationship of criminal law and social beliefs has centred on instances of direct comparisons or reciprocal influences between state law and popular justice. We know relatively little about such ties, but they were ubiquitous. One cause was the degree to which the high visibility of state justice (from the distant past) permeated popular culture as an exemplar of *the* way of doing justice. Some popular justice notably the rituals of "rough music"-appears to have remained relatively untouched in form until they died out in the nineteenth century. The most striking opposite case, the elaborate aping of state criminal procedure, took place among groups contaminated by very direct contact with the courts-prisoners holding mock trials in gaols, barristers doing the same in their circuit messes. But other reciprocal influences or similarities between state law and extra-legal social enforcement are more interesting. When judges and legislators ceased to believe in the *maleficium* of witchcraft in the early eighteenth century, and repealed the capital statutes on the subject in 1736, their unexampled mercy did not impress a large number of villagers, who in many incidents in the next half-century continued to interrogate and punish suspected witches by dragging them through ponds (with

murder charges by the state sometimes the result). On the other hand, the quick justice of the crowd against thieves caught red-handed, usually through ducking in a horse-trough, appears rather similar to the very rapid assessment of character and guilt which we now know was the norm in the courts, even in trials on capital statutes. Finally, a most interesting example of the complex relationship between state law and popular beliefs about law, or popular justice, is that of the food riot. It is interesting in part because it is now one of the best-studied aspects of eighteenth-century popular culture. And the evidence from many hundreds of instances shows that crowd action against bakers and millers suspected of profiting from high food prices was informed by a belief that seizing food and selling it for a "just" price, or punishing the offender more directly, was legitimated by a long tradition of legal sanctions against such suspected exploiters of the community. Magistrates as well as mobs agreed on the value of Tudor and Stuart (and earlier) legislation against middle-men in food enacted to prevent popular disorder of threatening proportions in times of dearth.¹⁵

It is worth pursuing this example a little further, as an illustration of the differences between social history of law and more doctrinal legal history, even when the latter is written by a lawyer highly sensitive to the need for contextual study of the legal past. It may also illustrate my contention that much doctrine may be explicable only by following litigation to its sources.

In *The Rise and Fall of Freedom of Contract* (Oxford, 1979) Patrick Atiyah is concerned to construct an argument that judges, in the course of the later eighteenth and early nineteenth centuries, sheared equitable protection from the law of contract. They moved from a tradition that sometimes interfered with agreements that were (or had become through circumstances) inequitable to almost invariable insistence on the execution of the expressed intentions of the

parties, however imbalanced the respective benefits. In making this case he draws on a wide range of evidence of changes in administration, attitudes to legislation, but above all the developing ideology of a market of freely contracting individuals, responsible for their actions, understood in the terms of early classical political economy. There are problems with the narrative, however, when judges behave in ways "difficult to interpret from an economic viewpoint." One such hiccup in the judicial imbibing of free market principles appears to be the decision of Lord Kenyon and his brothers in *R. v. Rusby* and *R. v. Waddington*, in 1800-1801.¹⁶ In those cases they emphasised that the common law crimes of buying and reselling foodstuffs for gain or in speculative quantities, or before they came to open market (engrossing, regrating, forestalling) . still remained after the repeal of many of the statutes in 1772.¹⁷ Moreover, Justices Kenyon and Grose not only repudiated the theories of political economy presented by counsel for the defendants: they also invoked older equitable notions (and Christianity, no less). In *Rusby*, Lord Kenyon said,

"It frequently becomes the duty of juries in this place to decide causes where the interests of individuals are deeply concerned; but a more important duty than is imposed on them today they never fulfilled: this cause presents itself to their notice on behalf of all ranks, rich and poor, but more especially the latter. Though in a state of society some must have greater luxuries and comforts than others, yet all should have the necessaries of life; and if the poor cannot exist, in vain may the rich look for happiness or prosperity. The Legislature is never so well employed as when they look to the interests of those who are at a distance from them

in the ranks of society. It is their duty to do so: religion calls for it; humanity calls for it; and if there are hearts who are not awake to either of those feelings, their own interests would dictate it. The law has not been disputed; for though in an evil hour all the statutes which had been existing about a century were at one blow repealed, yet, thank God, the provisions of the common law [against forestalling], were not destroyed Speculation has said that the fear of such an offence is ridiculous; and a very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr. Adam Smith had lived to hear the evidence of today, and then he would have seen whether such an offence exists, and whether it is to be dreaded. If he had been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be larger than his neighbours, so that the poor man who walks the street and earns his daily bread by his daily labour could get none but through his hands, and at the price he chose to demand; that it had been raised 3d., 6d., 9d., 1s., 2s., and more a quarter on the same day, would he have said there was no danger from such an offence?"¹⁸

And in *Waddington*, where the prisoner was a large dealer in hops (held to be foodstuffs because they were essential to brewing), Kenyon declared that engrossing large quantities, in hopes of an exorbitant profit, "is a most heinous offence against religion and morality, and against the established law of the country."¹⁹

For Atiyah, this is a paradoxical survival of an older tradition of benevolent paternalism, especially since Parliament had repealed the statutory provisions almost 30 years before.²⁰ (It was a paradox that had surfaced before 1800:

Kenyon had taken the opportunity in a case in 1795 to remark that the common law was still in effect.) Atiyah concludes, not unreasonably, that judges often get their law, and their prejudices, fixed at an early age, and suggests that Kenyon (who left the bench in 1802 after a long career) was simply behind the times, uninstructed in the truths advanced by the epigoni of Adam Smith (who indeed had compared the laws against forestalling to those against witchcraft).²¹ But the judgments, and particularly *Waddington*, involved more than political economy and paternalism. Atiyah remarks that that context was one of "acute shortage and high prices" for foodstuffs.²² It was indeed a crisis. Food prices in 1800 and 1801 were far higher than they had been during other periods of dearth: from early 1799 when wheat was about 6s. a bushel it had increased 300 per cent. to over a pound a bushel in March 1801 in most parts of the country. Vertiginously high prices were sustained throughout 1800 and 1801. Since bread made up so much of the average diet, a large part of the population was made destitute: no less than 40 per cent. of the population could not have bought, unassisted, enough bread to survive even if they had spent their entire family incomes on bread alone for the whole of 1801.²³ But it was a crisis not only for the poor. Food riots were widespread throughout the country, with the mob demanding that the authorities enforce the common law penalties against speculators in foodstuffs, in the belief that they were largely responsible for the dearth. Thousands of troops, by early 1801, faced hostile crowds who in some districts conducted a virtual guerrilla warfare against them.

