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The State and the Market: Lord Kenyon and Mr. Waddington

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THE STATE AND THE MARKET IN 1800: LORD KENYON AND MR WADDINGTON*

FREE MARKETS AND THE LAW

In early 1801 the judges of the Court of King's Bench sentenced Samuel Ferrand Waddington to a fine of £1,000, four months' imprisonment, and continued imprisonment until his fine was paid, for criminal behaviour in the markets. An established London merchant who had lately entered the hop trade, he had been found guilty by a City of Worcester jury and by a Middlesex jury in King's Bench of the common-law offence of having engrossed hops and artificially raised the market price in Worcestershire and Kent.¹ Waddington spent a year in the courts,

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¹ The law reports give a fragmentary account. See Edward Hyde East, *Reports of Cases Argued and Determined in the Court of King's Bench*, 16 vols. (London, 1800-12), i, 143-66, 167-72 (hereafter 1 East 143, 167), repr. in *The English Reports*, 178 vols. (London and Edinburgh, 1900-32), cii, 56-65, 65-68 (hereafter 102 ER 56, 65). Reported cases are cited hereafter by the standard abbreviation for the original report and the *English Reports* version, where one exists. There are three printed trials: *A Summary of the Trial the King v. S. F. Waddington, for Purchasing Hops at Worcester with Notes by the Defendant* (London, 1800), published by Waddington in November before the final judgement on the Worcester offence; *Trial of an Information Filed by Order of the Court of King's Bench, against Samuel Ferrand Waddington at the Assizes for the City of Worcester for Engrossing Hops, and Other Misdemeanours Relating to the Hop-Trade* (London, 1800); *The Proceedings at Large in the Cause the King v. Waddington, for Purchasing Hops, in Kent: Also the Pleadings, &c. when the Defendant was Called Upon for Judgment upon the Verdict at Worcester* (London, 1801). This last was probably also published by Waddington. For a chronology of the cases and other

and half a year in prison; the case ruined him.² He claimed throughout to have followed the accepted customs of the trade. The epigraph he gave to a published account of one of his trials was 'Perish Commerce!'³ Many, perhaps most, members of the government and parliament agreed with him, and believed that he had committed no offence whatsoever: the statutory penalties against forestalling, regrating and engrossing had been repealed in 1772.⁴ The judges, particularly Lord Kenyon, the Lord Chief Justice, were emphatically of the opposite view. They had worked hard to restate the offences at common law and were delighted with the outcome of the trials.

Waddington's Cases, and the related prosecution of *Rusby*, were notorious at the time, and almost incredible to nineteenth-century commentators. Lord Campbell termed Kenyon's judgements an 'absurd doctrine' about an 'imaginary crime'.⁵ More recently it has been suggested that the cases not only contradicted government policy in 1800 and earlier, but also a current of legal doctrine in the later eighteenth century that increasingly reflected many of the principles of classical political economy.⁶ After Kenyon's death in 1802 further prosecutions for marketing offences were quietly dropped; by 1816 the treatise writers declared that the law, so loudly proclaimed by the judges and so dramatically enforced at the expense of Mr Waddington, was dead.

In retrospect these cases appeared anomalous, but at the time they expressed an unresolved tension in law and policy. Lord Kenyon, who was Chief Justice of King's Bench from 1788 until

(n. 1 *cont.*;

related ones referred to below, and the sources in the records of King's Bench, see Appendix. Samuel Ferrand Waddington should not be confused with Samuel Waddington, 'little Waddy', radical printer and shoemaker: see Iain McCalman, *Radical Underworld: Prophets, Revolutionaries and Pornographers in London, 1795-1840* (London, 1988), 269, *passim*.

² He retained Edward Law (whose fees were very high since his successful defence of Warren Hastings) backed by seven other counsel; Law became Attorney General three days after Waddington was sentenced. The prosecution in both cases was led by Thomas Erskine, probably the most expensive barrister in England, backed by another phalanx of juniors: see *Dictionary of National Biography*; *Proceedings in the Cause the King v. Waddington*, 25.

³ *Proceedings in the Cause the King v. Waddington*, title page.

⁴ 12 Geo. III, c. 71.

⁵ John, Lord Campbell, *Lives of the Chief Justices*, 3 vols. (1857; repr. London, 1971), iii, 138.

⁶ Roger Wells, *Wretched Faces: Famine in Wartime England, 1793-1801* (Gloucester, 1988); also his *Insurrection: The British Experience, 1795-1803* (Gloucester, 1983); Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979).

1802, and at the time of the case was near the end of his long legal career, was idiosyncratic in some of his enthusiasms, but his view of the marketing offences was shared by most of the other eleven common-law judges in 1801.⁷ Moreover, all standard legal works throughout the eighteenth century emphasized that forestalling, regrating and engrossing were offences at common law, even after the 1772 repeal. The judges' endorsement of that view in 1801, followed by their repudiation of the doctrine within a few years, was an important transition in public policy, with large consequences.⁸ The marketing cases, when examined closely, also raise important questions about the place of the courts in the anatomy of the state, and cast some light on the nature of contract law in the late eighteenth century.

To inquire about the nature of a judiciary that is guaranteed independence from royal disfavour at the beginning of the eighteenth century is to pose the question of the 'relative autonomy' of law in a particular form. Not for the first time, but under new conditions after the Act of Settlement (1701), we see the possibility of a judicial politics independent of, or indeed opposed to, government policy, legislative intent or economic interest. Before *Waddington* there was Lord Camden's role in the cases involving Wilkes, when as Chief Justice of Common Pleas he opposed, in almost every instance, the decisions and politics of Lord Mansfield, who at the time sat both as Chief Justice of King's Bench and in the cabinet.⁹ In the nineteenth century we can cite the long series of cases in which judicial ingenuity was constantly exercised to block the willingness of Parliament to enact legislation designed to protect trade unions from the hostility of courts.¹⁰ In such cases of judicial politics we need to know where 'oppositional' judges get their politics and projects, how they justify their behaviour and how they manage to shape legal doctrine

⁷ Sydney Smith wrote in his old age: 'I remember when ten judges out of twelve laid down this doctrine in their charges to the various grand juries on their circuits', quoted in Campbell, *Lives of the Chief Justices*, iii, 80. At Rusby's trial, Kenyon stated that all the judges had charged their juries that the common-law offences still stood: *Times*, 5 July 1800.

⁸ Such an explanation is needed not only for the evidently anomalous case; all significant developments of doctrine, however linear, are accomplished only in specific cases.

⁹ Douglas Hay, 'Contempt by Scandalizing the Court: A Political History of the First Hundred Years', *Osgoode Hall Law J.*, xxv (Fall 1987).

¹⁰ The most recent account is John Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* (Oxford, 1991).

(sometimes surprisingly quickly) to such ends. We also need to ask how the interests of government are affected, how it responds and what are the consequences for accounts privileging a notion of 'the state' closely identified with 'law'. Finally, we need to examine the detailed evidence, in specific decisions such as these cases, of the relations judges have with government, party and wider publics. We can then say more exactly what we mean by the notion of an independent judiciary, and by 'rule of law'.¹¹

The marketing cases have also figured in a debate of the last twenty years concerning the nature of contract doctrine at the end of the eighteenth century and the place within it of classical political economy. Patrick Atiyah cited these cases as two instances of what he argued was a weakened but still extant tradition in the courts of interfering in some contractual matters in the interests of public policy, interference of a kind that became anathema to nineteenth-century judges, who by then were purposive facilitators of the market, some more overtly than others. Two questions are central. One is whether the eighteenth-century judges were willing, in some instances, to refuse to enforce agreements, particularly contracts for future performance, solely on the grounds that *ab initio* or through passage of time they were seriously disadvantageous to the public interest, or to one party in a way harmful to that interest.¹² The second point at issue is the extent to which such judicial practices, if they existed, were part of a world-view innocent of, or suspicious of, political economy, and were eventually ended by doctrinal changes inspired in significant measure by political economy.¹³

Atiyah's argument has been debated with evidence and argu-

¹¹ An assessment of how the bench viewed political economy, or the relationship of judicial to wider political power, cannot be based on a few cases. I am working on a general argument for the period between the mid-eighteenth and the mid-nineteenth centuries, based on an examination of a variety of cases in public and private law, *The Judges and the People: King's Bench and the Criminal Law in English Politics and Society, 1750-1820* (forthcoming).

¹² The suggestion is that this took place in the common-law courts through the use of jury verdicts, but also some elements of doctrine, and that similar views were expressed in decisions in Chancery and the equity side of Exchequer.

¹³ The argument is a wide-ranging one, covering doctrines of promise and consideration, attitudes to quasi-contract (restitution), expectation damages, the likely behaviour of juries and the elaboration of doctrines of mistake, unconscionability and reliance. Atiyah insists on the fact that he was describing tendencies in the law over about a century, not a sudden revolution. Atiyah, *Rise and Fall of Freedom of Contract, passim*. The marketing cases are considered at 363-6, where the citation of Rushy as 'Ruby' copies a typographical error in some reports.

ments of varying worth and, given the wide ambit of contract law, differing conclusions have been drawn about its relevance to particular aspects of contract.¹⁴ *Waddington* and *Rushy*, although criminal cases, are indeed relevant to an extent not evident in Atiyah's account. The detailed history of the litigation (rather than the laconic law reports) shows that classical political economy was actively debated in parliament, in the legal profession and on the bench by 1800.¹⁵ The wide reporting of cases in Westminster Hall by this date, and the duration of litigation there, made the central courts extremely important fora of that debate. My conclusion is that the brief notoriety and swift repudiation of these cases brought a vulgarized notion of political economy before the bench, and a much wider public, and helped to ensue its paramountcy in a few short decades.¹⁶

The continuing popular significance of the medieval and early

¹⁴ There is now a wide literature on Atiyah's description of changes in contract law and the somewhat different account of a wider range of private law of Morton Horwitz, *The Transformation of American Law* (London, 1977). A recent summary of the main points at issue is John Wightman, *Contract: A Critical Commentary* (London, 1996), chs. 4, 5. See also Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford, 1991), esp. ch. 9; on one important doctrinal issue presented as a test of Atiyah's argument, with much interesting evidence, Michael Lobban, 'Contractual Fraud in Law and Equity, c.1750-1850', *Oxford J I Legal Studies*, xvii (1997). Here, I think Lobban somewhat oversimplifies the debate about change, or at least Atiyah's complex account of it, when he describes it as 'fairness or freedom of contract' whether 'a communitarian and paternalistic approach was replaced by an individualistic and entirely-market orientated ideology of freedom of contract'. His own reading of the case law (in part) is that concern with 'fairness' actually increased in the common-law courts in the early nineteenth century. The argument tends to blur the fact that Atiyah described change largely as a contrast between 1770 and 1850; it is also confused by repeated references to Kenyon (who, indeed, was deeply concerned with fairness) as an exemplar of judicial attitudes of the early nineteenth century. Kenyon was an eighteenth-century judge in every sense of the word, including his dates (1732-1802). Many of his more adventurous attempts at fairness (not only the marketing cases) were repudiated by his immediate successors.

¹⁵ Which is not to say that the public debate was very learned; the struggle was for ideological conquest. Francis Horner in 1803 declined to publish a critique of Smith because the victory of political economy was not yet complete. 'We owe much at present to the superstitious worship of Smith's name . . . until we can give a correct and precise theory of the nature and origin of wealth, his popular and plausible and loose hypothesis is as good for the vulgar as any other', quoted in Biancamaria Fontana, *Rethinking the Politics of Commercial Society: The Edinburgh Review, 1802-1832* (Cambridge, 1985), 47.

¹⁶ Lobban in his critique of Atiyah argues against making 'too direct a link between changes in economic thought and changes in judicial behaviour' in this period. As evidence, he quotes John Stuart Mill (writing in 1825, at the age of nineteen) to the effect that before 1818 political economy was 'scarcely known and talked of beyond a small circle of philosophers'. Lobban further suggests that even after 1815 'the economic policy of the government tended to be pragmatic rather than ideological'

modern laws against forestalling, regrating and engrossing into the eighteenth century was recovered in E. P. Thompson's seminal article on the moral economy of the English crowd of 1971.¹⁷ He showed the persistence of popular support for prosecutions against middlemen, and the willingness of government at mid-century and many gentlemen and magistrates for decades after, to condemn middlemen for enhancing prices, and hence effective dearth, through the speculative practices stigmatized by the statute and case law. The traditionalist view was, above all, a matter of law, a fact which must be emphasized because it has been largely ignored in most discussions of moral economy since Thompson wrote. The old statutes were repeatedly cited by magistrates in charges to juries in London and in the country throughout the first half of the century. Forestallers, it was said, 'render the Poor less able to support their families' (Middlesex, 1718). They were:

Pernicious Sorts of People; who Plot and Conspire together to Advance unreasonably, or without any Real, Just Occasion the Price of Viduals, to the great Oppression, and Breeding of Murmuring and Discontent, especially amongst the lower and meaner Sort of People.
(Middlesex, 1725)

They were held to enhance prices to the 'common Prejudice of all Buyers' (Barnsley, 1741), and the offenders were esteemed by law 'great Offenders' (Guildford, 1745). A charge repeatedly used in Norwich in the early 1750s grouped the marketing offences

(n. 16 cont.);

and hence that 'if governments were not directly under the sway of economic theorists, there is no reason to believe that judges should have been, particularly if (like Eldon and Ellenborough), they were of High Tory persuasion'. See Lobban, 'Contractual Fraud in Law and Equity', 442 nn. 7-8. The nature of argument in the marketing cases suggests that all of these assertions (apart from the characterization of Eldon) are untenable for the first decades of the nineteenth century; the law reports are frequently misleading as to the nature of persuasive argument in court.

¹⁷ E. P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past and Present*, no. 50 (Feb. 1971). He recapitulated the argument with new evidence and a consideration of the ensuing debate, in 'The Moral Economy Reviewed', in his *Customs in Common* (London, 1991). There was truly ancient law on the matter: the Athenian constitution provided special officers of the state to detect and punish engrossers and those who made more than the legal profit on corn. The death penalty probably did not apply, but a member of the Athenian Council in a speech in 386 bc demanded punishment for men making such 'illicit gain': 'pity those of our citizens who perished by their villainy, and the traders against whom they have combined': 'Against the Corndalers', ch. 22, in *Lysias*, trans. W. R. M. Lamb (Loeb Classical Library, Cambridge, Mass., 1960); Aristotle, *The Athenian Constitution*, s. 51 (trans. P. J. Rhodes, Harmondsworth, 1984). I owe these references to Virginia Hunter.

with usury, monopoly, deceits and 'Cozinage in Weights and measures by which in a more particular manner the poor & needy are oppressd & mind for the emolument of some few of the most Worthless of Mankind'. In September 1767, the citizens of the city were again alerted from the bench to 'that cruel hardship on the poor Usury Forestalling Monopoly & the like'.¹⁸

The analysis of the political economists, that a wholly free market happily rationed supplies over the harvest year, seemed but abstract theory to traditionalists, contradicted by their own knowledge of the happy and opportunistic responses of millers and farmers to apprehended harvest failures. But the analysis of the advantages of market rationing, given classic form by Adam Smith in Book 4, Chapter 5 of *The Wealth of Nations* (1776), began to influence even country magistrates after the repeal of the statutes in 1772.¹⁹

The correctness of each theory in hindsight -whether speculative withholding (or 'market rationing') was harmful or beneficial, or even how the corn market worked in practice — is not my concern here.²⁰ It is important, however, to emphasize that the dichotomy of moral economy and political economy proposed by Thompson was in fact an organizing principle of political and legal debates to the end of the century. It is not a crudely simplifying device that he imposed on the evidence. This last is the suggestion of Hont and Ignatieff, who argue that there were, by the 1770s, political-economy arguments for interfering as well as not interfering in markets in times of real crisis, and that 'traditionalists' too were often simply taking a position within political economy and were not, therefore, traditionalists in the simple sense (they say) that Thompson makes them.²¹ Smith's

¹⁸ These examples and others are reprinted in *Charges to the Grand Jury, 1689-1803*, ed. Georges Lamoine (Camden Soc., 4th ser., xxxxi, London, 1992), 73, 105, 126, 188, 203, 218, 235, 297, 313, 323, 360, 369, 373, 378, 382.

¹⁹ Sir John Hawkins mentioned the offences briefly in a charge of January 1770; ten years later he ignored them. The Revd John Foley, a Gloucestershire paternalist, eloquently defended the wisdom of the market in a series of charges at the end of the century. *Ibid.*, 425, 431, 583ff.; Adam Smith, 'Digression concerning the Corn Trade and Corn Laws', IV. v. b, in his *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. W. B. Todd, 2 vols. (Oxford, 1976), i, 524-43.

²⁰ Some of the extensive comment on Thompson's article has concerned this issue, including the argument that markets are not efficient allocators in circumstances of real or apprehended famine.

²¹ Istvan Hont and Michael Ignatieff, 'Needs and Justice in the *Wealth of Nations*: An Introductory Essay', in Istvan Hont and Michael Ignatieff (eds.), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge, 1983), 15.

commitment to a *wholly* unrestricted trade in corn, both internally and externally, is, they argue, atypical even among the best-known theorists of the free market by 1776, as a result of direct experience by such theorists with the felt suffering and problems for governments of shortages in both Europe and Britain in the 1760s and early 1770s. Faced with starvation, they drew back from dogmatic certitude.²² (And even Smith, perhaps, would have admitted government regulation in the face of absolute starvation.)²³

This is a useful elucidation of published political economy, but it captures only a narrow band of contemporary opinion. Even among educated men the traditionalist view very often arose from premises quite unrelated to any discussion of the rationality of self-regulating markets. Conversely, those supporting such theories in England (notably Edmund Burke) had, by the 1770s and even more by the end of the century, no hesitation in drawing the fullest, un-nuanced, conclusions from Adam Smith.

However, traditionalists and political economists were both acutely aware that the marketing offences were, after all, issues of law. A reading of their social significance, of their meaning and their rationales, therefore, was ultimately, and crucially, dependent on the views of the legislature and even more of the judges of the Court of King's Bench when they came to consider, alter or uphold the law. What follows is in large measure an attempt to reconstruct the mind of the bench in 1800. But it is helpful to look briefly at the preceding half-century.²⁴

Kenyon was caricatured in 1800 as an old man who could not understand new ideas. In fact, he was voicing an important contemporary strand of educated opinion. Those supporting criminal

²² *Ibid.*, 17-19.

²³ Smith did say that to hinder the freedom of the farmer seeking the best market was 'an act of legislative authority which ought to be exercised only, which can be pardoned only in cases of the most urgent necessity': Smith, *Wealth of Nations*, IV. v. b. 39 (ed. Todd, i, 539), cited by Hont and Ignatieff, 'Needs and Justice in the *Wealth of Nations*', 20-1. They point out that a comparison with the position of Hume on dearth and markets suggests that by 'urgent necessity' Smith appears to mean only impending starvation. Smith also admitted the possible role of fraud in corn markets, as close readers pointed out: see Edmund Burke, *Thoughts and Details on Scarcity, Originally Presented to the Right Hon. William Pitt, in the Month of November, 1795* (London, 1800); also below, n. 98.

²⁴ The evidence and sources for the following three paragraphs appear in Douglas Hay, 'Moral Economy, Political Economy, and Law', in Adrian Randall and Andrew Charlesworth (eds.), *The Moral Economy: Crowds, Conflict and Authority* (London, 1998), a few paragraphs of which also appear in this article.

penalties for speculating in foodstuffs could cite the findings of parliamentary committees of 1764, 1766, 1768 and 1796 that one or more of the offences of forestalling, regrating and engrossing had recently and artificially enhanced prices to the detriment of the public. Parliament received petitions to this effect in most decades and bills for new penal legislation were attempted or actually brought before parliament in 1766, 1787 and 1797. An important source for some initiatives was the Common Council of London, largely reacting to the forestalling of its market of Smithfield. In part, their interest in legislation was initiated by retail butchers warring with wholesalers, but the recurrent controversy helped sustain support for all the old criminal law against market offenders, and city aldermen, as MPs, introduced some of the bills for new legislation.²⁵

On the other side were the supporters of Adam Smith. Smith's classic exposition of free markets in the corn trade was published in 1776, but the theoretical and practical case against the marketing laws was effectively made before that date in public lectures, parliament and the courts. A 1767 attempt to repeal the statutes came to nothing, but Edmund Burke, who had been involved, successfully achieved the passage in a few weeks' time in 1772 of an act that repealed all or part of six of the most important ones, and voided all current and future prosecutions on them.²⁶ The explicit justification was that such prosecutions increased prices, distorted markets, harmed the poor and threatened to interfere with the supply of foodstuffs to London. Burke successfully opposed the 1787 attempt to re-introduce criminal penalties by statute and was eloquent in condemning similar proposals in 1795 to interfere with 'the laws of commerce, which are the laws of nature, and consequently the laws of God'.²⁷ He lived just long

²⁵ Susan Brown understates the importance of the dispute in the meat-trade controversy. She makes the suggestive point, however, that expectations of civic paternalism, protecting the poor from market excesses, were probably more effective in the intimate setting of the City than in the rest of London. Susan E. Brown, 'A Just and Profitable Commerce': Moral Economy and the Middle Classes in Eighteenth-Century London', *Jl Brit. Studies*, xxxii (1993).

²⁶ *An Act for Repealing Several Laws therein Mentioned against Badgers, Engrossers, Forestallers, and Regrators, and for Indemnifying Persons against Prosecutions for Offences Committed against the Said Acts*: 12 Geo. III, c. 71 (1772). For the public presentation of Smith's ideas from the 1750s, see Ian Simpson Ross, *The Life of Adam Smith* (Oxford, 1995), 107-8; for David Hume's championing of free markets in corn in 1758, see *TLS*, 14 Aug. 1998.

²⁷ Hay, 'Moral Economy, Political Economy, and Law'; Burke, *Thoughts and Details on Scarcity*, 32.

enough to see the 1797 restoring bill (which horrified him) defeated.

Burke's position was also that of Lord Mansfield, the Chief Justice of King's Bench from 1756 to 1788, the judge who (with his three puisne justices) ultimately decided what was criminal in England. He may have been involved in planning the 1772 legislation and, after its passage, apparently deterred any prosecutions in his court under the common law.²⁸ Prosecutions at quarter sessions and assizes, which had been a recurrent if infrequent occurrence in most parts of the country before 1772, appear to have virtually ceased also at that time. But the exact state of the law was uncertain. Did the offences still exist at common law, in spite of the repeal of some of the statutes? Summaries of the old criminal law on marketing offences were republished in London in 1750, 1765, and at the end of the century. The leading legal treatises and abridgements on criminal and general law (Hawkins, 1716, 1795; Bacon, 1778) approved its policy and (more importantly), between 1754 and 1810 every one of the twenty-one editions of the leading guide for magistrates, Richard Bum's *Justice of the Peace*, reiterated that the marketing offences were still offences at common law. Traditionalists quoted one of the most famous judges of all: 'A Foretaller is called by my Lord Coke, *Pauperum Depressor & totius Communitatis & Patriae publicus inimicus* (a Depressor of the Poor, and a public Enemy of the whole Community and to his Country), and therefore is punishable at Common Law'.²⁹ This was the law as magistrates understood it should be. But Mansfield apparently believed that with the repeal of the statutes, the common-law offences also had perished. And he made the law: the bar probably believed that in any case brought before him, he would require proof both of criminal intent to raise prices and that such had been the result. As a follower of Adam Smith, he was unlikely to find any evidence that met both those tests. What must be emphasized, however, is that by the end of the century, the issue was not yet resolved, either in the courts (there was no recent fully argued precedent)

²⁸ For some of Mansfield's early connections with Smith, see Ross, *Life of Adam Smith*, 132, 158.

²⁹ W. Nelson, *The Office and Authority of a Justice of Peace*, 2 vols. (London, 1745), i, 404, and subsequent editions, quoting Coke (pt 3, ch. 89) on foretallers: for the last edition of Coke before Waddington's case, see Sir Edward Coke, *The Third Part of the Institutes of the Laws of England*, (London, 1797), 196. Coke in fact was quoting from a statute of Edward I.

or in parliament. When prices rose, the public demanded enforcement. A year after Mansfield retired from the bench, the *Times* protested:

It is equally surprising and unaccountable that all the wisdom and humanity of our Ministers and Magistracy in England will not put an end to monopolies -forestalling markets, and keeping up the prices of all the necessities of life to such an exorbitant pitch as they are at present. It is owing to this shocking Police, and cruel inattention to the poor, that our prisons are filled with insolvent debtors, our streets with beggars and pickpockets, our highways with robbers and footpads, and thousands of indigent people of industry, with families, are literally starving.³⁰

The crises of 1795 and 1800-1 (the worst dearth of the century) made resolution imperative. Abstaining from legal interference with the markets, where there were acknowledged to be widespread practices of resale and buying outside the market, was the position of those who controlled parliamentary majorities: William Pitt, the duke of Portland (the Home Secretary), William Wyndham Grenville (who argued that 'the best way would be to leave the grain to find its own value') and the duke of Richmond.³¹ It was that of the leaders of the opposition (both Charles James Fox³² and his nephew, the third Lord Holland, supported Pitt's approach to the dearth); it was also, significantly, that of some Jacobin supporters of revolutionary change.³³

There were traditionalists, however, even in cabinet. In September 1800, Lord Liverpool, president of the Board of Trade, received letters from Sir Joseph Banks and others blaming middlemen for the sufferings of the poor. Banks sympathized with the 'honest' rioting miners in his neighbourhood (he had unsuccessfully tried to divert them with a prosecution of a baker and a forestaller) and argued that 'Smith's Principles [are] like those of the French Revolution breathing nothing but unqualified

³⁰ *Times*, 21 Oct. 1789.

³¹ Grenville and Pitt read *Wealth of Nations* together in the 1780s and convinced themselves of its arguments: J. S. Girdler, *Observations on the Pernicious Consequences of Forestalling, Regrating, and Engrossing* (London, 1800), 58; Peter Jupp, *Lord Grenville, 1759-1834* (Oxford, 1985), 47-8; Richmond to Portland, 25 Sept. 1800: Public Record Office, London (hereafter PRO), HO 42/51, fos. 455-7.

³² 'I have talked with Fox, who thinks all this is visionary (taught, I suppose, in other days by Burke)': 'Erskine to Kenyon, London, 15 Oct. 1800', in George T. Kenyon, *The Life of Lloyd, First Lord Kenyon, Lord Chief Justice of England* (London, 1873), 373. In the debate on high prices in November 1795, Fox said he 'differed materially in no point' from Pitt, a point noted at Waddington's trial in Worcester: *Berrow's Worcester JJ*, 31 July 1800; Wells, *Wretched Faces*, 234-5.

³³ Henry Richard, Lord Holland, *Memoirs of the Whig Party during my Time*, ed. Henry Edward, Lord Holland, 2 vols. (London, 1852), i, 166-9.

liberty and are as little founded in reason & experience as the French are however specious they may appear to be'. Liverpool agreed there were conspiracies in the corn trade, which should not enjoy the freedom accorded other commerce. 'I do not mean to say', he wrote Banks, 'that our ancestors may not have carried these principles too far; but, I think, our modern Oeconomists have carried their principles to as great a degree of extravagance'. Smith 'pushed his principles to an extravagant length, and, in some respects, has erred . . . These principles are the favourites of all speculative men, who are averse to resort to the dull detail of facts'. Banks for his part sent Liverpool a memorandum on the ancient law, arguing that forestallers were more active than they had been for 500 years. He recommended fines, pillory, prison and banishment, although not the baiting by dogs and whipping out of town he found in a statute of Edward I: 'Such a succession of punishment would I am convinced tame even Mr. Waddington, if it is necessary to resort to a new enactment of these well considered laws'. Liverpool made some attempt to persuade his colleagues, including Henry Dundas and Portland, that practical experience called Smith's speculations into question, but apparently with no success; he abandoned the argument in October.³⁴

Similar attachment to the old law could be found in parliament and the Common Council of London, as the attempts at legislation in the 1780s and 1790s show. Thus Sir Richard Hill, whom Kenyon held in esteem, wrote William Wilberforce in December 1800, 'we are combatting imaginary famine in the midst of real plenty':

I am indeed sorry to see that the novel maxims of one scotchman, should be the rule of practice in all England and that the greatest men in the nation are kissing the toe of Pope Adam Smith. I heartily wish that *The Wealth of Nations* may not contribute to make ours poor, by introducing

³⁴ A. Morris to Liverpool, 9 July 1800: British Library, London (hereafter Brit. Lib.), Add. MSS 38,234, fo. 100; also in the same volume of manuscripts, see Sir Joseph Banks to Liverpool, 3, 9, 16, 28, 29 Sept. 1800 (fos. 138ff., 140, 152, 164, 166, 170); Richard George Robinson to Liverpool, Lichfield, [autumn] 1800 (fo. 170); P. D. Parquot to Liverpool, Warrington, 4 Nov. 1800 (fo. 228). See Liverpool to Sheffield, 30 July 1800: Brit. Lib., Add. MSS 38,311, fo. 68; also his letters to Henry Dundas, 15 Aug., 11 Oct. 1800 (fos. 65v, 83v); to John Kilshaw, 23 Sept. 1800 (fo. 75v); to Sir Joseph Banks, 25 Sept. 1800 (fo. 75); to Portland, 9 Oct. 1800 (fo. 79v). See also Wells, *Wretched Faces*, 65, 86-8, 197-8, 243-4.

opinions which strongly militated against the well being of the middle class of individuals, as well as against the more indigent.³⁵

Hill and those like him were delighted when it became clear that Kenyon, who had succeeded Mansfield as Lord Chief Justice, would not kiss Smith's toe.

II

THE LAW IN THE HANDS OF LORD KENYON

In 1795, Kenyon announced on the summer assize circuit that forestalling was still indictable at common law, a reaffirmation of what was undoubtedly to be found in Coke and Hawkins and Burn, but a significant statement because it gave notice that if Mansfield had been hostile to the doctrine, Kenyon was not. His charge to the grand jury in his own county of Shropshire was reprinted in many provincial newspapers:

Gentlemen, since I have been in this place, a report has been handed to me, without any foundation I sincerely hope, that a set of private individuals are plundering at the expence of public happiness, by endeavouring in this county, to purchase the grain now growing upon the soil! -For the sake of common humanity, I trust it is untrue: Gentlemen, you ought to be the champions against this hydra-headed monster. It is your duty, as Justices, to see justice done to the country! In your respective districts, as watchmen, be on your guard.

He warned that anyone convicted before him would feel 'the full vengeance of the law . . . Neither purse, nor person, shall prevent it'. The grand jury in Shrewsbury immediately resolved that they would use all their powers against such illegal contracts and would punish any undermining of traditional market practices. In

³⁵ Sir Richard Hill to William Wilberforce, 9 Dec. 1800: Bodleian Library, Oxford, Wilberforce MSS, c.3, fo. 51. Wilberforce himself remarked on the 'callousness, the narrow and foolish wisdom of servilely acquiescing in Adam Smith's general principles, without allowance for a thousand circumstances which take the case out of the province of that very general principle'. He wrote to Kenyon after Waddington's second conviction, but before sentencing: 'I feel deeply for the poor, I must say that it is trifling with them to announce that there is a sufficiency of food, unless it be at a price which is within their powers of payment'. He suggested that a maximum price (which Kenyon alluded to at trial) was desirable but not possible. A passage assuring the Chief Justice that any correspondence would remain confidential, and the passage quoted above, are not reprinted in the transcription: 'William Wilberforce to Kenyon, "near London", 9 Jan. 1801', in *HM C Kenyon*, 555 no. 1419; Kenyon MSS, HMC 1419, Gredington. I am very grateful to the Rt Hon. Lord Kenyon, DL, for his extremely helpful assistance and for permission to quote from his papers at Gredington.

November Mr Justice Ashhurst gave a similar charge in Middlesex.³⁶

Even before the crisis of 1795, the Chief Justice's view of the law appears to have encouraged other traditionalists who shared it. In Staffordshire, the grand jury apparently considered (but rejected) instituting public prosecutions of forestallers and engrossers in 1793, following assizes held before Kenyon and Nash Grose, the other King's Bench judge who was to be most active in Waddington's case.³⁷ The first prosecutions in the county since 1766 took place at Translation and Michaelmas quarter sessions of 1795, following an order of the magistrates that the Clerk of the Peace prosecute at the public expense.³⁸ In Wolverhampton the constables took several regrators to court, and this pattern of public enforcement is found in other counties.³⁹ In July 1795, the Birmingham High Bailiff announced that all forestallers, and those who sold to them, would be prosecuted. Within months an association of 'many respectable Inhabitants', advertised repeatedly that they would pay for prosecutions and appoint detectives in the markets, in order to end 'these enormous abuses' and 'shameful practices'; they promised to publish the names of offenders and to reward citizens informing against such 'pests of society'.⁴⁰ Oxford City Council instructed the city solicitor to prosecute all offenders dealing in corn, grain or flour and

³⁶ *Shrewsbury Chron.*, 7 Aug. 1795; *Berrow's Worcester JI*, 13 Aug. 1795, quoted in Girdler, *Observations on Forestalling*, 298, who misdates it 1796; *The Correspondence of Edmund Burke*, ed. George H. Gutteridge, 10 vols. (Chicago, 1961), viii, 344. The offence of purchasing growing grain was considered a species of forestalling, according to a statement of Coke's quoted in most justices' manuals. On the timing of Kenyon's decision to emphasize the common law, see pt iv below.

³⁷ Staffordshire Record Office, Stafford (hereafter SRO), *Q/!SB*, Michaelmas 1793, document 175, resolution of 10 October 1793 that the Clerk of the Peace prosecute any who 'forestalled or engrossed any market in the said county by buying up provisions before they are brought into open market'. The resolution is struck through and no such order appears in the Order Books.

³⁸ When Thomas Smallwood wrote to report a farmer, Robert Glover, for buying 300 strike of barley, John Sparrow JP alluded to the repeal of the statutes against forestalling and suggested that only if Glover sold again in a distant market would it be an offence; he asked the clerk to give Smallwood a fuller answer: Thomas Smallwood to John Sparrow, Betley, 12 Sept. 1795: SRO, *Q/!SB*, Michaelmas 1795, pt 1; also memorandum of Sparrow, 26 Sept. 1795.

³⁹ SRO, *Q/!SB*, Michaelmas 1795, recommendation that John Salt be appointed clerk of Wolverhampton market. Reeves, Povey, Welch and Ward were all fined ls. and costs at Staffordshire sessions on promising not to offend again; Welch (who had regrated lamb) was also imprisoned for four days: *Aris' Birmingham Gaz.*, 12 Oct. 1795.

⁴⁰ *Aris' Birmingham Gaz.*, 6 July, 7, 14, 28 Sept., 12 Oct. 1795.

offered a twenty-guinea reward.⁴¹ The following spring the city of Winchester offered twenty guineas in reward for information leading to convictions; there are many other examples.⁴²

The prosecutions that took place in 1795-6, and the more numerous ones of 1800-1, were in part stimulated by the activities of a number of traditionalist country gentlemen, including Joseph Girdler of Maidenhead (Kent), who first offered rewards for convictions of forestallers, regrators and engrossers in the provincial papers in 1795. He spread the gospel through letters and handbills from the beginning of 1796, with some success; he was threatened with death as a result. He credited to his efforts a number of successful prosecutions and also a lawsuit, instigated in Common Pleas by the City of London, in which the plaintiff got a verdict and damages for regrating.⁴³ But Girdler's activities, and those of others now using the courts, meant that the old common-law doctrine would be thoroughly considered in litigation at a time when the supporters of political economy were also intent on victory.

The dearth of 1795-6 generated, as we have seen, highly charged attacks on Kenyon's doctrine, notably Burke's denunciation of any interference with market forces. The prosecutions in 1795-6 at the behest of local government remained at that level; parliament and Pitt, having rejected the notion of restoring some statute law on the marketing offences a decade before, did so again in 1797.⁴⁴ By 1800, even some traditionalists were beginning to wonder whether the old doctrine was defensible. In April 1796 a wealthy Bedfordshire farmer, Thomas Battams, had pleaded guilty at Buckingham sessions to regrating fourteen quarters of oats at a profit of 6d. a quarter. The chairman, the marquis of Buckingham, had had Battams watched by two magistrates in order to get the evidence to convict him, and the prosecution was by a county subscription. At the sessions Buckingham warmly denounced the crime and a very large bench of justices sentenced Battams to fourteen days in gaol and a fine of £200. Some of the press commented that the law 'throws a man entirely on the

⁴¹ *Oxford Council Aas, 1752-1801*, ed. M. G. Hobson (Oxford, 1962), 233 (8 July 1795). This was two weeks before Kenyon sat there at the summer assizes noted below. For the harvest crisis in 1795, see Wells, *Wretched Faces*, 84-5, *passim*.

⁴² *Hampshire Chron.*, 23 Apr. 1796. I have not made a systematic search of the local press.

⁴³ Girdler, *Observations on Forestalling*, 209-15, 288, 295-7.

⁴⁴ On 1797, see Hay, 'Moral Economy, Political Economy, and Law'.

mercy of the Justices' and that 'no respectability of character can screen the offender from severe punishment'.⁴⁵ At the time Buckingham thought the consequence was a salutary fall in prices and had no doubts about the value of the prosecution. But four years later, in 1800, he noted, 'as I have frequently been obliged to argue with some whose opinions have great weight with me, and who doubted not only the policy, but the law of our proceedings in that case, I have paused upon one or two opportunities of making similar examples'. To settle those doubts, he wrote to Lord Kenyon for reassurance that the offence was indeed punishable at common law.⁴⁶

In short, if the common law was to continue to be put into effect, Kenyon and his brother judges needed to do two things: establish a modern authoritative precedent by a judgement after full argument by counsel; and encourage prosecutions through the most public discussion of the grounds of that judgement. By the time that Buckingham wrote, as corn prices mounted to vertiginous heights, Kenyon and several of the other eleven common-law judges had been busy for some months working to those ends.