Justices of the peace were hastening to make scores of exemplary prosecutions of middlemen in food, and doing so in the most public manner, in order to restore order. And the magistrates were acutely aware (as was the government)

that some of the troops were also disaffected, and that some food riots were accompanied by seditious calls to emulate the French (with whom Britain was at war) by establishing a revolutionary republic in England. It was in these circumstances, when the discretionary use of the laws against forestallers, regrators and engrossers of food was being heavily exploited as almost the only effective response to massive riot, that Waddington's counsel suggested to King's Bench that they reflected mere superstition, and pressed on the court the wisdom of Adam Smith. It is perhaps not surprising that the judges preferred the (rediscovered) wisdom of the common law, and in their judgments used the rhetoric of Christianity and humanity, rather than that of the market. But the perspective of the judges was a more personal one than that, and again it was imposed on their consciousness by events beyond doctrine and beyond general currents of economic theory. In sentencing Waddington to a large fine and imprisonment, Grose J. argued that the laws against speculation in foodstuff were not an unwarranted interference with trade in the light of other facts: "In support of the legal freedom of trade [he said] the law has declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities on their way. to market, taking them from the owner by force . . . or obliging them to accept a less price than he demands, is a capital offence, for which men have forfeited their lives to the law."²⁴ Women too had been sentenced to death for food riots, which is what Grose was describing, and he and his brethren had pronounced numbers of such sentences, some of them carried out, in 1783, 1795, and 1800. If freedom of trade had been enforced with such rigour, it seemed reasonable that it also should have legal limits to prevent such tragedies. Grose and the other judges were conscious that if riots could be prevented by prosecuting forestallers and

regulators and engrossers, fewer rioters would have to hang. Most important of all, they were also aware that in the extremely disturbed circumstances of 1801, the option of exemplary executions was increasingly fore-closed to them because hangings could provoke more riots than they prevented. Five years later, when prices had temporarily declined, the judges were showing much less hostility to engrossers, and by 1819, when the post-war depression had caused a great and pro-longed fall in agricultural prices (and when France was defeated), it was the opinion of the best lawyers that the courts would no longer enforce the common law penalties against middlemen in food without proof of specific intent to raise prices.

Waddington and *Rusby* illustrate the value-breeding, ideological functions of the judges, and their sense of the policy requirements of the criminal law, as much as their traditionalism or their benevolence. Such policy considerations permeated the administration of the criminal law, and, in this instance, perhaps shaped (for a brief time) its doctrine. And those considerations rested, in this instance, on the consciousness that a radically different view, both of what was just and what was law, was held by the labouring poor. In 1800-1801, they demanded that the courts respond to their belief that the law of England had been properly embodied in that mass of legislation which Parliament had repealed in 1772. Faced with riot, distress, and the threat of revolution, the judges responded.²⁵ In elucidating such cases we must reconstruct not only the doctrinal history and the wider intellectual currents of the age, not only the class perceptions of the bench and the differences between judges, but also the larger histories of actual litigation and wider social context. Only then will we illuminate the policy considerations and prejudices which are referred to so fleetingly in the reported cases, if at all, and be able to judge the relative

autonomy of doctrine from economic theories, class strategies, and imperatives of government. I have been able to use this example because Atiyah's account of contract is so rich in references to wider influences on doctrine, and because the food riot has attracted much research. On many other points the young disciplines of social and economic history still provide little commentary, in part because historians have been so ignorant of the chronology of legal change. Conversely, when some scholars come to prove the autonomy (or otherwise) of doctrine in the past, too often they have attempted to do so in a peculiarly unconvincing way. Detailed and informed work on fine distinctions of doctrine is placed against highly schematic, impressionistic versions of social, economic, and political "background," derived from secondary sources which are both dated and general. The connections between law and "context" are then remarked--or, more commonly, their absence noted, which one sometimes suspects was the interest of the enterprise. But no historian believes that causal relations work in such general ways, or that there is any interest in trying to show that they do. Without examining the specific mechanisms at the point of decision, and without knowing what the predicted, perceived and intended ends of many decisions (perhaps at a low level of consciousness) actually were, nothing has been demonstrated. In short, in history there is no "background." There are only a host of forces of different strengths, including the beliefs of different social groups, the effects of which must be weighed in each case, and in the aggregate over time.

IV

I began with an image of the different perspectives of the lawyer and the historian to the legal past, that of the climber and the geologist. Their sources and

their purposes differ greatly: in the case of the lawyer, a thin layer (particularly in England) of doctrinal materials used for immediately instrumental ends; for the historian, all surviving records of litigation, which are being searched for temporal and structural patterns of past law. And that is but the beginning, as some of my examples will have made clear. For historians, there can be no privileged sources, because few questions of any wide significance can be answered from materials, such as reports of cases, constructed for limited and specific ends.²⁶ Social historians in particular have taken their remit to be a wide one: explaining the beliefs and actions of not only legislators, judges, and the police, but of victims of crime, prosecutors, criminals, potential criminals, spectators in court, the public who read trial accounts, the spectators at executions, the children who lisped the oral tradition of criminal and legal folklore. To the lawyer, who asks what possible *use* such an endeavour may be, or even to a legal historian who knows how much doctrinal history is yet unwritten, such projects may appear to confuse the central with the peripheral, to exemplify perverse antiquarianism. Some take the view that what 90 per cent. of the population thought about the law, or did with it, is unproblematic or uninteresting. When those dead men and women are invoked, it is as past "public opinion" or "the people," shades who live in limbo, like those other unfortunate souls, the passengers on the phantom omnibus which never gets to Clapham.

I have argued instead that popular beliefs are important to any convincing history of past criminal law, even in some of its more detailed doctrinal history. Social historians start from an assumption that past societies (and present ones) are complex places in which apparently unrelated social orders

on closer inspection may show a remarkable interdependence. The connections may be circuitous, but because they are not immediately evident does not mean that they are not important. Tracing complex chains of causation, finding unsuspected connections, and revealing unspoken (or at least, privileged) values and decisions, in specific detail, is part of the historian's task. Our approach to the courts and their decisions, and to all those involved in the administration of justice is no different, whatever our theoretical perspectives.