The judges knew by January 1800 that three cases were likely to come before them. Two were indictments of John Rusby, a prosperous factor in the Corn Exchange in Marks Lane, who was prosecuted at the City of London Sessions in late 1799 for regrating and engrossing.⁴⁷ The prosecutor chose to have the indict-

⁴⁵ *Northampton Mercury*, 23 Apr. 1796; *Berrow's Worcester J I*, 28 Apr. 1796; *Shrewsbury Chron.*, 29 Apr. 1796; Girdler, *Observations on Forestalling*, 215, later noted that a similar prosecution in Oxfordshire resulted in only a 5s. fine.

⁴⁶ Buckingham was probably referring to William Wyndham Grenville, Lord Grenville, his younger brother, who was a convinced follower of Adam Smith: Jupp, *Lord Grenville*; Buckingham to Kenyon, Stowe, 8 July 1800: Kenyon MSS, box 23; Kenyon, *Life of Kenyon*, 374-6; Girdler, *Observations on Forestalling*, 214, 296.

⁴⁷ At trial Kenyon remarked that he was not aware of the case coming on, but he probably meant that he was unsure of the exact date: *Trial of John Rusby in the Court of King's Bench, Guildhall, London* (London, 1800), 7. The first indictment charged Rusby with engrossing 90 quarters of wheat to sell the same day, with three additional counts for doing so by contracting, and with the intention to sell at 'excessive and unreasonable rates and prices'. The second indictment was for buying 90 quarters of oats at 4ls. per quarter and regrating by selling 30 quarters in the same market on the same day for 43s. per quarter, in eight counts slightly varying one from another. The prosecutor of both was Richard Snell and the indictments appear to have been drawn very carefully. See Appendix. There is an abstract of the *Trial of John Rusby*, in Girdler, *Observations on Forestalling*, 231-60; another report was published as *The Trial at Large of John Rusby, Corn-Factor, for Regrating Corn* (London, 1800).

ments removed on writ of *certiorari* into King's Bench.⁴⁸ The indictments arrived there at the beginning of Hilary term, in January 1800, but many months might elapse before they could yield a satisfactory precedent and such a prosecution might well be dropped or compounded before that happened.⁴⁹ Kenyon and his brother judges were therefore almost certainly delighted by the prosecution of Waddington, begun before them directly in January 1800.

Between 22 January and 5 February, Kenyon, Grose, Simon LeBlanc and Soulden Lawrence, the four judges of King's Bench, supervised the taking of affidavits at the Guildhall, in chambers and even at Kenyon's home. Witnesses from Kent swore that Waddington had bought large quantities of hops and announced his intention of creating a scarcity in the market by investing some £80,000.⁵⁰ In short, both act and intent were likely to be made out at trial. The prosecution was brought by the hop-factors allied with the London brewers, who deeply resented Waddington (who had only entered the trade in 1798) for trying to manipulate a market that they ordinarily sought to control. The growers needed credit until the crop was sold, but Waddington subverted the brewers' hold over them by extending credit himself, establishing a bank as part of his strategy. The brewers and London factors were therefore unlikely to spare expense, or drop the prosecution; it appears that one of the prosecuting counsel was a partner in one of the main hop-factors' houses.⁵¹ Moreover, the prosecution was mounted in the most dramatic, expensive and speedy manner possible, through a crim-

⁴⁸ A possible motive would be to help establish a precedent by bringing the case eventually before the justices of King's Bench, but it is also possible that the intention was simply to make the prosecution oppressively expensive for the defendant: see D. Hay, *Crown Side Cases in the Court of King's Bench* (Staffs. Hist. Soc., forthcoming).

⁴⁹ The usual course would be for the charges to be sent for trial at the next sitting of *nisi prius* in the jurisdiction from which they arose, but there could be delays. In Rusby's case the trial, because the issue arose in the City of London, was before a justice of King's Bench, and in fact Kenyon heard the case in July 1800 (see below). But a precedent binding upon all other courts could only be established certainly after arguments on a motion for a new trial or in arrest of judgement, if the defendant made such motions, as the court doubtless expected Rusby to do. He did, and the arguments on the motions did not take place until late November 1800 (Appendix).

⁵⁰ PRO, KB 1130, Hilary 1800, no. 48, deposition of Thomas Knipe, sworn at Kenyon's house, Lincoln's Inn Fields, 22 Jan. 1800.

⁵¹ Peter Mathias, *The Brewing Industry in England, 1700-1830* (Cambridge, 1959), 517-19; S. F. Waddington, *An Appeal to the British Hop-Planters* (London, 1800), 11, 20, 28, *passim*.

inal information in King's Bench.⁵² A criminal information involved many stages of process, all of which were exploited in the proceedings against Waddington, with the advantage for Kenyon and his brother judges that the state of the law began to be argued in open court months before Rusby's case was heard on 4 July.⁵³ By then, Waddington's case had been the subject of widely reported arguments on seven occasions in February, May, June and early July.

Thus, on 8 February, Kenyon and Grose welcomed Erskine's application for an information against Waddington for the Kent offence, granting a rule nisi for more than one information, since Erskine mentioned offences in more than one county. Erskine, prosecuting, said it was 'a Misdemeanour . . . which, I believe, is much oftener practised than punished: and I am not very sure that in my time any similar application has been made to the Court'. He used the main arguments reiterated or adapted in the months to come, quoting Lord Coke's remark that forestallers ought to be ostracized as oppressors of the poor and enemies of the community, describing Waddington and his agents as 'locusts' who had in their 'talons' the entire crop. He concluded: 'The subject is of immense moment'. The Lord Chief Justice echoed immediately: 'It is of immense moment'. Both were aware that this case would probably be the best one to determine the state of the law.⁵⁴

While the lawyers prepared for the next stage of argument in the cases, the judges went on circuit to clear the county gaols and hear civil causes at *nisi prius*. Mr Justice Grose of King's Bench had already charged the two Middlesex Grand Juries on 5 February that forestalling, regrating and engrossing were still

⁵² Such charges could be laid only when the judges considered the offence a grave misdemeanour of public importance; presumably prosecuting counsel knew enough of Kenyon's views to be sure of success. The only faster way would have been an information *ex officio* by the Attorney General. It is clear that the government would not have agreed to such a prosecution.

⁵³ Motion for a rule granting the information, based on the affidavits and on oral argument by counsel, followed by trial in King's Bench or in the county of the offence and then judgement and sentence in King's Bench, with ample opportunities for arguments for a change of venue or (on conviction) for motions for a new trial or in arrest of judgement (Appendix).

⁵⁴ *Times*, 10 Feb. 1800; *Proceedings in the Cause the King v. Waddington*, 8-10. They were probably also not unaware that Waddington, for reasons discussed below, would be a particularly appropriate sacrifice to justice. On the arguments used in the case on this and other occasions, see below. Erskine argued his first case in King's Bench in 1778.

offences at common law, quite contrary to the common belief that the 1772 statute had ended the offence: he read aloud from Hawkins's *Pleas of the Crown* to prove it.⁵⁵ At spring assizes the same message was taken to the country. In Northumberland (and presumably other counties), Robert Graham, recently appointed to the Exchequer bench, deplored the repeal of the statutes, and anticipated the outcome of *Rusby* and *Waddington*, urging his grand jurors to fight the evil of market malpractice 'which, he felt much gratified in perceiving, was now beginning to be viewed in its proper light, and would soon, he hoped, be done away, to the great and lasting benefit of the community at large'. At the Norwich assizes, another Baron of the Exchequer, Beaumont Hotham, charged his grand jurors on forestallers, concluding that 'those who dragged forth those pests of society, and brought them to justice, deserved the commendation of every part of the community'. On 21 June, Grose again reminded the Middlesex grand juries in King's Bench that the offences incurred heavy penalties at common law. His charge too amounted to an invitation to prosecute.⁵⁶

Meanwhile Waddington made his own case worse. While the judges were exhorting grand juries at assizes, he went to Worcester, the most important hop-growing region after Kent. With the Kent charge due to be first argued in King's Bench on 5 May,⁵⁷ he openly encouraged the hop-growers and dealers at Worcester to hold out against the London factors for higher prices, claimed that the prosecution against him had been dropped and entered into forehand contracts with a number of growers for progressively higher prices. When the new term opened in King's Bench, the prosecution supplied new affidavits on which Erskine obtained, in the following term, a second criminal information against Waddington for his effrontery in Worcester.

Both the prosecution and Kenyon must have been delighted. The city of Worcester had its own assizes and the jury there was likely to contain consumers disturbed by high food prices rather than by hop-growers hoping for a rise in the market, which was

⁵⁵ *Times*, 5, 10 Feb. 1800.

⁵⁶ Girdler, *Observations on Forestalling*, 336-7; *Times*, 24 June 1800.

⁵⁷ Argument for a rule absolute. Waddington did not defend the charge at this point, because he believed the court was sure to rule against him: *Summary of the Trial*, 6. His intention was probably to try for an acquittal at trial.

the case in Kent, where a county jury would hear the case.⁵⁸ And the times were ripe for such a conviction: food prices had continued to rise, to reach the first of two unexampled peaks at just this juncture. This first hearing on the Worcester offence on 16 May also allowed Erskine, for the prosecution, and Kenyon, from the bench, to prepare the minds of any jurors who read the newspapers. Erskine declared: 'I pray your Lordships for a moment to suppose, that I am not speaking of hops, but of corn, and then see how easy it is to apply what is done in one instance, to another, and then say, what is to become of the people of this country?'⁵⁹ In turn, Kenyon, at this early stage of the proceedings, made clear his opinion of Adam Smith:

It is said, that people have no more reason to fear forestalling, engrossing, and regrating, than they have to fear witchcraft. It is easy for a man to write a treatise in his closet; but if he would go to the distance of 200 miles from London, and were to observe people at every avenue of a country town, buying up *butter, cheese, and all the necessaries of life* they can lay hold of, in order to prevent them from coming to market (which has happened to my knowledge), he would find, that this is something more real, and substantial, than the crime of witchcraft. The country suffers most grievously by it.⁶⁰

Finally, Waddington again assisted his opponents. Erskine came to court with the news that Waddington had dared to publish a pamphlet in which he attacked the Kent criminal information as a *lettre de cachet*, derided the sworn testimony, defended his actions at length as an *attack* on monopoly and told the hop-growers that they were the real defendants. He had also published an appeal to the Kent hop-growers in the county newspaper. King's Bench immediately granted Erskine a rule to remove the trial from Kent, where jurors' minds might be influenced, to Middlesex. The trial therefore would take place in King's Bench itself, before Kenyon, with a London special jury. Even if the Worcester jury acquitted, or Rusby's case failed, there was now an excellent chance for a conviction of Waddington. The pre-trial strategy of the prosecution was complete.⁶¹

⁵⁸ In April, the mayor and magistrates of Worcester advertised their determination to punish offenders against the marketing laws: *Berrow's Worcester JI*, 10 Apr. 1800.

⁵⁹ *Summary of the Trial*, 3.

⁶⁰ *Ibid.*, 5-6, emphasis in the original. For the comparison to witchcraft, see Smith, *Wealth of Nations*, IV. v. b.26 (ed. Todd, i, 534).

⁶¹ Waddington, *Appeal to the British Hop-Planters*; *Kentish Chron.*, 22 May 1800. The *Appeal* is dated 10 March (37). Law, for Waddington, argued that there was no

They were also successful at trial. Rusby was convicted in London on 4 July of regrating, before a crowded court in a trial lasting all day. On the 29 July Waddington was convicted in Worcester of forestalling, after a trial lasting from 8 a.m. to 8 p.m.: the guilty verdict was greeted with cheers by the crowd.⁶² The London jury found him guilty again on 8 December for his activities in Kent. All three verdicts were subsequently questioned in further proceedings, in motions for new trials or in arrest of judgement, but the judges were anxious to assert from the moment of the first verdicts that the law had been established. Kenyon, congratulating Rusby's jurors, declared: 'Gentlemen, a precedent made in a Court of Justice that will stem the torrent of such affliction to the poor, is certainly useful to the public'; and Mr Justice Grose, passing sentence on Waddington, remarked on 'the present moment, when a precedent is so peculiarly called for, which may operate as an example to others upon a subject which so materially concerns the Public'.⁶³ How these verdicts (and the judgements based on them) were constructed and defended is illuminating. Technical points of law, broad public policy and the new science of political economy were all cited by the lawyers and the judges. They were not of equal importance.

Technical law does not, in fact, seem to have carried much weight with either side, for it was inconclusive. There were the common legal quibbles that earlier cases had been badly reported or had become irrelevant in the light of later statutes and cases. The defence argued that the preamble of the 1772 repealing statute showed parliament's intention to end all such prosecutions, that Coke himself had enforced forehand bargains, and that the most recent leading cases for the common law offences were 200 years old. The prosecution countered that the statute law had interfered with the (superior) common law, hence the repeal.

(n. 61 cont.)

precedent for moving the case to King's Bench: it should have gone to an adjoining county assizes. Neither the prosecution nor the judges replied to this point.

⁶² *Annual Register* (1800), ii, 25; *Times*, 4 Aug. 1800; *Brit. Gaz.*, 3 Aug. 1800. On 12 July, two Newport butchers were convicted at Clerkenwell sessions of forestalling Smithfield; the press reported that the sentences were only fines of £20 and three months imprisonment, 'being the first examples since these sort of prosecutions fell into disuse': *Morning Chron.*, 14 July 1800.

⁶³ *Trial of John Rusby*, 37; Girdler, *Observations on Forestalling*, 260; *Trial against Samuel Ferrand Waddington*, 189. Grose's use of the word 'precedent' appears also in *Times*, 29 Jan. 1801, although the law report gives 'punishment' (1 East 166; 102 ER 65).

Kenyon simply cited Coke's damning words against profiteers and held that the statute of Edward VI was declaratory of the common law as it had stood from Saxon times.⁶⁴ The defence cited a decision of 1631 to prove that hops were not a victual; the prosecution countered that they had become such because beer was now essential to sailors at war, hence to national defence!⁶⁵ Erskine eventually moved to the position that the marketing offences could be committed with any commodity, not just foodstuffs.⁶⁶ When the defence tried to show that the old cases involved only actual monopoly, the prosecution (and Kenyon) simply ignored the argument.

Important issues of actual harm and criminal intent, and the origins of the prosecutions, were also raised, and also ignored by the bench. The defence argued that no actual harm was proven, that it had not been clearly shown that Waddington raised the price and that, in any case, an intent to do what is not a crime, is not a crime. Erskine merely reiterated that to use any device to raise the price of any commodity was an offence; the intent, in any case, was clear. These issues of harm and intent, largely ignored by the judges in 1801, were to become very important within a few years. The argument about the origin of the prosecution arose because criminal informations could only be granted to prosecutors who came with 'clean hands'. Waddington and his counsel knew who they were: London brewers and hop-factors, who constantly made similar contracts, but who resented Waddington's attempt to contest their control of the planters through their own price-fixing and credit arrangements. The problem for the defence was that the identity of the prosecutors was not a matter of record and was not raised early enough in the case. All references to their identity and activities had to be ironic, allusive or indirect, and could not be made in open argu-

⁶⁴ *Proceedings in the Cause the King v. Waddington*, 2-3, 8-9, 61, 64, 66-7, 69, 74; *Times*, 12 Feb. 1801.

⁶⁵ *Proceedings in the Cause the King v. Waddington*, 1, 65; *Summary of the Trial*, 42-3, 45 n.; *Trial against Samuel Ferrand Waddington*, 142. The hops case was *R. v. Maynard* (1631), Cro.Car. 231 (79 ER 802); it was well known because widely reported in the standard justices' manuals and abridgements as late as the 1790s.

⁶⁶ *Proceedings in the Cause the King v. Waddington*, 1, 4, 27. In doing so, Erskine began arguing that, since engrossing or raising the price of wheat was an offence, the same must be true of hops, the reverse of his argument when *Waddington's Cases* began. Rushy had been convicted in the interval.

ment. The prosecution did not have to reply to allegations that others did what Waddington had done.⁶⁷

Indeed, it did not even try to prove that Waddington had affected the market in hops (the witnesses flatly contradicted one another), but simply asserted that conspiracies did exist, that the poor were starving, and that the one caused the other. In other words, narrowly legal arguments were almost irrelevant: the cases were actually an extended rhetorical contest to denigrate, or legitimate, Smith's theory of markets and its application to hops, then corn.⁶⁸

Bargains for future delivery of growing crops were the rule in the hop trade, essential to the security of growers of a highly uncertain crop, and Waddington made them openly. This defence argument was crucial because Waddington's forehand contracts, on a rising scale of prices, looked to an outsider very like a deliberate attempt to move the market up, although the case law shows a brewer using one to secure his malt as early as 1532. But the suspicions on the bench probably went deeper. Patrick Atiyah has pointed out how foreign to a lawyer of traditional cast of mind such a contract could appear. The wholly executory contract, for future performance, he argues, was not then the paradigm that it was to become in the nineteenth century. A notion of an underlying equivalence in bargains, however attenuated, was still part of the way that judges thought. To such men, the very idea of making a profit through a price rise on a forehand contract might be thought immoral if its results were against public policy. This clearly was the view of Erskine and Kenyon. Erskine apparently did not believe that the usual practices in the hop trade could be considered a defence, as it was presented; he used it *against* Waddington. Kenyon, in his private bench notes, marked particularly all the testimony proving 'forehand bargains'.⁶⁹

To the argument that Waddington controlled far too little of

⁶⁷ *Proceedings in the Cause the King v. Waddington*, 2, 62, 64, 73, 72; *Summary of the Trial*, 17, 20, 25; *Trial against Samuel Ferrand Waddington*, 125, 57, 118, 121, 129-30. The doctrine of clean hands, part of equity, applied also in King's Bench with respect to criminal informations: see Hay, *Crown Side Cases*.

⁶⁸ There were also two arguments that the evidence did not prove exactly what the information charged, but Kenyon rejected one and ignored the other: *Proceedings in the Cause the King v. Waddington*, 71, 76; *Summary of the Trial*, 26. Kenyon seldom wrote his judgements: Kenyon, *Life of Kenyon*, 391.

⁶⁹ Atiyah uses the law reports of these cases as part of his general argument. The reports do not, of course, show how much effort Waddington's counsel put into the

the market to be convicted of engrossing, the prosecution (and Kenyon) replied that he had boasted of doing so, that ten men might control the market, or simply that he and his agents had swept the market like 'locusts'. This was the venerable rhetoric of the traditional moral economy and, to counter it, Edward Law, Waddington's counsel, used both practical and theoretical arguments. The practical one was that middlemen were essential, particularly to supply London. The statute of Edward VI was 'insane': the old law would starve the capital in two days. To this highly practical argument Kenyon made the extraordinary reply that the statesmen of Edward VI, and equally those of Elizabeth I and James I, were neither 'insane', nor 'ideots'. The legislation of Edward VI might well be better than that of 12 George III.⁷⁰

Kenyon's irritation arose from the fact that the principal argument of the defence was a condescending lesson in political economy. Mistaken notions on the bench and elsewhere could be corrected by exposure to the wisdom of Dr Smith, author of that 'learned and luminous performance ... upon the wealth of nations, from the reading of which no person, however richly endowed with previous knowledge, ever arose, without finding his funds of knowledge and information amply increased, enlarged, and improved'. Law lectured Kenyon on the wisdom of Smith's devotee, that 'eminent and eloquent person', Edmund Burke, and of some of the 'ablest', 'most enlightened', 'warmly benevolent', 'judicious' men in the recent history of parliament, who had seen to the enactment of the repealing statute of 1772. And he reminded the Chief Justice that the repeal now bore the imprimatur of both Fox and Pitt.

(n. 69 cont.)

effort to educate the bench in trade practices and economic theory; Atiyah also incorrectly represents Ellenborough as sharing Kenyon's opinions. Kenyon does seem to exemplify Atiyah's account of the eighteenth-century bench's unease with certain kinds of contracts for future performance. Waddington complained in 1811 that Kenyon had nonsuited him in King's Bench repeatedly when he sued farmers for non-payment on forehand contracts. I have not found these cases, but see below at n. 161 for Waddington's lawsuits against Bristow and others. *The Reports of Sir John Spelman*, ed. J. H. Baker (Seldon Soc., xciv, 1978), 247; Atiyah, *Rise and Fall of Freedom of Contract*, 128-9, 363-5, 528; *Proceedings in the Cause the King v. Waddington*, 27ff., 39, 47-8, 57, 67-8, 73; *Summary of the Trial*, 38; *Trial against Samuel Ferrand Waddington*, 85; Kenyon MSS, Term 3 Dec. 1800 to 18 Feb. 1801; PRO, HO 42/116, fos. 144-5, petition of Samuel Ferrand Waddington to the Prince Regent, Tonbridge Wells, 4 July 1811, enclosed with a letter from Waddington to the Prince Regent, Southboro Tonbridge, 4 July 1811.

⁷⁰*Proceedings in the Cause the King v. Waddington*, 2-3, 62-3, 75; *Summary of the Trial*, 36, 50; *Trial against Samuel Ferrand Waddington*, 139.

To this (hardly legal) argument, Law had the temerity to add a fairly extensive seminar in supply and demand, the rationing functions of markets in dearth, the 'general principles of commerce', the merits of the trading interest of the nation and the mysteries of price theory. He quoted Burke:

The market settles, and alone can settle, that price. Market is the meeting and conference of the consumer and producer, when they mutually discover each others wants. Nobody, I believe, has observed with any reflection what market is, without being astonished at the truth, the correctness, the civility, the general equity with which the balance of wants is settled. They who wish the destruction of that balance, and would fain, by arbitrary regulations, decree, that defective production should not be compensated by increased price, directly lay their axe to the root of production itself.

So much for arbitrary Chief Justices: mistaken, uncivil, inequitable, when compared to the market mechanism. Or at least some Chief Justices: Law pointedly remarked on Lord Mansfield's enlightened hostility to the marketing laws.⁷¹

From the beginning of the prosecutions Kenyon had known that his chief adversary was the dead professor from Glasgow. Throughout the case and some others in the same months he had attacked Smith as an impractical theorist, Burke as someone 'equally speculative'. He scorned Smith's comparison of the old marketing laws with those against witchcraft and declared that he would not enter into a discussion of *The Wealth of Nations*. The Lord Chief Justice deplored the repeal of 1772 and called for the re-enactment of the old statute laws. Fortunately, the common law had been left untouched. It is clear that Kenyon was a man with some robust and unfashionable notions, as well as a readiness to find in the law what he thought important. In short, he was much like many other judges of this — indeed, all — periods. What he found important was the immorality of playing the markets, the nefariousness of starving the poor. He thought the offences real, and human suffering their result.⁷²

For the case was dominated not by law, but by the tremendous crisis of dearth in 1800 and 1801. Its enormous pressure was felt throughout all the proceedings: crowds packed the courtrooms;

⁷¹ *Proceedings in the Cause the King v. Waddington*, 2, 61, 63, 70, 73; *Summary of the Trial*, 34, 43-4, 46; *Trial against Samuel Ferrand Waddington*, 124, 137, 144. Law was quoting Burke, *Thoughts and Details on Scarcity*: see above, n. 27.

⁷² *Times*, 17 May, 9 June, 21 Nov. 1800; also 'Law Report, Dent v. Howes', *Times*, 7 June 1800; *General Evening Post*, 7 June 1800; *Proceedings in the Cause the King v. Waddington*, 5.

cheers greeted the guilty verdicts. Waddington's lawyers begged the juries to forget popular prejudice, to beware inflaming the minds of the people. The prosecution regularly countered with references to 'this awful and alarming crisis', and claims that, if 'to starve the people had been his object', Waddington could have done no more. Counsel on both sides involved themselves in contradictions. Waddington's lawyers pleaded with juries to think only of hops, but argued also that free trade supplied towns with corn. The prosecution argued that the statutes were repealed in 1772 because corn, unlike hops, could not be engrossed, and then made the forbidden analogy in order to demand a precedent on hops that could in turn be applied to corn. Erskine 'prayed their Lordships, . . . and every person who heard him, for a moment, to suppose that he was not speaking of Hops, but of Corn, and then say, what was to become of the people of this country'. Law, for his part, came to rest the defence case on a general proposition of immense resonance: 'Instances like these must strike at the root and foundation of all property, and every right of the free controul and disposition in respect of the same'.⁷³

These *were* questions of utmost moment, and the government was unequivocally giving a different answer from Kenyon's. We must ask why there was such a sharp discrepancy between the bench and the parliamentary leaders; and we must explain why Kenyon's doctrine was abandoned so rapidly after his death.

III

THE JUSTIFICATIONS FOR MORAL ECONOMY

Kenyon's dismissive comments about commercial practice, his own admission of ignorance about the London corn market, suggest how different he was from Mansfield, with his merchant juries and project to re-order commercial law. But much of Kenyon's response to the cases and the way that it was expressed also appears to have come from his own knowledge of the suffering caused by the dearth of the years 1799-1801, as well as from the dictates of his faith.

Kenyon was one of the wealthiest of the judges in a generation of conspicuous judicial wealth, although he was of humbler origins

⁷³ *Summary of the Trial*, 21, 48; *Proceedings in the Cause the King v. Waddington*, 4, 71; *Trial against Samuel Ferrand Waddington*, 147; *Times*, 17 May 1800.

than some. He was typical of many eighteenth-century lawyers (unlike those of the nineteenth) who made a fortune from the profession and then sought to establish a landed dynasty. With a reputation for parsimony, he poured all of his fees into the estate he assembled at Hanmer in Shropshire. In his new role as a territorial magnate, he embraced the paternalist repertoire of the benevolent country gentleman, a role that in any case was to be expected considering his religious convictions (which were probably particularly acute at about this time).⁷⁴

The dearth of 1799-1801 hit hard at Hanmer. Even during the harvest of 1800 a Shropshire labourer could not earn enough to feed a family of any size. One consequence was housebreaking in the neighbourhood, but no damage was done, as the thieves looked only for food. Although he was in London most of the time, the Chief Justice ensured that his poor were relieved, instructing a niece at Hanmer to buy corn and sell it at less than market price. She wrote regularly about the results: 'I have this morning been again dispensing part of my dear Uncles bounty at Hanmer. I don't know what would have become of the poor but for him'. 'May the blessings of 64 poor people come upon my dear Uncle and all his family'. The poor came to a parlour window, described their wants and presumably their industriousness, and received a ticket from Kenyon's niece describing their entitlement. They took the ticket to a tenant's buildings to receive the corn. All this entailed standing in the rain all day, waiting while the line moved up to the window to get the ticket for food, 'for which they did All seem truly thankful to My dear Uncle'. He apparently gave instructions that only the truly deserving should be relieved, and his niece wrote him that she would not be so free next time, but choose those 'in much want yet very striving'. The results were gratifying in every way. In the summer of 1800 Kenyon's son wrote to him that the people 'all joined in thanks to you for your bounty to them last winter which has very far exceeded that of any of the neighbouring gentlemen, & without which several of them declare they think they would have been starved'. The following year Kenyon's family again sold corn at the parlour window. He also sent down twenty-four pairs of blankets and other goods for the poor of Hanmer, a response to letters from Shropshire pointing out that the expense

⁷⁴ Daniel Duman, *The Judicial Bench in England, 1727-1875* (London, 1982), 128, 140-3; Kenyon, *Life of Kenyon*, 393-6.

of corn was so great that nothing was left for fire or clothing in a labourer's family if there were a number of children. How appalling that so much of this suffering should be unnecessary: Lady Kenyon wrote, 'I wish one knew how to soften the Hearts of Corn dealers, but Corn is now 20s . . . tho there are such Quantities of Grain coming in daily'.⁷⁵

Strangers too wrote to Kenyon in his capacity as Chief Justice, confirming what he knew from his own family. An anonymous correspondent from County Durham blamed the 'villainy' of 'wealthy base men' on the public statements of Portland and Grenville. A man in Norwich sent Kenyon detailed suggestions for detecting and punishing forestallers and regrators, suggestions originally intended for his MP, 'but as I found that he was fearfull that it would hurt him in the opinion of his constituents, the principal part of whom are in the Corn Trade . . . and recollecting that your Lordships Justice and zeal had prompted You to be active for the comfort of the Poor, I thought I could not do better than to direct it to Your Lordships attention'. Kenyon's widely reported statements in court thus brought to his notice the extent to which many shared his opinions and the existence of hard evidence of illegal practices, evidence that it seemed could not be brought to the attention of parliament.⁷⁶

This traditional explanation for the dearth, always popular with landed country gentlemen, was much less convincing to the London legal and political elites. Country gentlemen read Burn's *Justice of the Peace*, with its reiteration of Coke's strictures on engrossing middlemen, but London barristers and members of parliament were more likely to read *The Wealth of Nations* or Barrington's *Observations on the More Ancient Statutes*, or Burke. And lawyers, as professional men without country estates, were also less likely to have the direct experience of local paternalism shown in Kenyon's correspondence with his niece. There were also other, long-standing, tensions between Kenyon and the bar.

⁷⁵ T. Hanmer to Hon. George Kenyon, Hot Wells, Bristol, 16 July 1800: Kenyon MSS, box 23; also in box 23, see Lady Hanmer to Kenyon, Bettisfield, [5 Feb.?] 1800, about selling corn valued at 14s. 7d. a measure for 8s.; Lady Hanmer to Kenyon, 8 Apr. 1800 (she noted, however, that 'very very few' had relief from the parish); Richard Kenyon to Kenyon, Chester, 2 Aug. 1800; in box 25, see M. Hanmer to Kenyon, 18 Feb. 1801; Lady Kenyon to one of her children, 4 Aug. [1801].

⁷⁶ Anonymous letter to Kenyon from co. Durham, 14 Feb. 1801: Kenyon MSS, box 25; for Samuel Bream to Kenyon, Norwich, 24 Oct. 1800, enclosing his letter of 8 Oct. to 'Honoured Sir', see box 24.

He was respected as an able enough judge, but his indifference to appearance, and his origins, made him a subject of jest to some lawyers. An attorney before he was a barrister, and with only a little Latin, he was not popular with those who felt the rough side of his tongue. They retaliated by portraying him as uncouth and avaricious.⁷⁷

On the other hand, he was often popular with the press and with the wider public, in part because he castigated the sins of the mighty as well as the humble. His moral crusades provoked much indignation and amusement in his later years. He was the scourge of adulterers who found themselves in his courtroom. He condemned gaming and threatened 'the first ladies in the land', if they were guilty, with the pillory. Duellists who committed murder, and journalists who spread scandalous libels about private persons, particularly innocent young ladies, enraged him. In all of this he was contesting some of the principle pastimes of the aristocracy, and such criticisms from a man bred a mere attorney, one who had not even been to university, was doubly insulting.

Kenyon was also critical of cheating farmers or tradesmen who did not behave with propriety.⁷⁸ In the year before *Waddington's Case*, he made clear his role as chief moral censor in the market-

⁷⁷ William C. Townshend, *The Lives of Twelve Eminent Judges* (London, 1846), 116, 123; *Public Characters*, 4th edn, 10 vols. (London, 1799-1809); Kenyon, *Life of Kenyon*, 87, 136, 393, 402. On the legal and other literature earlier in the century, see Hay, 'Moral Economy, Political Economy, and Law'. Erskine, who espoused so many popular causes in the courts, is a notable exception to much of the bar in this respect. The youngest son of the impecunious and Methodistical tenth earl of Buchan, he had experience as both a naval and army officer before coming to the bar, and it seems likely that this background fostered his own belief in the traditional measures: for Erskine's views and those of military men, see below 133, 156, 158.

⁷⁸ Townshend, *Lives of Twelve Eminent Judges*, 66-73, 86-8. Some convictions of farmers under Restoration statutes for not using the Winchester bushel in measuring wheat came before him in 1782 and 1783. He expressed his annoyance in the latter case: 'I am sorry that the obstinacy of the farmers, in some parts of the Kingdom, has partly defeated the provisions of the statutes of Cha. II because, after the case of *K. v. Major* ... was decided, we had an opportunity of knowing from the grand juries in different counties, that the decision gave great satisfaction'. *R. v. Major* and *R. v. Arnold*, cited in Girdler, *Observations on Foresalling*, 119-22; *R. v. Major* (1792) 4 Term Reports 750 (100 ER 1282); *R. v. Arnold* (1793) 5 Term Reports 353 (101 ER 197). During periods of dearth the relationship of customary to standard measures, which co-existed until the nineteenth century, was a sensitive one to suspicious consumers: see Thompson, 'Moral Economy'; Julian Hoppit, 'Reforming Britain's Weights and Measures, 1660-1824', *Eng. Hist. Rev.*, cviii (1993); see Adrian Randall and Andrew Charlesworth (eds.), *Markers, Market Culture and Popular Protest in Eighteenth-Century Britain and Ireland*, (Liverpool, 1996), 8-9, ch. 2.

place in two important labour cases. The 1799 prosecution of Hammond and Webb, two shoemakers, was for a conspiracy carried on by the London journeymen against their masters to raise wages. Kenyon declared that conspiracies by masters were equally illegal and that they 'would become the objects of much severer punishment than the poor journeymen':

The law of England held the balance even, upon the scale of Justice, between the rich and poor. Those who were to administer that justice, from their feelings as men, which he hoped he should always carry about him, were naturally led to protect the lower orders of the community, and who, some of them, had perhaps no other protection than the Law.

And he warned the journeymen that if conspiracies went unpunished, they would have to fear not only those of masters, but also those of middlemen: 'Suppose *butchers* were to combine to raise the price of *meat*, and *farmers* the price of *corn*'. The deluded journeymen were warned that if they had succeeded they would have laid 'the foundation for raising the price of *corn*, and the price of *meat*, as well as the price of *all the articles of life*, without many of which they could not exist'. In another case the same week, Kenyon warned the master ropemakers that a resolution they had made to hire only journeymen with discharges from their former masters was 'neither just nor legal': 'the men would thus become the slaves of the masters', and through such combinations 'the country might be undone'. An attempt by Essex labourers to raise their wages in the dearth of 1800 through 'Insurrection and Conspiracy', however, was denounced as a heinous offence bordering on high treason. *The Times* congratulated Kenyon, noting at the same time that 'his Lordship's decisions have alarmed all classes of regrators, and other such delinquents'.⁷⁹

His belief that 'The Law' properly balanced the interests of all classes in the marketplace, his willingness to castigate conspirators and profiteers, and his particular concern for the poor were characteristic of his moralizing approach in the marketing cases also. Imagining a case in which ten wealthy men engrossed a town's supply of corn for a fortnight, he asked, in the final arguments on one of Waddington's cases: 'Would not the poor

⁷⁹ *Radical Politics and the Working Man in England*, ser. 2, 'The Francis Place Collection in the British Library Department of Printed Books' (Harvester Microform edn, 1981), reel 23, set 39, 154, reports of 18, 23 Feb. 1799, probably from *Morning Chron.*; *Times*, 9, 13 Aug. 1800. I owe this information to Lynn MacKay.

be starved, and would not the conduct of these monsters be contrary to law, to morality, and to religion?' That many shared his moral revulsion was confirmed by his correspondence. Four days before final judgement on Waddington, a Doncaster evangelical clergyman wrote to compliment him on his assaults on sin, even among the great ones of the world:

how wonderful are the dispensations of Providence — that He should raise up so noble an advocate to lead his cause . . . It is *thro Him* -you speak, act & think . . . I met with your speech on Mr Waddington's business — *it* shot into my oppressed heart a beam of holy joy — & it is only right you should know you are not labouring in vain.

'Marcus Aurelius' wrote from Bristol in praise of 'your protecting Care over the Cause of Religion and Morality': 'continue my Lord to snatch the poor and the distress'd from the Iron Fang of the Oppressor to make Vice tremble tho' shielded by Title Opulence & Power'. Samuel Glasse, the prominent evangelical cleric and magistrate, wrote to ask permission to dedicate a work on the ten commandments: 'Your Lordship's Pole-Star of Direction in your judicial course is well known to be the Law of God as it is recognized by the Laws of our Country'. Glasse and William Mainwaring, who introduced the forestalling bill of 1797, were members of the Proclamation Society. Kenyon had been a member in its early years.⁸⁰

These letters, and their authors, are a reminder that Kenyon's dislike of fraud, of the sins of the wealthy which hurt the poor, and of wickedness in general, was fortified by deep religious convictions shared by a wider educated public, perhaps particularly by evangelical gentlemen not convinced by new economic theory.⁸¹ Kenyon's own faith apparently became stronger in later

⁸⁰ *Proceedings in the Cause the King v. Waddington*, 55, 76; Payler Mathew Proctor to Kenyon, Hatfield (Yorks.), 24 Nov. 1800: Kenyon MSS, box 24; he concluded with the observation that it was comforting to know there was a communion of saints even on earth; 'Marcus Aurelius' to Kenyon, Bristol, 28 Aug. 1801: Kenyon MSS, box 25; Samuel Glasse to Kenyon, Greenford, 25 Feb. 1801: Kenyon MSS, box 25. Glasse was the author of a wide range of religious works and also a handbook for JPs. On Glasse and Mainwaring, see Joanna Innes, 'Politics and Morals: The Reformation of Manners Movement in Later Eighteenth-Century England', in Eckhart Hellmuth (ed.), *The Transformation of Political Culture: England and Germany in the Late Eighteenth Century* (Oxford, 1990), which is also the source for Kenyon's membership of the Proclamation Society and the fact that he probably resigned on becoming Chief Justice.