Such an approach seems perverse to some lawyers because it contradicts their own working premisses. I would reply that those premisses subvert historical explanation. At the risk of constructing an hypostatised English lawyer who never existed. I want to suggest some characteristics of legal scholarship which, if transposed to study of the past, would generate histories without depth or process. Our lawyer's handicap can be grouped under two heads: thinking like a lawyer, and doing so in England.

By "thinking like a lawyer" I mean certain intellectual habits which are purposefully honed in the course of most legal education and practice, but which vitiate historical explanation. It is perhaps most convenient to list the errors in historical logic that seem likely to result from each.²⁷ Five stand out; some are more common to the arts of advocacy, some to doctrinal analysis in the library.

One to which I have made reference already is the fallacy of *moralism*. It is implicit in any unexamined assumption that state law inscribed a moral consensus, perhaps imperfect, but roughly the same in most social classes for most of the recent past. Yet it is instructive to consider why most historians (of at least this century) have been wary of using such assumptions to ground

explanation. They are acutely conscious that their own values are highly contingent on culture and epoch, and are no guide to explaining the past. The point is a truism, even if in practice the boundaries between the theory one inevitably brings to research, and the personal reactions to what one finds, have a common plane. But a corollary is that in historical explanation there can be no privileged actors, whose values can be assumed, or dismissed, because they do or do not appear to coincide with one's own, or a postulated consensus.

All this becomes more difficult to remember if the subject is crime, and if the social actors are rioters and burglars as well as judges and victims. An attempt to explain the values and acts of each in equally neutral or sympathetic terms may seem, to a lawyer, presumptuous and wrong, because it entails an *uncommitted* consideration of the meanings and uses of legal institutions. It has been argued that for those trained in the law, the legal order becomes ideology, that "law, and within it jurisprudence, constitutes 'a world · of its own'- which the inquirer who takes legal norms, as such, as object of knowledge, cannot but inhabit and *desire to serve*."²⁸ The assertion is undoubtedly cast in too absolute terms. But when the historian who approaches the criminal law as an object of knowledge encounters the assumption that because state law is an unqualified human good, its victims are self-evidently beneath serious consideration, he suspects the moralistic fallacy on the grand scale.

Presentism, the fallacy of working from present concerns to past origins, is anathema to historians, but necessarily half the lawyer's method.²⁹ Whatever its merits in finding supporting arguments for a brief, it has the effect in historical work of writing out of the past any developments which did not survive in much the same form into the present. Since there is little in human affairs that did so, not even sex and hunger, it is disastrous as an intellectual method for recovering

the past. In search of origins, it tends to find false analogies which, when stripped of context, can be made to look like their putative descendants. Where the object of knowledge has few recognisable descendants, the search does not even begin. Presumably that may explain (to take one example) why so little has been written about the wider effects of the purposeful extinction, through parliamentary enclosure Acts, of a great corpus of customary law in England over the last three centuries, a change which has changed the meaning in England of law itself.³⁰

The *fallacy of identity* appears likely to be a particular affliction of lawyers looking at history. Training to demonstrate legal consequences from legal causes entails the necessary assumption that legal effects usually have legal causes, or at least that those are the main causes worth considering. It is a presumption that must be immensely strengthened by the persuasive evidence for some autonomy of law and legal culture from wider social forces. But the form of doctrinal debate is (to an historian) a pervasive form of mono-causal explanation, in which the question of autonomy and its degree are not even raised because the answer is assumed: new law largely is considered in terms of the working-out of implications of old law, and awkward cases tend to be dismissed as a residual term, rather than explained. Historians are sometimes surprised to see such cases (and legislation) smoothly accommodated in accounts in the doctrinal tradition. It may make them wonder if the best efforts of the other profession are not often put to reconciling differences which in other disciplines would call for explanation rather than reconciliation.

The assumption of legal autonomy is often closely allied to a *rationalist* view of legal decision-making again conditioned by reliance on a narrow range of sources. This, like many of the other points that occur to an historian

about legal reasoning, was one of the concerns of the legal realists, but some of their initiatives were doomed to inconclusive results. When they tried to analyse contemporary law the attempt was sure to be only marginally successful, particularly in studies of judicial decision-making, for two good reasons. One (as the reviewer of a recent biography of Frankfurter has pointed out) was that they were themselves insiders.³¹ Too rigorous an application of realist criticism could be construed as unseemly, impertinent personal criticism of colleagues with whom the rest of their professional lives were spent. More important was the fact that they could not read the private papers of their subjects. Short of the confessional (and one suspects that some judges in the confessional are as aware of exclusionary rules there as in their courtrooms), private correspondence, notably correspondence meant to be kept private, is a prime source from which historians (including realists) have considered the levels of overt intention, collective assumptions, class bias, and professional learning (not necessarily in that order) which a bench brings to a case, or an Attorney-General brings to a prosecution.³² Analysis *begins* there, since the exercise of power is often a profoundly calculated act, and where it is not consciously so calculated it is enacted within a medium of often unspoken but nonetheless powerful assumptions. Those assumptions include implicit judgments about "proper behaviour" resting on class, interest and ethnicity. Such assumptions often remain unexpressed, either because they are unacceptable within the wider political culture, or simply in the belief that knowledge is often best kept back from most people for their own good. (It is

very easy to make that rationalisation if that good is equated with the smooth operation of the instruments of government, or the administration of justice.)³³ They are particularly likely to remain unexpressed by the bench, as irrelevant to the issue, if the dominant style of legal judgments is narrowly formalist, as it has been in this country for well over a hundred years. In that case, as Atiyah suggests to us, we may be obliged to watch for instances in which judges "give themselves away" and reveal values, even unconscious influences, which help them to a decision but which are concealed thereafter in the language of pure doctrine.³⁴

Finally, much legal reasoning is dichotomous, which in historical work can easily lead to *false dichotomous questions*. It seems a likely consequence of viewing life in terms of what can be litigated, if not in the logic of law itself.³⁵ David Hume pointed out that to move from arbitration to litigation was to redefine the problem, and the solution:

"Hence it is, that in references, where the consent of the parties leave the referees entire masters of the subject, they commonly discover so much equity and justice on both sides, as induces them to strike a medium, and divide the difference betwixt the parties. Civil judges, who have not this liberty, but are oblig'd to give a decisive sentence on some one side, are often at a loss how to determine, and are necessitated to proceed on the most frivolous reasons in the world. Half rights and obligations, which seem so natural in common life, are perfect absurdities in their tribunal; for which reason they are often oblig'd to take half arguments for whole ones, in order to terminate the affair one way or another."³⁶

Shared rights and obligations-"so natural in common life"-have found little support in English courts in recent centuries (although *divided* ones, of course, have.) The paradigm of litigation has tended to support a strong bias toward an individualist interpretation of what are collective interests.³⁷ When such conflicts are mediated through criminal law, as they often have been in the English past, then collective responses can appear, in insufficiently sensitive legal accounts, as individual acts of deviation from an already assumed social norm. This configuration of the two assumptions of a societal consensus and individualist actors, orchestrated in the trial, is also a powerful reinforcement (in criminal law) of the moralistic fallacy. Moreover, when carried into an analysis of the social significance of the criminal law, dichotomous reasoning leads to false questions. Was the criminal law a generator of social symbols, or a service institution for the prosecution of crime? Did the criminal law promote specific class interests or was it used by all social classes? Were rules real constraints on judges or were they aspects of an orchestrated ideology of justice? For the eighteenth century, the answer in each case is "both," and it is that multiplicity which constitutes much of the significance of law.³⁸

Any scholar from another discipline, particularly those which try to view societies in the round, will compile her own list of what appear (from such a perspective) to be idiosyncrasies of legal reasoning. But I think they will often in the end lead to two central tenets: that state law has both *matched* an unproblematic social consensus and has exhibited a logic largely *independent of context*, particularly that of economic and class interest. We are told that it is sensitively autonomous. I suggested earlier that in fact the legitimacy

and authority of the criminal law are often inferred from an undemonstrated social consensus, and some accounts of the legal past tend to import equally undemonstrated assumptions of autonomy. Robert Gordon has suggested that that is why traditional legal scholarship tends to be highly suspicious of history in the sense in which historians *tout court-practice* it: that is, of history without a prefix, committed to the understanding of the relationships of all social belief and practice. Historians propose to *test* the autonomy of the law in precisely the way they test the autonomy of other social orders, such as religious beliefs, economic organisation, class division-by looking purposefully for interrelations, in specific detail, in the minds and institutions they jointly form. Gordon argues that legal scholarship, at least in America, responds by employing a battery of intellectual stratagems to resist any recognition of the historical contingency of law.⁹

But I suggested earlier that if an ahistorical consciousness might be an expected result of lawyerly habits of thought, it also, at least in this country, has indigenous causes peculiar to England. By that I meant two things.

The first is that the common-law tradition is so broad a part of the constitutional and cultural foundations of this country that there are a host of intimate relations between popular norms and state law, and have been for many centuries. At least in the past, the connections do not amount to anything like the "autonomous but sensitive" criminal law which is often proposed to us. The social history of the criminal law shows that the relationship was instead contradictory, shot through with collective values opposed to state law,

popular celebration of old law which the state was bent on purging, and usually a massive avoidance of the state legal apparatus on the grounds that it was both financially rapacious and unpredictable. Nonetheless, when centralised state law is so powerful and so visible, even in limited contexts, from so early a date in the history of the kingdom, it is easy to make a premature identification of state law and popular mores. That kind of oversimplification is less likely when English law is found in a context where elite perceptions cannot be directly identified with national culture, in law or other areas. The extreme case is that of the Third World, where the abrupt intrusion of English and other European law has done much to develop paradigms of imposed law and legal pluralism, and a sensitivity to the concealed and overt class strategies encapsulated in law.⁴⁰ But even in countries where the common law inheritance bulked much larger in the foundations of the national culture, the assumption of an identity of state law and social norms is less likely than in England to be an immediate one.

In Canada, the example I know best, encomiums to the tradition of English law are a staple of formal occasions, and have been ever since underemployed English barristers and solicitors, or refugee Loyalist Americans, began reconstructing English criminal law and practice in eighteenth-century Nova Scotia or Upper Canada. But in Quebec, English criminal law was also the imposition of the English conqueror in 1764 (for reasons of state justified in terms of benevolence) on a population which was 96 per cent. French-speaking and accustomed to Colbert's Ordinance of 1670.⁴¹ They also learned, as Lord Devlin pointed out on another occasion, that it was often the "second-rate" and "the blimps" from England who brought the common law to the colonies.⁴² More important, when they used legal arguments resting on English and

Imperial precedents, in the cause of self-government, the English response was not congratulation but repression: charges of sedition, imprisonment without recourse to *habeas corpus*, and within another generation the bloody military suppression of an armed populist insurrection in which French and Irish nationalist lawyers figured prominently as leaders. The Canadian public prosecutorial tradition also exhibits an interesting mix of traditions, one of them being the Imperial interest in maintaining direct colonial rule from London.⁴³ The contribution of Scots law is probably important here too, and perhaps also Dublin Castle's highly centralised prosecutorial system which (like its police) was in Ireland an outcome of the determination of the British state to maintain its rule in the face of a greatly rebellious population.⁴⁴ If some of its emigrant lawyers probably helped to found a system of prosecution in Canada with some similarities, other Irishmen and women carried their traditions of resistance with them. Undoubtedly the most notorious criminal episode in Canadian history, that of the Donnellys, had roots in blood feud endemic in those parts of Irish society in which the state's courts were avoided like the plague, and perhaps also from the immigrant experience in England, where Irish prisoners got short shrift from judges in the eighteenth century, and where Irishmen were the most prominent group involved in mutual physical violence with the "new" nineteenth-century police.