⁸¹ As well as Girdler, Glasse and Mainwaring, see the comments of Sir Richard Hill and William Wilberforce (also members of the Proclamation Society), quoted above at n. 35.

life. He was said never to have missed attending church in twenty-six years.⁸² In 1800 he was an old man, almost seventy, and at the time of Waddington's second trial and judgements he was plunged in grief by a crisis which undoubtedly intensified his preoccupation with his faith. His beloved eldest son had become seriously ill in the spring of 1800, worsened while Kenyon was on the summer assize circuit, and died on 15 September.⁸³ The intensity of his mourning, his own anticipation of death (he died in April 1802) and his sense of his Christian duty to the poor, help explain the strength of his certitude in the marketing cases. His language in the final arguments, two months after the death of his son, was often that of the biblical prophet: the registrator 'sins against the moral feelings of men' and commits 'an immoral, a very immoral act'; laws must be 'not inconsistent with the laws of God';⁸⁴ 'we are objects of the constant attention of the benign Ruler of the Universe';⁸⁵ 'if [Mr Waddington] can lay his hand upon his breast and say I am innocent –if his conscience acquits him, I hope he will meet with mercy at the tribunal of God!'⁸⁶ And he silenced Adam Smith with a greater text:

When we were at Church last Sunday (I am a grave man, and I speak to grave men), we heard upon this subject the words of inspiration. "He", says the King of Israel, "who withholdeth corn, shall be cursed, and woe unto him that keepeth back bread from the people".⁸⁷

But, of course, Kenyon did not rely only on scripture for precedent. He was, after all, Chief Justice of the common-law world. And he also had Thomas Erskine.

Kenyon had made clear as early as February that he thought the common law provided ample powers, but he knew he would not have to hear final argument on the law until Michaelmas term, in November, when Waddington would come up for judgement. He was clearly discussing the case with other judges, no-

⁸² Townshend, *Lives of Twelve Eminent Judges*, 116.

⁸³ Kenyon MSS, Diaries; Townshend, *Lives of Twelve Eminent Judges*, 114, misdates this 1801.

⁸⁴ *Proceedings in the Cause the King v. Waddington*, 76.

⁸⁵ *Ibid.*, 5.

⁸⁶ *Ibid.*, 6.

⁸⁷ *Ibid.*, 5. The passage is the only biblical reference to corn that was useful to Kenyon, but it also appears that he misquoted to the advantage of his own argument, as critics said he often did. In the King James version it reads: 'He that withholdeth corn, the people shall curse him: but blessing shall be upon the head of him that selleth it' (Prov. 11:26). Blessing is not explicitly withheld from him that reselleth in the same market.

tably Lawrence. What is more interesting is that he was in direct communication with the prosecution. Erskine had led for the prosecution on both informations against Waddington. His eloquence had been sarcastic, disinterested, pathetic by turns, as he spoke of middlemen, the law and the poor. He had other advantages. He was believed to be the Chief Justice's favourite at the bar, while Law, counsel for Rushy and Waddington, emphatically was not.⁸⁸ In the arguments on Waddington's second conviction, Kenyon derided an assertion in Law's final address to the court: 'There is no saying what you will not confidently contend, Mr Law'.⁸⁹ Henry Clifford, another of Waddington's lawyers, was notoriously an advanced Whig and a Catholic, and he had recently exchanged insults with Kenyon in another political case. Silenced by Kenyon in court, Clifford had then published a pamphlet reflecting on the Chief Justice's origins as a poor attorney.⁹⁰

To these advantages Erskine added advocacy in private. A letter he wrote to Kenyon on 15 October 1800, after the jury verdict in Worcester but before final judgement and before Waddington's second trial, shows that prosecuting counsel and judge had privately discussed the cases and continued to do so in the vacation. In the new term Kenyon would probably have to answer further arguments, as Waddington and Rusby's counsel were likely to move for a new trial or in arrest of judgement.⁹¹ Erskine's letter was in fact written a full six weeks before Kenyon gave final judgement against Waddington in King's Bench. Erskine was unequivocal. He alluded to Kenyon's rumoured retirement, trying to dissuade him, in part on grounds that he still had 'great duties to perform'. These were made clear:

You are perfectly right in the view you have taken of the evils arising from the high prices of provisions, and of the law which visits and corrects

⁸⁸ Townshend, *Lives of Twelve Eminent Judges*, 43, 54, 77; Campbell, *Lives of the Chief Justices*, iii, 133-4.

⁸⁹ *Proceedings in the Cause the King v. Waddington*, 71.

⁹⁰ 'We seldom observe in our hereditary peers those pedantic notions of impracticable morality, or that boisterous impetuosity of manners, which sometimes accompany and disgrace, even in the highest situations, those who have been raised to them from the desk, merely on account of their industry and professional success': Henry Clifford, *Proceedings in the House of Lords in the Case of Benjamin Flower* (1800), quoted in Townshend, *Lives of Twelve Eminent Judges*, 58; *Proceedings in the Cause the King v. Waddington*, 41. Clifford was the nephew of Hugh, 4th Baron Clifford.

⁹¹ They did so: Rusby's motion for a new trial was made on 7 November and argued 25 November; Waddington, whose counsel had given notice of a similar motion, waived the right on 20 November, but the court none the less heard counsel and treated it as a hearing for a new trial or in arrest of judgement.

them. I have looked at the subject since we met, and am sure of what I say. The war, undoubtedly, and the vast circulation of paper, increases the public suffering; but, depend upon it, the whole system of trade in provisions has been entirely changed. There are now only great land-holders (the farmers) and great merchants with great capitals, in lines which were not formerly considered as the occupations of merchants. They sweep the whole country before them, in the purchase of the necessities of life, and they command the markets.

But Erskine did more than strongly reinforce Kenyon's moral condemnation of market conditions. He added:

I have not found a case, almost, in which I have been consulted, that the common law will not reach; and perhaps that is one of the evils attending the repeal of the statutes; they served at once as helps and as qualifications of the common law, in cases where its principles might have reached too far.⁹²

Erskine thus confirmed for Kenyon that the doctrine to which he was so attracted on the grounds of tradition, paternalism and religious conviction was also, without question, good law. If, by October, Erskine wondered whether the powers of the common law were perhaps too wide (he had made the opposite argument in February),⁹³ that was a question of public policy, and Kenyon had his own decided views on that.

There is some surviving evidence of the arguments that Kenyon and his brother judges found most compelling, although they did not feel it necessary or relevant to reproduce them all in court.⁹⁴ Kenyon's last public words on Rushy were cast entirely in terms of the dating and definition of the term 'ingrosser' as found in the standard legal texts. He concluded: 'Finding these authorities I cannot on the ground of any abstract reasoning say that regrating is not an offence at Common Law'.⁹⁵ Yet sometime in the later months of 1800 and early 1801 the judges of King's Bench also privately considered the 'abstract reasoning' of Smith and Burke

⁹² 'Thomas Erskine to Kenyon, 15 Oct. 1800', *HM C Kenyon*, 544 no. 1418; Kenyon MSS, HMC Calendared, no. 1418.

⁹³ *Times*, 10 Feb. 1800.

⁹⁴ Lincoln's Inn Library, London, Dampier MSS, L.P.B. 339a. This bundle of papers once belonged to Sir Soulden Lawrence, a puisne judge of King's Bench when Waddington and Rusby were tried, and appear to be in his hand. Lawrence took some of the depositions in the Kent prosecution (e.g., PRO, KB 1130, Hilary 1800, deposition of Peter Broadley *et al.*, Thomas Ellis, 5-6 Feb. 1800). I wish to thank the Honourable Treasurer and Benchers of Lincoln's Inn for permission to use and quote from these papers.

⁹⁵ In what appears to be the ruling on the motion for arrest of judgement, argued 31 January 1801.

and Law with some care, in a series of memoranda on markets and market theory.⁹⁶

They were not impressed. Was the market too big for concerted conspiracy? No: 'corresponding societies shew how easy [is] communication'. Were middlemen necessary to prevent famine? Surely scarcity alone would raise the price sufficiently to ration supply, without their machinations. Farmers had to come to market and the price then was a fair one; the ingrosser had no such compulsion, but could hold back what he had paid less for, forcing the price to rise. When the price was set by buyers free not to buy and sellers free not to sell, the market might work; when buyers had to buy from sellers not obliged to sell, the market failed. The price would be fair only when production was 'not fraudulently lessened by corn kept back'. And combination was not an imaginary possibility: Mark Lane 'regulates the whole kingdom'. The arguments of Smith applied to the whole market, if at all, but forestalling and regrating might 'hurt the inhabitants of a particular place'. In the margin of Smith's argument that 'those who may be hindered from supplying themselves on that market day, may supply themselves as cheap on another', is written the query, 'What are they [to] do in the mean time? Eat they must'.

The judges clearly relied on the current pamphlet debate for critiques of Smith.⁹⁷ The claim that 'trade will find its level' did not apply to limited goods with a fixed level of consumption, or where the seller controlled the buyer, or where the good was an absolute necessity, all of which applied to corn. Buckles, buttons, ribbons and clothes were one kind of good; corn was emphatically of a different kind. And since hackney coaches, interest rates and wages of journeymen were all regulated, why should not the

⁹⁶ There is a summary of Smith's defence of corn merchants in *Wealth of Nations*, some passages from Burke's *Thoughts on Scarcity*, and references to some of the arguments produced by counsel. The following passages are all found in Lincoln's Inn Lib., Dampier MSS, L.P.B. 339a, which is not paginated. Whether Lawrence's summaries were the basis of the conclusions of all four judges is not clear. Kenyon's own correspondence and public utterances do not suggest a knowledgeable or sophisticated view of markets: it seems likely that he relied upon Lawrence's conclusions without following his reasoning in detail.

⁹⁷ One of the memoranda, after the summary of Smith's argument, abstracts [Sir William Young], *Corn Trade: An Examination of Certain Commercial Principles in their Application to Agriculture and the Corn Trade* (London, 1800), which called for the restoration of statute law to reach not only the 'petty forestaller' but also great wholesalers.

market in corn be regulated also - 'if it be necessary some times to interfere the general rule can hold'? Smith had admitted that 'the real monopolist' wicked enough to raise prices by false alarms, combination or undue means undoubtedly could exist, and Burke appeared to admit that fraud could infect even the corn market.⁹⁸

Dismissing political economy, Kenyon and the other judges dealt also with another defence: that criminal acts should be shown to be the result of criminal intent and have harmful consequences. The judges appear to have concluded that the repealed statute of Edward VI made clear that the offence was criminal, 'without any consideration of intent and effect', and that that statute was simply declaratory of the common law.⁹⁹ In the end, unconvinced by the new economics, believing that a large body of old statute and case law showed that the acts themselves had always been deemed criminal, and persuaded to a moral certainty that profit-taking in times of famine was wicked in the eyes of the law and God, Kenyon and his brother judges found the convictions of Rushy and Waddington to be sound in law and policy. Pitt might tell the House (as he did on the opening of parliament, 11 November 1800) that the system of market regulation of 500 years ago was irrelevant and dangerous,¹⁰⁰ but the judges would decide the matter.

In resisting parliamentary opinion, Kenyon may have sensed that he had important constitutional support. Kenyon held George III in the very highest esteem.¹⁰¹ On 27 November, the day before Kenyon passed judgement on Waddington, Lady Kenyon had an audience with the king, who received her kindly and expressed concern for her safety in travelling home to Shropshire for

⁹⁸ One of the summaries quotes Burke, *Thoughts and Details on Scarcity*, 21; the word 'fraud' is twice underlined.

⁹⁹ Lincoln's Inn Lib., Dampier MSS, L.P.B. 339a, on a single sheet of rough notes dealing with these two issues; also in the bundle is a copy of the information in the Kent prosecution of Waddington, in which the passages referring to intent and to consequences are all underlined.

¹⁰⁰ He also allowed that it might be unwise 'to be guided solely by speculative systems of political economy', but his biographer a few years later noted that in his speech 'he displayed notions of political economy not less correct than those which he manifested on matters of legislation and government': John Gifford, *A History of the Political Life . . . of William Pitt*, 6 vols. (London, 1809), vi, 525-9.

¹⁰¹ He eulogized the king in addresses to grand juries, sometimes concluding with a quotation from scripture: 'Our good King may say with Samuel of old, "Whose ox have I taken? Whose ass have I taken? Whom have I defrauded?"' (1 Sam. 12:3): Townshend, *Lives of Twelve Eminent Judges*, 113.

Christmas. But the king also had a message for the Chief Justice: he 'said he [Lord Kenyon] was doing all he could to keep these forestallers in order, and thought they would feel it; seemed pleased with what he had done about Waddington'.¹⁰² If Kenyon had any doubts about the wisdom of confirming judgement against Waddington, the king's clear approval the day before must have been decisive.

E. P. Thompson's dichotomy between 'traditionalists' and 'economists' on the issue of regulating markets in food is fully illustrated in the marketing cases. Certainly between Burke and Kenyon, or Law and Erskine, there was no mere difference of emphasis, no mere argument within the structure of the new economics, but a moral and empirical gulf that seemed in 1800 unlikely to be bridged.¹⁰³ Kenyon, and other judges like Hotham, Graham and Grose certainly spoke like traditionalists, using in public comment almost entirely moral arguments; their references to political economy were either simple denigrations or criticisms of its speculative excesses.¹⁰⁴ To a lawyer of Kenyon's deep religious views, Burke must have seemed not only mistaken and hard-hearted, but also blasphemous, when he wrote, in words widely reprinted in 1800, of 'the laws of commerce, which are the laws of nature, and consequently the laws of God'.¹⁰⁵ The Chief Justice knew a different truth: 'Our [common] law, thank God, is the same with the divine'.¹⁰⁶

¹⁰² 'Mary, Lady Kenyon to her sisters, 29 Nov. [1800]', in *HM C Kenyon*, 558 no. 1429; Kenyon MSS, no. 1429, reporting an audience of Thursday (27 Nov.). In *HM C Kenyon* it is dated 1801, although the contents make clear that it was written before final judgement; no date appears on the manuscript letter which also contains the remarks about Lady Kenyon's trip. Kenyon passed judgement on Waddington, thus confirming the verdict of the jury, on 28 November: see *Proceedings in the Cause the King v. Waddington*, 6. For other comments on Waddington in Lady Kenyon's letter not published in *HM C Kenyon*, see below; for his relations with George III, see Kenyon, *Life of Kenyon*, 281-3.

¹⁰³ See above, text at n. 21.

¹⁰⁴ I have not been able to establish whether Mr Justice Lawrence, the apparent author of the private criticisms of Smith cited above, made similar arguments in public.

¹⁰⁵ Burke, *Thoughts and Details on Scarcity*, 32.

¹⁰⁶ *Proceedings in the Cause the King v. Waddington*, 5, after arguments on the motion for arrest of judgement in the Worcester prosecution. On the role of scripture in judicial rhetoric and as a source of law, see Douglas Hay, 'The Laws of God and the Laws of Man: Lord George Gordon and the Death Penalty', in John Rule and Robert Malcolmson (eds.), *Protest and Survival: The Historical Experience: Essays for E. P. Thompson* (London, 1993), 95ff.

IV

ORDER, PROPERTY, LAW

Most of the other eleven common-law judges supported Kenyon's interpretation, but not all shared his moralizing outlook. To explain the near-unanimity of the bench in 1800 in the face of leading parliamentary opinion, and their subsequent lack of agreement, we must consider the implications of an issue that probably mattered most in the end. From September 1800, the duke of Portland and others in government had been stressing the sanctity of private property.¹⁰⁷ In his last argument before Lord Kenyon, Law made the point:

Will the law dispossess the man who requires the terms of his property? Will it punish him as an extortioner, for so doing? No . . . it has not *yet* been contended that every man has not a right to put his own price, at least, upon his own land, and the uses thereof . . . Instances like these must strike at the root and foundation of all property, and every right of the free controul and disposition in respect of the same. It strikes equally at the foundation and free rights of property, thus to question this gentleman with Hops.¹⁰⁸

Waddington himself made the same point to the public.¹⁰⁹

The first answer from the judges was that property presumed a prior social good: order. The public-order argument had been in Kenyon's mind for years as a justification that transcended (or at least strongly qualified) all quibbles about such issues as the status of hops in the common law, let alone the theories of Smith. In the first, preliminary hearing of Waddington's case, on 8 February 1800, Kenyon observed:

A few years ago it became my duty to state to a Grand Jury, that Forestalling was clearly an offence at Common Law; and if I had not done so, I do not know what would have been the consequence. When I went to Oxford corn was dear, the people threatened an insurrection, and the whole country was alarmed. I stated what the law was, and the punishment that awaited those who were guilty of this offence. When the people knew there was a law to resort to, it composed their minds, and the alarm ceased. This is a thing most essential to the existence of the country.¹¹⁰

¹⁰⁷ Wells, *Wretched Faces*, 238.

¹⁰⁸ *Proceedings in the Cause the King v. Waddington*, 70-1, moving from the argument that it is lawful to charge for easements over land for the transport of coal, thus increasing the price of a necessity, to the analogy of foodstuffs. On the property issue, see also Hont and Ignatieff, 'Needs and Justice in the *Wealth of Nations*', 14.

¹⁰⁹ *Summary of the Trial*, vi.

¹¹⁰ *Times*, 10 Feb. 1800 (hearing for rule nisi). Kenyon was on the Oxford circuit in 1795, but he conflates a sequence. The press accounts suggest that at Oxford, faced with riot, he urged only repression; it was not until he arrived at Shrewsbury that he

This conviction, that promulgation of the existence of the offences of forestalling, regrating and engrossing was essential for pacifying the mob, undoubtedly owed something to Kenyon's discussions with country magistrates.¹¹¹ From many accounts of food riots, and encounters between rioters and gentlemen, we know that the restoration of public order depended largely on the ability of JPs to convince rioters that something would be done. As 'Governor' Thomas Pownall put it in 1795, the people would be 'patient' and 'peaceable' if justices were seen to be acting; otherwise, there would be '*insurgent demands of redress*', which like hammered steel would acquire 'a temper of resistance and recoil, which will not and cannot by any force be kept down . . . the people in their hunger will not perceive that they are doing wrong'. It was thus imperative that steps be taken to deal with forestalling.¹¹² By far the easiest response was to promise, and perhaps carry out, a few prosecutions of middlemen. This was self-evident to judges earlier in the century. Sir Thomas Parker, Chief Baron of the Court of Exchequer, wrote to his brother on King's Bench, Sir John Eardley Wilmot, during the great riots of 1756:

none of the Rioters were Indicted before me at Stafford, so that all the Service I could do my Country was to endeavour to prevent such disturbances for the future, by declaring in my Charge what remedy the Law had provided against Engrossing, and the other abuses complained of, if they were really aggrieved, but I repeated to make the better impression, that Outrage and Violence were not to be endured under any pretext whatsoever.¹¹³

As the marquis of Buckingham observed to Kenyon, just after Rusby's conviction, Buckingham's own conviction of Battams in 1796 'operated much on the minds of our lower people, who during the present calamity have not shewn the slightest discontent'.¹¹⁴

The restoration of order was of urgent concern to thousands

(n. 110 cont.)

began to speak of forestallers. See *Berrow's Worcester Ji*, 23 July, 13 Aug. 1795; also above, text at n. 36.

¹¹¹ Reflecting upon another case, he noted, 'we had an opportunity of knowing from the grand juries in different counties, that the decision gave great satisfaction': *R. v. Major, R. v. Arnold*, cited in Girdler, *Observations on Forestalling*, 119-22.

¹¹² Thomas Pownall, *Considerations on the Scarcity and High Prices of Bread-Corn and Bread at the Market* (Cambridge, 1795), 10, 50, 53.

¹¹³ Sir Thomas Parker to Sir John Eardley Wilmot, Park Hall (Staffs.), 7 Sept. 1756: Beinecke Library, Yale University, Osborne Lee papers, Osborne files.

¹¹⁴ Above, n. 43.

of country magistrates while Kenyon was hearing the marketing cases in King's Bench. The largest and most violent food riots of the entire century took place during these months¹¹⁵ and the desperate correspondence received by the Home Secretary was undoubtedly paralleled by equally desperate direct appeals to the judges when they met their grand jurors on circuit. Food prices were so high that forty per cent of the population in the Midlands could not have bought enough bread to survive even if they had spent the entire family income on nothing else.¹¹⁶ Doctors warned of epidemic disease, but magistrates warned of desperation, and, increasingly, insurrection. Their paternalism and their attempts to restore public order were inextricably entwined. The Revd Alexander Bunn Haden, the most energetic Staffordshire magistrate, despaired by May 1800 of effective parliamentary action against cheating millers. He appealed to the Home Secretary:

As a Conservator of the Peace, I shall always stand forward to protect it: but I never can attempt it, at the hazard of my Life, for the enriching of one part of the Community & supporting them in the most glaring Act of Oppression at the Expence of the Comforts, Happiness & even the Existence of the Other.

He cited instances of farmers withholding supplies, relying on their armed force in the Association Movement to suppress riot, and millers who engrossed and doubled the price of wheat that Haden himself had had sold at an affordable price.¹¹⁷ A spirited correspondence ensued, in which Haden stood by his comments on market prices in the face of increasingly sharp admonitions from the Home Secretary to protect the property of millers and farmers. By October 1800, Haden was apologizing for the strength of his criticisms of farmers and middlemen ('Your Grace, no doubt, has the best Information on the Subject'), but he would admit no more than 'I am satisfied that the high price of Grain is not entirely owing to the cause [Combination] I have attributed it'.¹¹⁸ Magistrates doubted the policy of freeing markets from

¹¹⁵ See Wells, *Wretched Faces*, *passim*.

¹¹⁶ Douglas Hay, 'War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts', *Past and Present*, no. 95 (May 1982), 129-32.

¹¹⁷ Revd Alexander Bunn Haden to Portland, Bilston, 10, 16 May 1800: PRO, HO 42/50, fos. 48-9. See also *Aris' Birmingham Gaz.*, 3 June 1795, for Haden's activity that year.

¹¹⁸ Revd Alexander Bunn Haden to Portland, Bilston (Staffs.), 27 Sept. 1800: PRO, HO 42/51, fos. 609-10; Haden to Portland, Bilston, 2 Oct. 1800: PRO, HO 42/52, fos. 421-2; Portland to Haden, 14 May 1800: PRO, HO 43/11, fos. 485-7; Portland to Haden, 30 Sept. 1800: PRO, HO 43/12, fos. 194-6.

controls, but they also doubted their ability to maintain order, faced with the most massive riots of the century, without lawful powers to control market abuses or at least promise to do so. By the summer of 1801, Haden was desperately demanding troops: 'nine-tenths of the inhabitants are of the lowest Class . . . in case a Riot should break out in the dead of the Night . . . what is to become of me, my Family and Property during the long interval that must take place before the soldiers can arrive?'¹¹⁹

Kenyon's reanimation of the common-law offences was very popular with many country and borough magistrates who thought in these terms. When the first conviction of Waddington was achieved at Worcester at the end of July 1800, Kenyon brought the good news to them as quickly as possible. He was sitting at assizes at Chelmsford and an express rushed the verdict to him from Worcester, so that he could inform the Essex grand jury that 'a most respectable jury' of the county of Worcester had found Waddington guilty on every count.¹²⁰ In the months following, local prosecution initiatives proliferated, at both the county and borough levels. At Oxford, for example, influential citizens suggested petitioning parliament for legislation to punish the marketing offences summarily, and the county justices suggested similar legislation to deal with frauds by mealmen and bakers. Oxford City Council announced a subscription to prosecute offenders and offered a reward, advertising these decisions by handbills and instructing the mayor to employ informers in the city markets. In Nottingham (where there were intense food riots in September), resolutions of local gentlemen and farmers called for action against profiteers and a new statute; there were similar resolutions at Chesterfield, Kidderminster and Worcester; an association to prosecute profiteers was formed in Middlesex.¹²¹

Kenyon was aware of the realities and the dangers of massive public disorder in London. In November, shortly before the

¹¹⁹ Haden to Portland, Bilston, 31 July 1801: PRO, HO 42/62, fos. 326-7. I am indebted to Malcolm Thomas of Friends' House Library, London, for this and other material from PRO, HO 42.

¹²⁰ *Summary of the Trial*, 92. It was in fact a *city* jury (Worcester city held its own assizes), before whom Waddington had doubted he would receive a fair trial.

¹²¹ *Nottingham JJ*, 6 Sept. 1800; Wells, *Insurrection*, 45; Chesterfield resolutions, 8 Sept. 1800; also Middlesex resolutions, 23 Sept. 1800: PRO, HO 42/51, fos. 406-9; similarly, Kidderminster, 15 Sept., Worcester, 10 Oct. 1800: PRO, HO 42/52; *Oxford Council Acts, 1752-1801*, ed. Hobson, 276-7 (3 Sept. 1800); *Jackson's Oxford II*, 27 Sept., 15 Nov. 1800. I owe these latter references to Wendy Thwaites. In general, see PRO, HO 42/51-2.

judgement on Waddington, Lady Kenyon wrote from London to her son about a threatened riot on Kennington common, but felt confident that the authorities were alert.¹²² Perhaps she and Kenyon were also reassured by the six huge blunderbusses that the Chief Justice had ordered the year before from Mssrs Boulton and Watt of Birmingham.¹²³ But Kenyon's conviction, that establishing a modern precedent would lead to the restoration of public order, had already been called into serious question by the unexpected consequences of Rusby's conviction for regrating in early July 1800, the first case tried by the Chief Justice.

The special jury in Rusby's case were twelve merchants, a fact that Kenyon made much of at a later stage of the case.¹²⁴ The evidence was conflicting as to whether Rushy indeed had resold oats, as charged in the indictment, but Kenyon disparaged the awkward testimony, suggesting perjury, and gave a virtual instruction to convict. He invited the jury to imagine the extreme case: 'Suppose a rich man were to be placed at every avenue of this town, who was to purchase up every article of provisions destined for the supply of the metropolis, and to sell the articles so purchased from hand to hand, increasing the price at every sale, what, in that case, would become of the poor consumer? This is an evil of an alarming magnitude, and every exertion to stem the torrent, in courts of justice, must be highly beneficial'. The *Times*, in its report, quoted Kenyon as explicitly calling for the jurors to establish a 'precedent' to end the afflictions of the poor. It is not surprising that they 'almost instantly' found Rushy guilty.¹²⁵

Very high prices continued through the summer. On 15 September, a mob organized through handbills hissed and shoved and threw mud at the mealmen going into the corn market

¹²² Lady Kenyon to the Hon. George Kenyon, London, 10 Nov. [1800]: Kenyon MSS, box 24.

¹²³ 'deadly instruments each capable of killing 50 men at a shot (more I believe than his Lordship's mouth ever sent from this world at one judgement . . .)': M. R. Boulton to James Watt, 4 Feb. 1799: Birmingham City Archives, Boulton and Watt Collection, parcel B.

¹²⁴ On the proceedings in a motion for a new trial, 24 November, see *Bell's Weekly Messenger*, 30 Nov. 1800.

¹²⁵ *Times*, 5 July 1800, quotes Kenyon in his peroration blaming jobbers not simply for an increase in price, but an increase of 50 per cent. On receiving the verdict, Kenyon invited the prosecutors of Rushy to proceed against his partner Smith on the basis of the evidence Smith had given in Rusby's defence, that he had been the one who had resold the oats. Kenyon MSS, *nisi prius* from 4 July to 3 December 1800; *Bell's Weekly Messenger*, 6 July 1800; date of trial given as 4 June in error.

at Mark Lane. The Lord Mayor came to reason with the crowd, but eventually read the Riot Act when they began throwing stones and brickbats at the constables. Finally, after sporadic attacks on bakers' shops, the mob went at midnight to the house of Rushy and entirely gutted it, as the property of the man who had been marked out and convicted before the Chief Justice as a social enemy. It was already clear to critics of Kenyon that his words had exposed many dealers to grave danger and given enormous encouragement to the mob.¹²⁶

Two months later, Law, acting for Rushy, moved for a new trial on the grounds that several counts in the indictment had not been proved. In his address to the court, he made much of 'the sufferings of the defendant in consequence of the popular clamour against him'.¹²⁷ The arguments on the motion were heard 24 November and, when Law again referred to the 'lawless violence' from which Rushy had suffered at the hands of the mob, Kenyon (who said he was ignorant of these acts) promised the fullest punishment for any of the rioters who had taken advantage of Rusby's conviction; however, he stated in the most unequivocal terms that he agreed with the verdict, found by the twelve merchants, 'men of great understanding and undoubted integrity'. And he repeated his sentiments that, although commerce was the 'very pillar of the state', '*Free Commerce -Free Commerce!* was a very captivating expression' that could not be allowed to justify rich men perverting the markets to the misery of the poor. Justices Grose and LeBlanc concurred in the refusal of a new trial.¹²⁸

At this point, Law abandoned any attempt to convert the judges to political economy and opened a new argument on what he termed 'merely . . . a dry question of law'. No evidence could be found of a prosecution for regrating (buying and selling on the same day, in the same market or one nearby), before the statute

¹²⁶ 'Chronicle' (14 Sept.), in *Annual Register*, xiii (1800), 33ff.; letter from Harvey Christian Coombe, Lord Mayor of London, 19 Sept. 1800: PRO, HO 42/51, fo. 284; also in the same volume, Fitzwilliam to Portland, Wentworth, 3 Sept. 1800: fos. 6-11; Revd David Hughes to Portland, Temple House, 19 Sept. 1800: fos. 197-8; Wells, *Wretched Faces*, 128ff. An extraordinary instance of the danger of encouraging the mob was reported after the 1796 attack on the king: a man was prosecuted at Lewes assizes for saying, 'Damn the King; I wish they had stoned him to death -he is a monopolizer, and a forestaller, and I wish his head on Temple Bar': *Manchester Gaz.*, 6 Aug. 1796.

¹²⁷ *Bell's Weekly Messenger*, 9 Nov. 1800.

¹²⁸ *Times*, 26 Nov. 1800; *Bell's Weekly Messenger*, 30 Nov. 1800.

of Edward VI, and that had been repealed in 1772. That is, the offence of *regrating* was not an offence at common law. On this, Kenyon granted him a rule to show cause why the judgement should not be arrested.¹²⁹ But where had the courts arrived at by this point, in terms of public policy rather than 'dry questions of law?' For it would be surprising, in view of what has been revealed about the cases, if the judges were thinking of nothing but old precedents in deciding Rusby's case. There was, in fact, a gradually dawning realization that two practical problems resulted from the policy of the court.

Law emphasized one of them in increasingly lurid detail. If the provisions of the statute of 6 Edward VI were carried out, 'this great and populous city must become a desert; all large aggregate bodies of people, wherever collected, must disperse, and betake themselves to the woods and fields, and seek their immediate nourishment like the other live stock upon the farm, and from the very soil which produces it. If the common law be the perfection of reason, can this be common law?'¹³⁰ Kenyon dismissed the argument that Londoners would starve if middlemen were banished: 'I say that it is not warranted'. But the argument was in fact a potentially crucial one, and Law pressed it again when Waddington's second trial came on a few weeks later: middlemen were indispensable to unite in one market distant producers with London consumers.¹³¹

Meanwhile, some counsel were becoming aware of unintended consequences of the prosecutions.¹³² The attack on Rusby's property showed that Kenyon's unnuanced hostility to *all* middlemen was, in its enthusiasm and venom, having the opposite effects on popular opinion to those that had been envisaged. Rather than calming the mob by showing that the law was active, Kenyon's rhetoric was greeted by the poor of London as yet another genteel sanction for the food riot. The September attack on Rusby was now followed, in December, by extremely widespread rioting in London, the most serious food riots in the capital in the eighteenth

¹²⁹ *Bell's Weekly Messenger*, 30 Nov. 1800; *Times*, 28 Nov. 1800 (reporting 27 Nov.).

¹³⁰ *Proceedings in the Cause the King v. Waddington*, 2-3, 62-3; *Summary of the Trial*, 36, 50; *Trial against Samuel Ferrand Waddington*, 139.

¹³¹ *Times*, 9 Dec. 1800. Law may have been aware that traders at Mark Lane had communicated their alarm about their personal security to the Lord Mayor and the Home Secretary: letter by Harvey Christian Coombe, Lord Mayor of London, 6 Oct. 1800: PRO, HO 42/52, fo. 163.

¹³² *Proceedings in the Cause the King v. Waddington*, 4 (comments of Garrow).

century. They began within a week of Waddington's conviction before Kenyon for the Kent offence.

Through these later months of 1800, although the king may have supported Kenyon's position, criticism of the Lord Chief Justice, both in private and in public, mounted. His 'exultation' at convictions, his ignorance and prejudices, were increasingly blamed for the riots and attacks on property, and for the 'monstrous and cruel usage' of men like Rusby. Certainly the mob claimed his sanction: they papered inflammatory handbills on the Monument; they painted walls with slogans, 'No hoarders -no grinders of the poor -Lord Kenyon, and down with the mealmen'; and they sang ballads in honour of him. Kenyon, his critics said, incited disorder and wakened oppressive doctrines, so that the common law seemed an 'incomprehensible, unknown, undefined but superior power' waiting to punish acts, 'which have been proclaimed aloud, by the omnipotent voice of Parliament, to be the only genuine and true sources of national prosperity and commercial greatness'. Richard Brinsley Sheridan publicly criticized the Lord Chief Justice; there was talk of impeachment. The duke of Portland privately deplored the popular ignorance and violence encouraged by 'the indiscreet & ever to be lamented doctrines which were promulgated from the Bench in the course of the Assizes'. J. Symonds, professor of modern history at Cambridge, attributed some of the rioting to 'the intemperate language so extra-judicially used'.¹³³

The Lords' committee investigating dearth reported on 15 December, the day that the London riots broke out, that they had not found anything but normal and laudable dealings by dealers.¹³⁴ Yet Kenyon and his brother judges did not initially draw back. In late January and early February 1801, when

¹³³ Kenyon, *Life of Kenyon*, 372; Fitzwilliam to Portland, 3 Sept. 1800: PRO, HO 42/51, fos. 6-11; John Graves Simcoe, 27 Mar. 1801: PRO, HO 42/61, fos. 351-3; 'Chronicle', in *Annual Register*, xiii (1800), 212; [Sir Thomas Turton], *An Address to the Good Sense and Candour of the People, in Behalf of the Dealers in Corn: With Some Few Observations on a Late Trial for Regrating, by a Country Gentleman* (London, 1800; internal date of 30 Sept. 1800), 13, 15, 18, 136-7, 152; Portland to Henry Dundas, 12 Oct. 1800: Nottingham University, Portland MSS, PwV 111; Wells, *Wretched Faces*, 245; *Autobiography of Arthur Young*, ed. M. B. Edwards (London, 1898), 344-5. Turton's lengthy pamphlet is a full defence of the wisdom of Smith and Burke, of the 1772 repeal and of the injured innocence of Rusby; the evidence, logic, and justice against his conviction is examined in detail in a very explicit critique of Kenyon's conduct of the case. There was a second edition later that year.

¹³⁴ *Second Report, Lords Committee to Consider the Dearth of Provisions: Ordered to be Printed 15th December 1800* (London, 1800), 21-2.

Waddington was finally sentenced on his two convictions, the judges still were determined to castigate speculators. But they faced a delicate balancing of priorities. They wanted to make an example with a severe sentence (to deter others), yet in terms that would meet the objections of those who said that such prosecutions were an interference with property. Moreover, they needed to do so without further encouraging the poor to take matters into their own hands. In particular, they had to ensure that the provisioning of London was not interrupted by mob action.

V

WHY WADDINGTON?

The warning to the mob, and the justification for interference with markets and property, were entwined in the sentence passed on Waddington on 28 January 1801 for the Worcester offence. By sending Waddington to prison for a month (he had already been there for many weeks) and fining him £500, Mr Justice Grose, who had been one of Kenyon's most enthusiastic supporters, emphasized the importance of the precedent now firmly established on the common law found 'in our ablest Reporters and Commentators'.¹³⁵ The security of property and commerce, far from being threatened by the judges, was a value to which they had sacrificed human lives:

God forbid this Court should do any thing which interferes with the legal freedom of trade! In support of this, the Law has declared that to violate the freedom of trade by intercepting commodities in their way to the market, taking them from the owners by force, or obliging the owners to accept a less price than that at which they were willing to sell them, and carrying them away against their will, or committing like violence on the owners in the market, is *a capital offence*, for which men have forfeited their lives to the Law.

This reference to capital convictions and executions was both a warning to would-be rioters and a justification for the doctrine on markets:

The Law, therefore, so far protects the freedom of trade, as it encourages men to bring their goods to market; and punishes those who by acts of

¹³⁵ *Trial against Samuel Ferrand Waddington*, 186. While in prison Waddington was said to have sold a ton of potatoes daily, and 'appropriated the proceeds to the benefit of his poorer fellow prisoners': T. C. Turberville, *Worcestershire in the Nineteenth Century* (London, 1852), 111.

violence would deter them from doing so. The same Law, which protects the rich against the violence of the poor, also protects the poor man against the avarice of the rich. And from all time it has been the object of the Law to prevent the enhancement of the price of merchandise coming to market, and peculiarly the price of the necessities of life, for the purpose of enriching a single individual.¹³⁶

The judges thus constructed their final argument not out of law, but out of natural justice, a common-law kind of equity.¹³⁷ The argument that hangings could be avoided through controls on freedom of trade was a familiar one to country gentlemen.¹³⁸

Two weeks later, sentencing Waddington for the second offence, Grose remarked on 'the speculations of gamblers, . . . the avarice of the rich', and 'the apathy of those who wrapped up in themselves, were forgetful of the relative duties they owed to their fellow-creatures'. He also adverted to 'the merciless quality of the crime'.¹³⁹ He seemed to journalists 'extremely anxious' to impress Waddington with his guilt, and passed a sentence of another £500 fine and another three months imprisonment, to commence at the expiration of his first sentence.¹⁴⁰ The heavy sentence appears to have been based not only on what Waddington did in Kent and Worcester.

For Waddington 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 and their revolution. Kenyon emphasized several times in the case that he did not know Waddington (although he admitted to knowing his family).¹⁴¹ It is likely that the entire bench knew of Waddington's notoriety. Certainly by June 1800 they had had direct evidence of his politics, because his *Appeal to the British Hop Planters* had a passage attacking the war with France (an 'ensanguined field, reeking with the blood of thousands — PREMATURELY SLAIN!'), and another denouncing the 'dignified orders' of

¹³⁶ *Trial against Samuel Ferrand Waddington*, 186-7.

¹³⁷ Atiyah's use of the *outcome* of the cases as illustrations of this tendency in eighteenth-century law, including private law, is thus only part of the story. The judges' own justification is presented explicitly in such terms.