The American influence (about which we have, typically, ambivalent feelings) is a conflict of influences. While English law and government in Canada for much of the first century after 1776 were devoted to extirpating republican and democratic constitutional heresy whenever it raised its head, and respectable opinion commonly attributed crime to contamination from the same source (and sometimes still does), in late years American influence has affected

our view of civil liberties. Once it was based squarely enough on principles within the English tradition (although sometimes reflecting a distinct cultural clash between the working assumptions of French and English-speaking justices in the Supreme Court).⁴⁵ But now widespread popular views of police and criminal law in Canada owe much to the American mass media, and at a legislative level may have more than a little to do with our recent enthusiasm for Bills of Rights.⁴⁶

Finally, all students of our Supreme Court and our constitution are aware that some very particular (and occasionally peculiar) conceptions of Canadian society, politics, and federalist imperatives were to be found in the Judicial Committee of the Privy Council, before it ceased to be our final court of appeal in 1949. The experience of having a crippled domestic court which was constantly bypassed for recourse to a body in London which decided crucial constitutional issues, often in a single day and without written briefs, is an important constituent of our experience of disjunctions between "law" and "society."⁴⁷

I have trespassed on your hospitality enough, and I shall not sketch the Amerindian, Scandinavian, German, Italian, or Douk- habour cultural memories which might further condition Canadian perceptions. (Nor can I.) But I hope I have said enough to suggest why Canadian historians perhaps are less sure than their English counterparts that the criminal law (or other state law) reflects in an _unproblematic way the wider values in the past society. We are more apt to be aware of legal transplants, imposition of law, recourse to martial law, and the slow and contradictory way in which English law became part of our national culture. The Third World experience, while extreme, is not wholly alien to us. But neither am I convinced (and this is the point which prompted

my excursion into chauvinist display) that criminal law *in England* has always exhibited quite so simple a relationship with cultural norms as seems sometimes to be supposed by her lawyers.

One reason is the issue of social class, which has been of central interest to social historians. In the New World, social class and race and ethnicity have often been powerful reinforcing identities. But class divisions (and ethnic and racial ones) have not been unknown in England. It seems curious that the subject so rarely has appeared (I shall note a few significant exceptions) in the larger scholarship of English law, when it is (if an outsider may say so) so striking a constituent of everything English from education to health care, from the national sense of humour to the temper of academic life. The remarkable reticence among lawyers on the subject may not be unrelated to those aspects of legal reasoning which I suggested help sustain professional belief in the apolitical autonomy of law and the dangerous irrelevance of social inquiry to most legal pursuits. But perhaps there are other reasons too, for it was not always thus. A scholar in Great Britain could once address his students in jurisprudence in the following terms without provoking (as it might in the more ideological climate of the early 1980s) loud denunciations of bias in education:

". . . when . . . some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulation made which may protect the property of the rich from the inroads of the poor . . . Laws and governments may be considered in this *and in every case* as a combination of the rich to oppress .the poor, and preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not

hindered by the government would soon reduce the others to an equality with themselves by open violence."⁴⁸

This quotation, well known only since 1978, is from Adam Smith's lectures on jurisprudence in the University of Glasgow in the 1750s and 1760s. It is his principal characterisation of the state of the law in the second, pastoral stage of an evolutionary model of law and society. As Peter Stein and others have argued, Smith's explanation of social and legal change, while related to the natural law tradition, was based in large part on what he believed was an empirical base of observation or informed conjecture about the actions of men and women, spontaneous or modified by custom, habit, culture: education, or vested interest.⁴⁹ But at base was economic reality, and, as he made clear in this passage-"in this and in every case"-Smith was convinced that much of the law of his own society was also "a combination of the rich to oppress the poor. . . ." His division of society into those two elements was a staple of eighteenth-century usage-the poor being the labouring poor, which contemporaries estimated to be at least half the population.⁵⁰ The social analysis of the larger purposes of law was an equally common element of the "philosophical historians" of the Scottish enlightenment. If the passage now brings to mind Marx rather than a "sound" British tradition, it may be, if I read Stein correctly, that the indigenous development of a jurisprudence grounded in social observation and analysis of interests and classes was short lived, at least in part for ideological reasons of a kind not entirely unfamiliar to us today.

For Smith's observation and his larger approach to law could have a different significance in different hands, and in different circumstances. The prime instance was Smith's disciple, James Millar, who took the social and legal theory

of the Scottish enlightenment to its most advanced point. Although no radical democrat, being an advanced Whig was enough, by the 1790s, to ensure that his theories would alarm Tories, one of whom 'once denounced his "democratical principles, and that sceptical philosophy which young noblemen and gentlemen of legislative rank carried into the world with them from his law-class, and . . . displayed with popular zeal, to the no small danger of perversion to all those under their influence."⁵¹ An analysis which distinguished different interests in society, and contested an aristocratic hegemony in government (at a point when that influence was stronger than any time earlier in the century) was uncomfortable. At a time when the ideologues of the status quo fought Jacobinism by emphasising the blindness of English law to social division, having a "sceptical" law professor do the opposite was deeply disturbing.

England's upper-class political culture was profoundly anti-Revolutionary during the French wars and for decades thereafter, and it was in that period that Smith and Millar's project of historical social inquiry in law was abandoned.⁵² If there is a connection, we do not yet understand its dimensions. But when an historical school of jurisprudence once again became significant in Britain, it was anodyne in its analysis and conservative in tendency, using history to oppose a reform movement identified with Benthamism. Its inspiration was Savigny, in whose work there is no hint of class, but an evocation of law as the spirit of Nation and People. History was appealed to in the unspecific and comforting terms which Burke had made familiar to Tory English gentlemen, as an *argumentum ad antiquitatem*. Savigny's own work was strongly conditioned by its conservative political significance for Germany; it was embraced, with that of Blackstone and Burke, as the instinctive way to think about the history of English law.⁵³

I shall take the word of other scholars for the fact that Maine and others swallowed that tradition of universalism, and undifferentiated social wisdom of

law, outside any social analysis. (For Maine, classes existed perhaps in ancient Rome, but not in England--or, at least, the virtual absence of British references in his work made it unnecessary to consider the issue).^{s4} The great emphasis on the medieval period which henceforth characterised legal writing on the history of law, and the abandonment of social inquiry in much professional history, also helped to disinfest the history of law of a social analysis. Where it survived, it was as subtext.

An instance was Sir James Fitzjames Stephen. He may hardly be taken as a typical English lawyer, which is perhaps why he was also the one who wrote the last extensive treatment of the history of criminal law in England until the mid-twentieth century.^{s6} He was an indefatigable propagandist and controversialist, as well as lawyer, historian, and judge. But undoubtedly one thing that attracted him to the study of criminal law was his deep interest in the issue of class politics in England. He was convinced that man's innate capacity for evil had been dangerously inflamed in the working class. They had been absurdly flattered by advanced democratic theorists and corrupted by irresponsible novelists like Dickens. England, in short, faced great danger from an ignorant and levelling democracy, and Stephen thought it only a matter of time before the disaster of the universal franchise became a reality. In such circumstances the criminal law, although so heavy an engine of social ordering that it should never be used lightly, was absolutely indispensable. A strong and enlightened leadership from men of the higher and professional classes (and Stephen undoubtedly saw himself as one such) could be expected to use it with care and discretion and, where necessary, harsh effectiveness.