¹³⁸ Buckingham, in his letter of 8 July 1800, noted that he had prosecuted Thomas Batts after dealing with rioters 'whose lives would have been forfeited, if they had been prosecuted for the heavy offence of plundering the corn-waggons': Buckingham to Kenyon, Stowe, 8 July 1800: Kenyon MSS, box 23; Kenyon, *Life of Kenyon*, 374-6.

¹³⁹ *Times*, 12 Feb. 1801.

¹⁴⁰ *Bell's Weekly Messenger*, 15 Feb. 1801.

¹⁴¹ *Times*, 21 Nov. 1800. Actually, Kenyon only said that, to the best of his knowledge, 'I have never seen his person before', a rather different claim.

England: 'Degen'rate sons! of Britain's fall'n race / Honor's dishonor, and Fame's last disgrace!'

By November the judges were even angrier. Waddington's *Summary* of his trial, his appeal to public opinion over the court, compared witnesses against him to spies in 'the old regime of France'¹⁴², and compared Kenyon's behaviour to the most political and oppressive acts of Lord Mansfield, bolstering the argument with a long quotation from the notorious libel on that Chief Justice by Junius.¹⁴³ In court, Waddington argued on his own behalf at one point, citing to Kenyon a defence of Horne Tooke, who in a famous action ten years before had humiliated Kenyon in open court.¹⁴⁴ And Waddington published yet another attack on the court while he was waiting for judgement.

Such effrontery received the treatment it deserved. Lady Kenyon reported to the family:

Lord Kenyon has sent my Geo.[Kenyon] a paper to see a very Impudent advertizement Waddington has published since he was Confined, which I fancy he will repent for they have delayed giving judgement till next term that he may have leisure during his imprisonment to consider & humble[?] his Tone of thinking and acting.¹⁴⁵

Waddington's politics probably added extra edge to Kenyon's distaste for the man.¹⁴⁶ But the issue of politics was more than a personal one. Erskine and another of the prosecution lawyers made glancing reference to Waddington's evil motives and private life, demanding an exemplary punishment.¹⁴⁷ This was probably a reference to the belief that, *if* there were machinations in the market-place, they were in part instigated by Jacobins in order to increase suffering and foment revolution. In short, Waddington, if he had not actually manipulated the market with

¹⁴² *Summary of the Trial*, 66 n.

¹⁴³ *Ibid.*, 52-9; see Hay, 'Contempt by Scandalizing the Court', 476.

¹⁴⁴ Townshend, *Lives of Twelve Eminent Judges*, 59ff.; *Proceedings in the Cause the King v. Waddington*, 6.

¹⁴⁵ Mary, Lady Kenyon to her sisters, 29 Nov. (1800): Kenyon MSS, no. 1429; this part of the letter is not printed in *HM C Kenyon*, 558. She meant that sentence had been delayed (until 28 January 1801); judgement was given 28 November 1800. See also *Proceedings in the Cause the King v. Waddington*, 6-7; *Times*, 29 Nov. 1800.

¹⁴⁶ He wrote home from Maidstone, while on circuit in July 1801: 'The hops and corn promise most extremely well indeed. They say hops will be very cheap, and that the speculators will suffer much. It is said a dealer in this town will lose by his monopolising scheme from twenty thousand to forty thousand pounds. Waddington, I understand, is very unpopular now, and likely to feel very reduced circumstances': Kenyon, *Lzfe of Kenyon*, 386-7.

¹⁴⁷ *Proceedings in the Cause the King v. Waddington*, 4, 11.

the intention of fomenting revolution, was the kind of man the judges were sure would exult in such an outcome.¹⁴⁸

The belief was plausible. The marketing cases were contentious, contradictory in their effects and the interpretations they provoked, precisely because they encapsulated a critical moment in the history of classical political economy and also in popular economic beliefs. Not only was there widespread disagreement among country gentlemen and the highest judges and the government as to the merits of Adam Smith versus ancient law; there were also strong cross-currents in popular opinion. Food rioters throughout the land stood with Lord Kenyon, but many Jacobins, including not only Waddington but also Thomas Paine himself, were persuaded that free markets, in the cloth halls of the northern textile industry, in some labour markets and even in food-stuffs, were ineluctably part of individual freedom, the freedom from aristocratic government. By 1779, during his time in Philadelphia, Paine had come to oppose market controls.¹⁴⁹ Waddington and many other radicals, including Cobbett, believed or claimed that the prosecution had in fact been instigated by 'Pitt's myrmidons' in order to punish Waddington for his politics.¹⁵⁰ Given Pitt's opposition to the old laws, this seems highly unlikely, however much he liked to gaol Jacobins: Waddington's conviction apparently created a precedent that sustained a theory of markets that Pitt deplored. Believing that he had been convicted of an offence abolished by parliament in 1772, Waddington tore up a copy of the statute in the court, exclaiming, '*most disgraceful! most disgraceful!*'¹⁵¹ The irony is that the prime minister and most of the government agreed with him.

On his release from King's Bench prison, where he had spent twenty-seven weeks, he was given a hero's welcome in Kent.

¹⁴⁸ This belief was reported from Lichfield by Richard George Robinson to Liverpool in the autumn of 1800: Brit. Lib., Add. MSS 38,234, fo. 170. See also *Aris' Birmingham Gaz.*, 28 July 1800, reprinting from the *London Packet*.

¹⁴⁹ Eric Foner, *Tom Paine and Revolutionary America* (London, 1976), ch. 5. Bentham remarked with respect to 'interference of government': 'I leave it to Adam Smith, and the champions of the rights of man . . . to talk of invasions of natural liberty', quoted in Atiyah, *Rise and Fall of Freedom of Contract*, 326.

¹⁵⁰ W. T. Sherwin, *Memoirs of the Life of Thomas Paine* (London, 1819), 132-5; William Cobbett, *American Register* (Arlington, 1816), 329, has an account of the trial; see also his *Rural Rides*, ed. George Woodcock (Harmondsworth, 1967), 179; 'S. F. Waddington to Lord Chief Justice Abbott, 12 Jan. 1825', *Republican*, 21 Jan. 1825. I owe the last reference to James Epstein.

¹⁵¹ *Bell's Weekly Messenger*, 1 Feb. 1801.

First came a celebratory feast at Tunbridge Wells. Hop planters then took the horses from his carriage 'covered with wreaths of hobbins', and drew him by relays of men the twelve miles to Maidstone. He made a triumphal speech to cries of 'Waddington and the freedom of commerce', and a subscription was begun on his behalf.¹⁵² But despite this his legal costs appear to have ruined him.¹⁵³

Grose and Kenyon had repeatedly urged the importance of such a precedent as they now appeared to have. Yet the policy argument of supplying London was not a trivial one. The old laws might make some sense in local markets, but the corn exchange and Smithfield were ramified with practices that threatened to expose hundreds of traders to prosecutions and, indeed, convictions, especially for regrating. It was at this point, when Kenyon was coming under very strong criticism from within government and a significant part of public opinion, that Law and the other counsel still defending Rushy elaborated the newly minted argument that regrating –the crucial question in the corn and meat markets of London –could not, by the most exhaustive examination of the ancient statutes and cases, be shown to have been an offence before the statute of 5 & 6 Edward VI. It had been repealed; the offence therefore no longer existed.¹⁵⁴ On 31 January the court granted a rule to show cause why

¹⁵² Turberville, *Worcestershire in the Nineteenth Century*, 112.

¹⁵³ In his 1811 petition to the prince of Wales he described his ruin: to support his family (he was married with eight children) he had to depend on 'the benefactions of intelligent and philanthropic people'. He petitioned for a position in the customs or elsewhere; he was refused a year later. In 1812 he appealed to Liverpool, and also wrote to Eldon and Ellenborough (who, as his counsel in 1800, had played a part in his financial ruin), again seeking a position, and again without results. He petitioned the prince again in July 1814, reminding him of his wrongful conviction for diverting money from 'the harpy fangs of intermediate agents . . . into the hands of the industrious cultivators of the soil'. He proceeded to inveigh against the predominance of Jews (another monopoly, in his eyes) in the victualling of the navy. PRO, HO 42/116, fos. 144-5, petition of Samuel Ferrand Waddington to the Prince Regent, Tunbridge Wells, 4 July 1811, enclosed with a letter from Waddington to the Prince Regent, Southboro Tonbridge, 4 July 1811; attached minute, 'not advised to take any step in consequence of it', 12 Aug. 1812; Waddington to Liverpool, 11 June 1812: Brit. Lib., Add. MSS 38,248, fo. 20; also R. Willmott's draft reply to Waddington of 26 June 1812: 'Lord L acknowledged receipt, informs you that he is wholly unacquainted with the circumstances of your case, has referred letter to the Home Department': Brit. Lib., Add. MSS, 38,248, fo. 126; Brit. Lib., Add. MSS 38,258, fo. 198, petition of Waddington to the Prince Regent, 21 July 1814.

¹⁵⁴ For a summary of counsel's arguments, see Joseph Chitty, *A Practical Treatise of Criminal Law*, 4 vols. (London, 1816), ii, 536-7, n. r.

judgement should not be arrested, and, following the arguments of counsel, the judges were divided.

This inconclusive outcome on regrating, and Waddington's convictions for forestalling and engrossing in November 1800 and February 1801, marked the end of Kenyon's campaign. In the event, no judgement was ever given in Rusby's case: the prosecution was absolutely discharged a few years later. A few other cases that had been progressing through the labyrinthine procedures of King's Bench resulted in acquittals in 1801, or were dropped.¹⁵⁵ The common law had triumphed through its ambiguity. A Jacobin engrosser had been publicly and severely punished; the justice of the law's interference with commerce had been vindicated. But, with the sudden discovery by the judges that regrating no longer existed as an offence, the pressing practical danger to the London markets had been adroitly avoided. Lord Holland, who attributed Kenyon's hostility to middlemen to ignorance, concluded that in the end, the Lord Chief Justice rather ignobly capitulated to the Ministry.¹⁵⁶ It seems more likely that, when he died in 1802, Kenyon, if not his brothers on the bench, still believed that he was right to enforce the marketing laws, and probably hopeful that the new precedent in *Waddington* would curb the evil for the foreseeable future.

VI

CONCLUSION

Kenyon was not to know that his successor as Lord Chief Justice was to be Edward Law, now Lord Ellenborough, who as Waddington's counsel had lectured his predecessor on the wisdom of the market.¹⁵⁷ Ellenborough displayed his ideological commitment to Smithian economics in a number of ways.¹⁵⁸ He doubtless also believed the two public-order arguments that had discredited

¹⁵⁵ Edward Edwards, the prosecutor in three of them (removed by *certiorari* from Essex and Middlesex), was himself successfully prosecuted for an offence in Kent (Appendix).

¹⁵⁶ Holland, *Memoirs of the Whig Party*, i, 167-9.

¹⁵⁷ Of which his father, Dr Edmund Law, Master of Peterhouse at mid-century, had not heard: 'Last week I called a meeting of the heads, who heartily concurred in endeavouring to break a combination of ingrossers and forestallers that had almost ruined our market': see letter by Law to an unspecified Lord, 20 Jan. 1756: Brit. Lib., Add. MSS 32,862, fo. 163.

¹⁵⁸ I deal with this in forthcoming work.

Kenyon's stand. If the old laws were enforced, the middlemen upon whom the supply of large urban markets, especially London, depended, could not trade, and the supply of food would be greatly disrupted, with all the dangers of riot that that entailed for the early modern state. The second danger lay in the fact that Kenyon's analysis of the mood of the people was wrong: far from reassuring them that the authorities were acting, denunciations of middlemen from the bench *encouraged* the mob to riot. Rusby's house had been destroyed shortly after he had been declared a social parasite by one of Kenyon's juries; the largest food riots in the capital in a century had followed Kenyon's second conviction of Waddington. More fundamentally, by 1802 the balance of persuasion and coercion in the maintenance of public order had changed in England, during the very months when Waddington and Rushy were being prosecuted. There had been a massive reinforcement of military power in England itself, as Pitt constructed barracks and thousands of troops were poured into the Midlands and other parts of the country.

In short, Kenyon's theory of social pacification through invocation of the law was rapidly becoming irrelevant, at least in terms of marketing. As one respected contemporary put it, 'doctrines of most serious tendency had been propagated from the bench, the bar, the hustings and the press, directly, although unintentionally, countenancing the popular passions and prejudices', which incited the mob to acts of violence. 'What has saved us lately, from conflagrations and massacres, but the country happening to be in a state of armed preparation?'¹⁵⁹ Kenyon and his brother judges had blundered into inflaming the mob. Denouncing forestallers from the throne or the bench had always been a calculated risk, and the purpose, calming anxiety about the markets in order to prevent riot, was now becoming irrelevant as Britain became an armed camp.

But Law, who as counsel for Waddington and for Rushy had urged such arguments, and had also given Kenyon a seminar in the Smithian market model, was by April 1802 Lord Chief Justice, the guardian of the common law. Part of that law now was *Waddington's Case*, an unequivocal and recent precedent. Or was it? What was Ellenborough's attitude as a judge, rather than as an advocate for a client?

¹⁵⁹ [Sir Gilbert Blane], *Inquiry into the Causes and Remedies of the Late and Present Scarcity*, (London, 1800).

At the time of Rusby and Waddington's cases, at least seven other marketing prosecutions were under way in King's Bench. But, as the price-crisis eased, most were dropped, resulted in acquittals before juries or were found insufficient in law. One, the prosecution of a Camarthen miller for engrossing very large quantities of grain, was due to go before a jury in March 1802, but Kenyon was ill (he died in April). The case never came to trial.¹⁶⁰

Waddington, while still in prison early in 1801, tried to sue for monies that he had advanced to a hop-grower on the value of his crop, which had never been delivered to him, on a contract of 1799. He was nonsuited at spring assizes in Kent, on the grounds that the written agreement had not been stamped, and the nonsuit was confirmed in the court of Common Pleas. The few comments of the judges suggest, however, that new arguments were being rehearsed. Although Mr Justice Rooke used the fact that Waddington's contract was 'a speculative bargain' rather than 'an ordinary commercial transaction' to find against him, Mr Justice Chambre explicitly referred to the legality of a contract for the sale of growing hops for future delivery.¹⁶¹

Once Ellenborough was on the bench it was evidently realized that no convictions could be had, or would stand re-examination, in King's Bench. In 1804, Rusby, who had been held to a recognizance until the disputed point of law on whether regrating was an offence had been determined, was given a final and free discharge. In 1806, Waddington sued the delinquent hop-grower (or rather his executors) once more, this time in King's Bench, Ellenborough's court. There, Waddington got a verdict and judgement for £861 damages. The defendants appealed the judgement, having the case heard again on writ of error in Exchequer Chamber. Their defence there was explicitly based on the precedent Kenyon had created in Waddington's criminal convictions: that selling growing hops was the equivalent of forestalling and that the statute of 1772 had not taken away the common-law offences. The Chief Justice of Common Pleas, who headed the court, rejected the argument from analogy on several grounds,

¹⁶⁰ See Appendix.

¹⁶¹ The suit was against executors of a deceased hop-grower, who like him had failed to deliver all the hops on 22 acres which Waddington *et al.* had contracted in November 1799 to buy at £10 per cwt; the nonsuit was on the ground that the unstamped agreement could not be entered in evidence: *Waddington et al. v. Bristow et al., Executors of Simmons* (9 June 1801), 2 Bosanquet & Puller 451; 126 ER 1379.

and explicitly endorsed parliament's will in 1772: 'After the 12 Geo. 3 we should expect a precise determination in point to authorize us to hold such a contract against law'.¹⁶²

The realization that *Waddington* was being set aside as a precedent can be partially traced in the justicing handbooks. The 1805 edition of Burn's *Justice of the Peace* preceded a full account of *Waddington's Case* with the comment, 'indeed lamentable would be the plight of the public and of the state, were there no remedy against practices which have been justly termed most heinous offences against religion and morality, and against the established law of the country'.¹⁶³ But the 1807 edition of Bacon's *Abridgement* ignored *Waddington* and, by the 1810 edition of Burn, the account of the case was considerably shortened.¹⁶⁴

The decisive change, however, came with Joseph Chitty's treatment of the offences in 1816, in the first edition of his influential *Practical Treatise on Criminal Law*. In the absence of any further decided cases, it was impossible to be absolutely certain of the grounds on which King's Bench would dismiss prosecutions for forestalling, regrating and engrossing. But Chitty's conclusion was that the court would apply the tests of the criminal law in the most stringent way to such accusations. For an act to be a crime it had both to do harm and also be the product of knowing or evil intent (*mens rea*) on the part of the actor. *Waddington* may have fit the latter if not the former requirement (there was evidence on his trial that he had tried to organize growers to drive up prices), but *Rusby* was probably more typical, in that he was simply engaged in his usual practices of buying and reselling, an essential link in the complex nexus of wholesale and retail markets. It would be very hard to prove that such a man intended to reap an unwarranted profit. But Chitty's interpreta-

¹⁶² *Bristow and Others, Executors of Henry Simmonds v. Waddington and Others, in Error*, 20 Nov. 1806, 2 Bosanquet & Puller (N. R.) 355; 127 ER 664. Exchequer Chamber, which heard cases appealed from King's Bench, consisted of the judges of the other common-law courts. *Waddington* cited this decision in his petitions to the Prince Regent.

¹⁶³ Richard Burn, *The Justice of the Peace and Parish Officer*, 20th edn, 4 vols. (London, 1805), ii, 358 (also in the 1814 edn). It provided forms of indictments for each offence at common law, as did Thomas Walter Williams, *The Whole Law Relative to the Duty and Office of a Justice of the Peace*, 2nd edn, 4 vols. (London, 1808), ii, 503-7, which also noted some unrepealed statutes. Neither cite *Rusby* on regrating and both say that all three offences remain punishable at common law.

¹⁶⁴ Matthew Bacon, *A New Abridgement of the Law*, 7 vols., 6th edn (London, 1807), iii, 261; see Hay, 'Moral Economy, Political Economy, and Law', for Bacon's treatment of the offence in earlier editions.

tion of the probable state of the law also pointed to the doubts about what Kenyon had simply assumed: that engrossing, and the other penalized acts, actually harmed anyone. Two cases in particular were used by Ellenborough from the bench to show that the reverse was in fact the case. The first, *R. v. Webb et al.* (1811), was a prosecution against the partners of the Birmingham Flour and Bread Company under the Bubble Act. Ellenborough endorsed the finding of the jury that a company that bought very large quantities of grain for the purpose of regularly supplying Birmingham with bread and flour had a purpose 'not manifestly tending to the common grievance', but one 'expressly found to have been beneficial'.¹⁶⁵ In the following year, in *Pratt v. Hutchinson* (1812), the issue of whether a company purpose was beneficial was again raised, and the example in *Webb* again relied upon. The year was a significant one, for prices were higher than at any time since 1801 and there was widespread suffering and, in many parts of the country, again near-insurrection. In these circumstances, Ellenborough did not reactivate the common-law offences; rather the reverse.¹⁶⁶

Although in both of these cases it was a jury that had made the determination, Chitty concluded in 1816:

at the present day, it would probably be holden that no offence is committed unless there is an intent to raise the price of provisions by the conduct of the party. For the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing of a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community . . . the *division of labour or occupations* will in general occasion the commodity to be sold cheaper to the consumer.¹⁶⁷

The reference to Smith is clear. Forestalling and perhaps regrating continued to be attacked under local market regulations for some years, but the common-law offences were dead.