Criminal law was of political significance, in the widest sense. ^{s7}

But Stephen was also writing within the tradition of legal evolutionism shared by his friend Henry Maine, and probably at its height. There was a marked equivocation in Stephen's treatment of the relationship of the criminal law to wider social norms. On the one hand, he argued in defence of legislation for morals that there was a general social consensus on the boundaries of good and evil, for which the criminal law was (where its standard of proof reached) an effective expression: "the *ratio ultima* of the majority against persons who its application assumes to have renounced the common bonds which connect men together."^{s9} But the highest efficacy of the law is not simply that it expresses such moral majoritarian sentiments-that it gives effect to predominant opinion, especially with respect to the most serious crimes-but that it *shapes* that opinion, and can help *create* normative majorities, if used with care: "Even indifferent or virtuous acts will come to be condemned by the moral sentiment of particular times and places, if the law condemns them."⁶⁰ At many points in Stephen's treatment, tensions of that kind, arising largely from the possibility of different class perceptions of The Good, lead him to write a more rounded account of the law than any doctrinal exposition could be. He emphasised, for instance, that prosecution conducted in the form of private litigation also immensely strengthened the capacity of the criminal law to teach moral lessons in a theatrical setting. To contemporary suggestions that the English prosecutorial system was inefficient, he replied that that was a necessary price to pay for the legitimacy that the mode of prosecution conferred on the criminal law, and on the constitution, as a

whole. An efficient prosecution in the hands of the state could too easily (even if wrongly) be identified with tyranny. The criminal law's great capacity for obtaining consent to the social order should never be sacrificed to lesser goals.⁶¹

Stephen shared a belief of many social historians now studying the eighteenth and nineteenth century that "the administration of criminal justice is the commonest, the most striking, and the most interesting shape, in which the sovereign power of the state manifests itself to the great bulk of its subjects." If that was one aspect of its importance, for Stephen there was another: English criminal procedure channelled popular passions into safe ends, inculcated virtue, and taught a working class dangerously close to revolution "to regard the Government as their friend. . . ."62

V

My purpose here, and throughout, should not be misunderstood. It is not to say that the Scottish philosophical historians, or Stephen, argued that the doctrines and institutions of the criminal law, or all law, could be understood only or even primarily in terms of a wider social analysis. I have mentioned them for two reasons. The passages I have quoted contrast with many nineteenth century (and twentieth century) accounts of law which assumed rather than demonstrated the substantial identity of law and social consensus, an identification which I have suggested may still be one of the larger background ideas of much traditional legal scholarship, if rarely articulated in explicit terms. Secondly, and more important, they may help to explain to lawyers the interests of social historians now studying how the criminal law worked in that same period

(roughly 1760 to 1860).

Adam Smith and Sir James Fitzjames Stephen were fascinated observers of their own societies,⁶³ and they were convinced that the criminal law was a central nexus of its class divisions, and helped to sustain them. Their expression of that conviction, however foreign to the style of much legal scholarship, is abundantly familiar in tone to historians examining popular and elite opinion in that period. And like Smith and Stephen, when we study the place of the criminal law in Hanoverian and early Victorian society in daily life as well as opinion, we encounter the issues of class, contested norms, and their problematic relationship to the coercive power of an undemocratic state. Those issues demand exploration, particularly of a social institution which avows that it transcends substantive social inequality.

In this century, Adam Smith's tradition of social inquiry has been resuscitated in some areas of legal scholarship. Journals devoted to exploring the law with the tools of social science—the inheritors of the realist programme -- or from more radical theoretical perspectives, have established beachheads (I am told) in academic law. But I am also told by its practitioners that the enterprise is regarded as one of marginal interest by most of their colleagues. Some even attribute to it sinister purposes.⁶⁴ I hope I have explained why social historians think an uncommitted exploration of the social functions of law to be important. But we too are aware of a degree of wariness among the lawyers. In the fable with which I began, there was one last warning given to the historian before he went off to tunnel through the strata of legal manuscripts. In solemn tones, the lawyer gave him formal notice: "Do no environmental damage. We take conservation of the Law Mountains very seriously indeed."

Notes

¹ The Chorley Lecture 1983. I was unable to give the lecture on June 8, as scheduled, to my regret; what follows is a slightly revised version of my text. I am grateful for the sympathetic understanding of the Directors of the *Modern Law Review*, in what were for me difficult circumstances. The lecture was written while I held an SSRC post at the School of Law, University of Warwick, and without implicating my hosts in what follows I wish to say how much I learned from them.

² Eric Newby, *A Short Walk in the Hindu Kush* (Secker & Warburg, 1958).

³ On a different occasion, he elaborated: "The view is terrific, the altitude intoxicating, the technical problems endlessly fascinating. As a professional climber I also make quite a lot of money."

⁴ Law Reform (Personal Injuries) Act 1948; see J. L. J. Edwards, *The Law Officers of the Crown* (London, 1964), Chap. 11, for an account of the Campbell case, which led to the defeat of the first Labour Government, and strengthened the quasi-judicial role of the Attorney-General.

⁵ Mark One Legal Excavator. The computer has made it possible to handle the great bulk of past judicial records; and to relate them to other social facts, in ways not possible before. English criminal records invite such treatment, particularly for the period before the nineteenth century: see Hay, "War, Dearth and Theft: the Record of the English Courts" (May, 1982) 95 *Past & Present*. The Maitland Club was digging long before.

⁶ A very rough estimate (and any other is impossible) suggests that for the year 1783 (an average one for the 1780s, a busy but not grossly untypical decade for the courts) there were less than 50 criminal cases reported, most of them settlement and other poor law cases (1-8 *Brown's Parliamentary Cases* (1-3 E.R.); 3 *Douglas* (99 E.R.); *Ca/decott's Magistrates Cases*). In the same year there were 500 committals at the Home Circuit assizes alone, and possibly a total of 10,000 prosecutions on indictment, summarily before magistrates, and on certiorari or by criminal information in King's Bench, for the country as a whole. Evidence for perhaps one-third of that bulk of cases (mostly on indictment) probably survives, with comparable evidence for *each year* of the eighteenth century for the later periods, variable but generally lesser amounts for earlier.

⁷ One reason may be the fact that until very recently the bulk of lawyerly legal history, at least in England, has concerned other areas of the law, perhaps reflecting the powerful ordering of priorities within the profession: "Crime has never been the business of lawyers." (S. F. C. Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969), concluding sentence.) It is easier for me to describe the reasons from the historian's side. They include the development of a large body of work on popular protest, in which the criminal law figures importantly as respondent (and precipitant); the importance of the criminal law to the early history of working-class political movements and trade unionism; a growing realisation among historians (in England dating largely from the establishment of County Record Offices after the war) that the very large surviving deposits of criminal court records contained much information about aspects of past daily experience not found in other sources; the layman's greater consciousness of the criminal law (perhaps reflecting its importance in structuring that consciousness in all periods); the legislative bias of the criminal law, a comfort to those acquainted with only that source of law (and historians continue for the most part to shun the others); the relative simplicity of criminal procedure (although many have not appreciated its complexities); and the place of the reform of the substantive criminal law in general histories of ideas, parties, religion and government in the period 1750...1850. For an introductory account of the literature in the social history of the criminal law for this period see Hay, "Crime and Justice in Eighteenth and Nineteenth-Century England," in Norval Morris and Michael Tonry (eds.), *Crime and Justice: an Annual Review of Research* (Chicago, 1980). That selective bibliography is now spectacularly out of date. For recent work see references in the *Newsletter* of the International Association for the History of Crime and Criminal Justice, the new annual *Criminal Justice History*, and the leading journals in history and social history and law, where most of the work continues to be published.

⁸ 6 & 7 Wm. 4, c.114; 11 & 12 Vict. c.42.

⁹ Stanley Diamond, "The Rule of Law versus the Order of Custom," in Stanley Diamond (ed.), *In Search of the Primitive: A Critique of Civilisation* (New Brunswick N.J., 1974).

¹⁰ Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (London, 1948), 4 vols., i, preface.

¹¹ Bruce Lenman and Geoffrey Parker, "The state, the community and the criminal law in early modern Europe," in V. A. C. Gatrell, Bruce Lenman and Geoffrey Parker (eds.), *Crime and the Law: the Social History of Crime in Western Europe since 1500* (London, 1980), pp.11-48. The argument that the process was substantially complete, and that popular norms and state law largely coincided by the eighteenth or nineteenth centuries, is either a relative statement of the most general kind or needs more demonstration.

¹² Patrick Devlin, "The Judge as Lawmaker," the fourth Chorley Lecture (1976), 39 M.L.R. 1, reprinted in *The Judge* (Oxford, 1981), p.9, emphasis added.

¹³ See below for an instance in 1800-1801.

¹⁴ Randall McGowan, "The Image of Justice" (1983) 32 *Buffalo Law Review* 89.

¹⁵ E. Thompson, "The Moral Economy of the English Crowd" (1971) 50 *Past and Present* 76, is the central title in a large literature.

¹⁶ Peake Add.Cas. 189, 170 E.R. 241; 1 East 143; 102 E.R. 56. See Atiyah, pp.363-366 (citing *Rusby* as *Ruby*).

¹⁷ 12 George 3, c.71.

¹⁸ Peake Add.Cas. 192, quoted in Atiyah, p.364.

¹⁹ 1 East 143, 155.

²⁰ Atiyah, p.366.

²¹ R.H. Campbell and A.S. Skinner (eds.) *Wealth of Nations* (1976), Vol. 1, pp.534 *et seq.* Atiyah, p.363.

²³ Hay (*supra*, note 5), pp.128-135.

²² 1 East 143, 163.

²⁵ The cases were interesting in other ways. *Rusby* was convicted, but not punished because the bench

was divided on whether regrating was an indictable offence at common law, after hearing arguments on a rule to show cause why judgment should not be arrested. Waddington, who was convicted and also punished by fine and imprisonment, was a Jacobin. He had been expelled from the Surrey troop of light horse for his radical politics, and had attacked Burke in print for slandering the French Revolution. The prosecution was begun by other hop-factors, but for the government he was a most convenient target for a criminal information for engrossing at a time when food riots against engrossers had been tinged with Jacobin slogans. I shall publish a fuller account of the case.

²⁶ As Kalm-Freund observed, in a modern instance, "the law reports are the worst possible mirror of society. They convey to the beholder a distorted image in which that which is marginal appears as typical, and this may be one of the reasons why sometimes the judgments of lawyers on social policy are so surprisingly warped and ill-founded" (1970) 33 M.L.R. 241, 242.

The most readable exposition remains David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (Routledge and Kegan Paul, 1971): working historians may differ on the choice of examples, but will agree in most cases on the classification, and the perniciousness of each genre. See pp.75-82 (*moralistic fallacy*), 135-140 (*presentism*), 177 (*identity*), 195-200 (*rationalist-or idealist* in Fischer's terminology), 9-12 (*fallacy of false dichotomous questions*). To name names on an occasion such as this would be invidious rather than gracious, but I have encountered examples of each of these in recent accounts of the past written by lawyers. Historians usually commit different ones: notably, the genetic fallacy.

²⁸ Iain Stewart, "Sociology in Jurisprudence: the Problem of 'Law' as Object of Knowledge," in Bob Fryer, Alan Hunt, Doreen McBamet and Bert Moorhouse (eds.), *Law, State and Society* (Croom Helm, 1981), p.120, emphasis added.

²⁹ J. H. Hexter's explanation (Source distinctions) for "tunnel history" (quoted in Fischer, at p.142) is only part of the explanation; when lawyers commit this fallacy it seems equally likely to be a result of assumptions of autonomy, the imperatives of advocacy, and the interest in policy recommendations (below).

³⁰ But see C. K. Allen, *Law in the Making* (7th ed., Clarendon Press, 1964), pp.67 *et seq.* and Appendix for the doctrine. What is lacking is the social and economic consequences of its application, and the disjunction between custom in popular understanding and practice on the one hand, and what the doctrine came to allow on the other.