They had a short afterlife in the manuals of justices of the peace. In the 1820 edition of Burn, the encomium of the common law quoted above was retained, but Chitty's strong endorsement of Law's arguments was also quoted at length, complete with

¹⁶⁵ *R. v. Webb* (1811) 14 East 406 (104 ER 658), at 421. The Company was said to be a direct response to the dearth and high prices of 1795-6: see 14 East 409.

¹⁶⁶ I discuss these cases more fully elsewhere.

¹⁶⁷ My emphasis. Like Ellenborough when he argued before Lord Kenyon, Chitty cited *Wealth of Nations*, as well as *Webb*, and *Pratt v. Hutchison*: Chitty, *Practical Treatise*, ii, 528 n. h.

references to *The Wealth of Nations*, and to *Rusby*.¹⁶⁸ Finally, in 1837, the editor observed: 'This offence is now of rare occurrence, or, at all events, the offender is rarely, if ever, proceeded against; it is deemed, therefore, not necessary to insert any forms hereon'. In 1844, when parliament passed *An Act for Abolishing the Offences of Forestalling, Regrating, and ingrossing* . . . (7 & 8 Victoria, c. 24), which formally abolished the offences at common law or by any statute and repealed a number of statutes earlier than those repealed in 1772, as well as Irish and Scottish statutes, there was not one word of debate.

I have argued here that the successive phases of criminalization and decriminalization of the marketing offences can only be fully explained when such contingencies as the idiosyncrasies of Chief Justices and the short-term crises of harvest failure are taken into account. But the marketing cases are also significant markers of several fundamental processes in English society at the end of the eighteenth century.

The acts and politics of Waddington as a defendant throw into sharp relief the complicated and unresolved attitudes of wider public opinion to classical political economy before the end of the century. There were probably generational differences: Kenyon trained as a lawyer in the 1750s, when the marketing offences were accepted law (supported by Ellenborough's father, among others).¹⁶⁹ But even in 1800 the acceptance by the parliamentary leaders of Smith's conclusions was opposed by a disparate group of doubters. Evangelical reformers or sympathizers such as Glasse, Girdler and Kenyon himself levelled a moral critique against Smith. Traditionalist magistrates and others who prided themselves on practical rather than theoretical knowledge (Liverpool, Banks, probably the King) distrusted him. Military officers often supported the old view for similar reasons: Erskine, who had served in both the navy and army, was an instance; and Warren Hastings advised close regulation of British markets in 1801, based on his experience in India in 1783.¹⁷⁰ But political and theoretical alignments were greatly complicated by the endorsement of Smith by Jacobins, including Waddington

¹⁶⁸ Unchanged in the 1825, 1830 and 1836 editions of Burn, *Justice of the Peace and Parish Officer*.

¹⁶⁹ Above, n. 157.

¹⁷⁰ Salim Rashid, 'The Policy of *Laissez-Faire* during Scarcities', *Econ. JI*, xc (1980), 500-1.

(who dedicated one of his pamphlets to Pitt) and Tom Paine himself.

The fact that Waddington and Rushy were prosecuted in such a glare of publicity helped to bring about fundamental change. The trials were a public seminar in market theory, in the details of the wholesale trades, in the issues of public order. Smith's critique had been directed at law, and these cases were the ultimate test of the argument that courts could beneficially criminalize certain kinds of contracting. The failure to establish a precedent against regrating in 1801, and the destruction of Kenyon's precedent against engrossing by the new Chief Justice after 1802, powerfully endorsed the government's support of non-intervention. (The most important politician of all who may have continued to doubt, George III, was no longer in a position to do so effectively after his final madness began in 1810.) The repudiation of *Waddington* as a precedent became part of the interconnected arguments that increasingly justified a new theory of contract law, one attuned to the ideal of perfect markets rather than to those of morality, custom or 'police', in its old sense.¹⁷¹

These cases also call our attention to the immense change in the nature of public-order calculations brought about by the Revolutionary war. One of the oldest policy consideration behind the marketing laws, preventing disorder by protecting the consumer, was suddenly outmoded, not only by the doubts about the effects of the laws, but also because the massive armed force created in the course of the war with Revolutionary France, a large part of which was now garrisoned on the British public, made it possible to weaken the regulatory state by strengthening the policing state. Troops allowed the political elite to believe in the practical possibility of free markets, as well as their theoretical desirability.

Finally, the cases delineate some of the contours of the constitutional independence and political influence of the judiciary in this period. Kenyon attended some cabinet councils, but did not sit there as Mansfield had done continuously for some years, and Ellenborough was to do for some months. None the less, like all of the great eighteenth-century judges, he was a powerful political figure when he wished to be. Often such influence was out of the

¹⁷¹ Atiyah, *Rise and Fall of Freedom of Contract*; Douglas Hay and Nicholas Rogers, *English Society in the Eighteenth Century: Shuttles and Swords* (Oxford, 1997), chs. 5-9.

public eye: advising on the Regency Crisis of 1788; questioning political prisoners before the Privy Council; commenting on proposed legislation. But the marketing cases are a reminder –one of many –of how large issues of public policy, hotly contested, were in fact debated in the courts rather than in parliament, and how important the influence of a powerful judge could be on such debates, in directing verdicts, giving judgement and making comments *obiter*. The most important common-law judges were as much statesmen as was the Lord Chancellor, and the role was expected of them.¹⁷² After 1701, they were statesmen independent of the administration when they wished to be.

Ellenborough's endorsement of Smith was not followed immediately everywhere in the common-law world.¹⁷³ There was independent Irish legislation of 1738 and 1746 punishing forestalling and engrossing and neither it nor ancient statutes was affected by the 1772 English repeal.¹⁷⁴ As in England, there was probably confusion about what the new political economy meant. Sir Richard Aston, in a charge to a Dublin jury in 1763, referred to both the price mechanism and to the old laws with approval.¹⁷⁵ Moreover, traditionalists were still dominant in the Irish legislature. In 1774, a statute was passed that empowered any three of the market jury of the City of Dublin to visit markets and storehouses and shops, and to seize and condemn any provisions 'in the hands of forestallers, regrators, or ingrossers'; similar powers were extended to other parts of Dublin by a statute of 1787.¹⁷⁶ In September 1800, the Recorder of Dublin charged the grand jury to present forestalling: 'A crime of such magnitude ought, at all times, to be narrowly watched, and rigorously pun-

¹⁷² I make this argument in a book in progress, *The Judges and the People: King's Bench and the Criminal Law in English Politics and Society, 1750-1820* (forthcoming).

¹⁷³ In Scotland, not a common-law jurisdiction, forestalling was an offence considered of such public importance (or delicacy) that prosecution was reserved for the Lord Advocate, so that government policy rather than the wishes of private prosecutors was decisive: Douglas Hay and F. Snyder, 'Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State', in Douglas Hay and F. Snyder (eds.), *Policing and Prosecution in Britain, 1750-1850* (Oxford, 1989), 29. See also J. Erskine, *An Institute of the Law of Scotland* (Edinburgh, 1773), 765-6.

¹⁷⁴ 11 Geo. II, c. 11 (1738); 19 Geo. II, c. 17 (1746), cited in Sir Richard Bolton, *A Justice of Peace for Ireland*, ed. Michael Travers (Dublin, 1750), 269-70.

¹⁷⁵ *Charges to the Grand Jury*, ed. Lamoine, 405.

¹⁷⁶ 13 & 14 Geo. III, c. 22, s.73 (1774); 27 Geo. III, c. 46, s. 3 (1787); both were repealed in 1844.

ished'.¹⁷⁷ The statutes continued to be cited in the standard Irish justices' handbook into the nineteenth century.¹⁷⁸

In the British North American colonies, perhaps especially those with governments strongly influenced by military officers of a traditional cast of mind, the wisdom of closely regulating markets in foodstuffs was widespread. The rejection of such legislation in Philadelphia during the American Revolution has been mentioned. Ordinances of Quebec in 1777 and 1780 continued the market regulation common under the French regime before 1760 and in the earlier period of British rule, defining and setting penalties on forestallers, regrators and engrossers.¹⁷⁹ In Nova Scotia, in British hands from 1713, there was legislation against forestallers and engrossers enacted in 1758, 1766, 1778 and 1798, for food, hay, provisions and wood. From 1826, the statutes were suspended repeatedly; they were repealed in 1847.¹⁸⁰

These were colonies of British, or at least, European settlement. In India and the rest of the non-white Empire, new economic theory favoured at the highest level could be expressed as policy and law much more quickly, particularly with lecturers like Thomas Malthus at Haileybury. The governor of Bombay intervened actively during the famine of 1802-4, but by the time of the Madras famine of 1806-7 policy was divided, with copious references to Smith used to justify non-intervention. Henceforth, famine in India largely was left to the mercies of the invisible hand.¹⁸¹

The strength of the belief in theory is clear in the English case and the abrogation of the marketing laws was, in many ways, a crucial step in its advance. Supplying the consumer by direct state intervention was one of the oldest and most developed parts of the Tudor/Stuart regulatory state inherited by the Hanoverians, even if in a decayed form. The issue of starvation was the ultimate test of a commitment to political economy. Many

¹⁷⁷ Quoted in Girdler, *Observations on Forestalling*, 314.

¹⁷⁸ Leonard MacNally, *The Justice of the Peace for Ireland*, 2 vols. (Dublin, 1808), i, 676-7.

¹⁷⁹ Quebec 17 Geo. III, c. 4 (1777); 20 Geo. III, c. 2 (1780), in Arthur G. Doughty, *Report of the Work of the Public Archives for the Years 1914 and 1915* (Ottawa, 1916; sessional paper 29a of 1916), 60-2, 103-10.

¹⁸⁰ 32 Geo. II, c. 10 (NS); 6 Geo. III, c. 6 (NS); 17 Geo. III, c. 5 (NS); 38 Geo. III, c. 4 (NS); SNS 1826, c. 20; SNS 1847, c. 66. I owe these references to Philip Girard.

¹⁸¹ Rashid, 'Policy of *Laissez-Faire* during Scarcities', 500-1; S. Ambirajan, *Classical Political Economy and British Policy in India* (Cambridge, 1978), chs. 1, 3.

economists on the Continent, theorizers of the free market, had indeed drawn back in the 1770s from the extreme conclusion that food markets were like other markets; in England, perhaps because more of the population was above the line of subsistence, they did not.¹⁸² In 1801, faced with a far greater crisis, the English judiciary (but not the government) also refused to abandon the moral supervision of markets. But once that crisis had passed, the political validation of Smithian economics was massively advanced in England, and its empire.

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¹⁸² R. W. Fogel, 'Second Thoughts on the European Escape from Hunger: Famines, Chronic Malnutrition, and Mortality Rates', in S. R. Osmani (ed.), *Nutrition and Poverty* (Oxford, 1992).

APPENDIX

MARKETING PROSECUTIONS IN KING'S BENCH 1799-1801*

28 Nov. 1799, *John Rushy, yeoman (certiorari by prosecutor Richard Snell, from London City Quarter Sessions, for engrossing 90 quarters of oats at the Corn Exchange, and another indictment for regrating 30 quarters)*: for details, see text. Sources: KB 10/51, pt 1, Hilary 40 Geo. III, nos. 4, 5; KB 15/6, Hilary 40 Geo. III; KB 15117, Easter and Trinity 40 Geo. III; KB 21147, 350, 357, 362, 373, 409, 411, 433, 438; KB 21148, 337.

22 Jan. 1800, *S. F. Waddington (criminal information of 10 counts for engrossing a large quantity of hops and making forehand bargains with intent to raise the price, persuading persons not to carry hops to market, at Maidstone, Kent)*: for details, see text. Sources: KB 11161, pt 1, Easter 1800, no. 2; KB 15/6, Trinity 40 Geo. III; KB 15117, Michaelmas 41 Geo. III; KB 21/47, 344, 358, 395, 403, 436, 444, 454, 458, 467; KB 1130, Hilary 1800, affidavits of Thomas Knipe, Edward Meredith, William Richmond (2), Thomas Ellis, Peter Broadley *et al.*; also Trinity 1800, affidavits of William Richmond, Samuel F. Waddington.

29 Mar. 1800, *S. F. Waddington (criminal information of 8 counts for spreading and raising false rumours to enhance the price of hops, persuading dealers not to bring hops to market, engrossing hops, at Worcester)*: for details, see text. Sources: KB 11161, pt 2, Trinity 1800 no. 1; KB 15/6, Trinity 40 Geo. III, 10 July 1800; KB 15/17, Trinity 40 Geo. III; KB 21147, 344, 358, 369, 376, 396, 427, 439, 451; KB 1130, Easter 1800, affidavit of William Penn.

15 Sept. 1800, *Richard Laycock, yeoman (certiorari by prosecutor, Edward Edwards, M ddx., for forestalling Smithfield of cows and calves)*: offence 13 Mar. 1800; indicted 15 Sept. 1800; 1 Dec. 1800 certiorari allowed; leave to imparl, pleads not guilty Hilary 41 Geo. III. Sources: KB 10/51, pt 2, Michaelmas 1800; KB 15/6, Michaelmas 41 Geo. III; KB 21/47, 435.

7 Oct. 1800, *Yeats (certiorari by prosecutor, Edward Edwards, from Chelmsford, Essex Quarter Sessions, forestalling lambs at Rumford market)*: offence 1 Sept. 1800; indicted 7 Oct. 1800; certiorari allowed 7 Nov. 1800. Sources: KB 11161, pt 1, Michaelmas 1801, no. 25; KB 21/47, 411.

8 Oct. 1800, *Richard Mansel Philipps Esq. (certiorari by prosecutor, John Davies, gent., from Carmarthen Quarter Sessions, for engrossing 4,000 quarters of wheat, 6,000 quarters of barley, 3,000 lb of cheese, 6,000 quarters of oats)*: offence 1 Mar. 1800; presented 8 Oct. 1800; certiorari 22 Oct.; leave to imparl Michaelmas 41 Geo. III; 23 Jan. 1801 order to plead; 27 Jan. order to plead; 31 Jan. order to plead; order for trial 4 Feb. 1802; 12 Feb. order for special jury at instance of defendant; order for trial countermanded 11 Mar. 1802. Sources: KB 11/61, pt 1, Michaelmas 1800, no. 28; KB 15/6, Michaelmas 41 Geo. III; KB 15/17, Hilary 42 Geo. III; KB 21/47, 444, 449, 454, 630.

8 Oct. 1800, *Joseph Wood, brewer (certiorari by defendant, from Newcastle on Tyne Quarter Sessions, for enhancing price of barley)*: offence 27 Sept. 1800; indicted 8 Oct. 1800; certiorari 12 Feb. 1801; leave to imparl Easter 41 Geo. III; 25 June order for a jury of Northumberland at instance of defendant; notice of trial 21 July 1801; 6 Nov. rule nisi for judgement for defendant. Sources: KB 11161, pt 3, Easter 1801, no. 39; KB 15/6, Easter 41 Geo. III; KB 15/17, 21 July 1801; KB 21/47, 542, 546.

13 Jan. 1801, *Samuel Quarrel, butcher (certiorari by prosecutor, William Brundell, Essex Quarter Sessions, forestalling lambs)*: offence 1 Sept. 1800; indictment 13 Jan. 1801; certiorari 12 Feb. 1801. Sources: KB 11/61, pt 3, Easter 1801, no. 30.

13 Jan. 1801, *Samuel Mathers, butcher (certiorari by prosecutor, Edward Edwards, Chelmsford, Essex for forestalling lambs)*: offence 2 Sept. 1800; indicted 13 Jan. 1801; certiorari 12 Feb. 1801. Sources: KB 11/61, pt 3, Easter 1801, no. 29.

13 Jan. 1801, *Samuel Judson, butcher (certiorari by prosecutor, William Brundell, Essex Quarter Sessions, for forestalling calves)*: offence 1 Sept. 1800; indicted 13 Jan. 1801; certiorari 12 Feb. Sources: KB 11/61, pt 3, Easter 1801, no. 28.

16 Jan. 1801, *William Josceline, yeoman, prosecuted by John Cowper, gentleman, clerk of the peace for the borough (certiorari by defendant, borough St. Albans, Herts., regrating 7 loads of wheat)*: offence 29 Nov. 1800; indictment 16 Jan. 1801; certiorari 18 May 1801; leave to imparl, Michaelmas 41 Geo. III; 23 June by consent of prosecutor, ordered that defendant may sign judgement for want of a joinder in demurrer. Sources: KB 11161, pt 2, Trinity 1802, no. 17; KB 15/6, Trinity 41 Geo. III; KB 21/47, 535, 536.

18 Apr. 1801 *John Gilbert (certiorari by defendant, City of Lincoln, engrossing fish, geese, and ducks)*: offence 24 Oct. 1800; indicted 18 Apr. 1801, traverses; certiorari 12 Feb. 1801; leave to imparl Easter 41 Geo. III; 8 June order for a concilium at instance of defendant; 17 June after hearing counsel both sides, it is adjudged that the prosecution is insufficient in law, judgement for the defendant (the judgement was found bad on demurrer for not specifying quantities): *R v. Gilbert*, 1 Easter 582. Sources: KB 11/61, pt 3,

Easter 1801 no. 36; KB 15/6, Easter 41 Geo. III; KB 21/47, 512, 525; KB 21/48, 342.

Jan. 1801 Edward Edwards (Kent) for regrating a cow at Farningham fair: Jan. 1801 indicted for regrating a cow at Farningham fair but not tried; imprisoned in Fleet as of June 1801; removed on habeas corpus to Kent; fined £50 and to be imprisoned 12 months, quarter sessions for Western Division of Kent, Aug. 1801. Sources: KB 1/3111, Trinity 41 Geo. III no. 1, no. 51, affidavit for habeas corpus to remove to Kent for trial; *Manchester Mercury*, 11 Aug. 1801. (The fact that Edwards appears as both a prosecutor and defendant in these cases suggests that he was a common informer, skilled in the use of the law. He is perhaps the Edward Edwards who applied for habeas corpus from Newgate in November 1791, after being arrested for not having answered to an indictment for theft in Wiltshire in 1786: PRO, KB 16/21/1.)

* Sources: The manuscript records of the Court of King's Bench in the Public Record Office, London, consist of paper affidavits, many series of parchment rolls and files, and a variety of registers. To reconstruct a case it is usually necessary to use all or almost all of the series. Some of those on the crown side of the Court are KB 1 (for the affidavits); KB 10 (London and Middlesex criminal informations); KB 11 (out-county informations); KB 15 (appearance and notice of trial books); KB 16 (returned writs); KB 21 (rule or order books); KB 29 (controllment rolls). An explanation of the KB series is given in my *Crown Side Cases in the Court of King's Bench* (Staffs. Hist. Soc., forthcoming).