³¹ Alan M. Dershowitz, reviewing H. N. Hirsch, *The Enigma of Felix Frankfurter* (1981) in the *New York Times* February 22, 1981. Karl Llewellyn's nearest approach was a foredoomed attempt in the 1930s to assess the wider influences on judicial decision-making by asking some former colleagues, recently appointed to the bench, to keep notes of their methods! See William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, 1973), p.246.

³² But it seems unlikely that for many judges we will be given the kind of materials that illuminate the wider sources of doctrine (not that they end scholarly debate about it) of the kind connected with Frankfurter's relationship with Brandeis: see B. A. Murphy, *The Brandeis-Frankfurter Connection-the Secret Political Activities of Two Supreme Court Justices* (New York, 1982), and the review by Robert M. Cover, "The Framing of Justice Brandeis," (May 5, 1982) 186 *New Republic* 17-21.

³³ See Twining, *op. cit.*, p.228, for an incident in which an English judge took Llewellyn to task for the more venial sin of advocating a jurisprudence which would expose the "tacit assumptions and subtle nuances" in the working relationship of English bench and bar, assumptions and nuances which the judge insisted should remain unexpressed and unexamined.

³⁴ Patrick Aliyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979) pp.374, 660 *et seq.*

"Llewellyn forcefully warned his students in jurisprudence of this point: see Twining, *op. cit.*, pp.115, 516.

³⁶ David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (2nd ed., Oxford, 1978), p.531. Or, more succinctly, "The continuum in which we live [unlike law] is not the kind of place in which middles can be unambiguously excluded" (Reuben Able, quoted in Fischer, p.12, with my addition).

³⁷ In the Chorley Lecture for 1982, Patrick McAuslan remarked the importance of this perspective of the courts in their acquiescence in the attack on collective provision by the present Government ((1983) 46 M.L.R. 1, esp. pp.11 *et seq.*).

³⁸ Arthur Leff, "Law and" (1978) 87 Yale L.J. 989.

³⁹ Robert W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017-1056.

¹⁰ See, for example, the work referred to and presented in *The Journal of Legal Pluralism*.

"Hay, "The Meanings of Criminal Law in Quebec 1764-1774," in L. A. Knafta (ed.), *Crime and Justice in Europe and Canada* (Wilfred Laurier Press, Waterloo, Ontario, 1981).

⁴² Patrick Devlin, *supra*, note 12.

⁴³ Hay, "Controlling the English prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165; J. L. J. Edwards, *Ministerial Responsibility for National Security as it Relates to the Offices of Prime Minister, Attorney-General and Solicitor-General of Canada* (Hull, Quebec, 1980), esp. Chaps. 7, 8 and 10.

⁴⁴ John McEldowney, "Crown Prosecutions in Nineteenth Century Ireland" (forthcoming).

⁴¹ Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa, 1969).

⁴⁶ *Canadian Bill of Rights* (1959); *Charter of Rights, Canada Act* (1982).

⁴⁷ Robert Stevens, *Law and Politics: the House of Lords as a Judicial Body* (Weidenfeld and Nicolson, 1979), 180, 202.

⁴⁸ Adam Smith, *Lectures on Jurisprudence*, (Glasgow Edition) ed. by R. L. Meek, D. D. Raphael, P. G. Stein (Oxford, 1978), p.208 (emphasis added), from the version of 1762-63, and quoted in Peter Stein, *Legal Evolution. The Story of an Idea* (Cambridge, 1980), p.34. The passage continues, "The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exert on the rich;

they tell them they must either continue poor or acquire wealth in the same manner as they have done." In the report dated 1766 (at p.404 of the Glasgow Edition and first published in 1896), the point is rendered, "Till there be property there can be no government, the very end of which is to secure wealth, and to defend the rich from the poor." (There is no advice about how to become rich.)

⁴⁹ e.g. Stein, *op. cit.*; Ronald Meek, *Social Science and the Ignoble Savage* (Cambridge, 1976).

⁵⁰ Compare the words of Lord Kenyon in *R. v. Rusby* (*supra.*), the examples quoted in Robert Malcolmson, *Life and Labour in England 1700-1780* (Hutchinson, 1981), pp.11-19, and Smith (above, note 21) Vol. 2, p.715.

⁵¹ Alexander Carlyle of Inveresk, quoted in Duncan Forbes, "'Scientific' Whiggism: Adam Smith and John Millar" (1954) 7 *Cambridge Journal* 669.

⁵² I do not mean to imply that that was the only reason: see for example Meek, esp. Chap. 6.

⁵³ The legal evolutionist corollary that law at a given time meets an undifferentiated social need is still pervasive in legal thought, sometimes disguised as a form of functionalism. I take it that that is the point of the argument in (e.g.) Alan Watson, *Society and Legal Change* (Edinburgh, 1977), although many of his examples are hardly contemporary (Chap. 1).

⁵⁴ Stein, p.93, and Chaps. 4, 5. It will be clear that I am less confident than Stein that everyone now "think(s) it absurd to try to describe legal change in isolation from social and economic changes" (p.127).

⁵⁵ On the last, see the conclusions of J. C. Wilsher, "Power Follows Property: Social and Economic Interpretations in Historical Writing in the Eighteenth Century and Early Nineteenth Century" (1983) 16 *J. of Social History*, w. 3, 7-26.

⁵⁶ Sir Leon Radzinowicz is hardly a typical English lawyer either, but that is another story.

⁵⁷ See James A. Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (Macmillan, 1983), pp.3-4, 12, 35-36, 50-55, and Chap. 7.

⁵⁸ *Ibid.* at p.110.

⁵⁹ Quoted *ibid.* at p.145.

⁶⁰ Stephen, *A General View of the Criminal Law of England* (1863), pp.99-100.

⁶¹ Colaiaco at pp.87-88.

⁶² *General View*, pp.207, 232-233.

⁶³ Smith developed his course on jurisprudence in the 1750s, and died in 1790, before the French and English Jacobins helped to make philosophical history an object of suspicion. Stephen first formulated his principal ideas on the moral educative functions of English criminal law (and the importance of historical work) in his *General View of the Criminal Law* (1863).

⁶⁴ See Gordon (*supra*, note 39), and Twining (*supra*, note 31) at p.28.

• Douglas Hay: Associate Professor of Law and History, Osgoode Hall Law School and York University (Toronto).