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Writing About the Death Penalty

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WRITING ABOUT THE DEATH PENALTY

DOUGLAS HAY*

John Beattie aroused my interest in both the law and the eighteenth century when I was an undergraduate, encouraging me to work with E.P. Thompson for the doctorate. His many articles and two fundamental books have largely created the field, and his ongoing research continues to shape it. Jim Phillips and James Muir both have taught me a great deal through their outstanding work on the law of the colony of Nova Scotia and on other topics. The contributions of all three to this issue are generous to a fault, and I am grateful for their prompting to look back at my first published piece, its reception, and the development of the subject. I should add that I have benefited immensely from the collegiality and thoughtfully critical support given over many years in the Toronto Legal History seminar, where this exchange originated in February 2006.

The other contributors have succinctly summarized several elements of my argument and evidence in 1975.1 ‘Property, Authority and the Criminal Law’ was a version of the concluding chapter of my doctoral dissertation.2 Some of the chapter’s argument was hunch (presented as a hypothesis); most was based on a lot of archival research. Its reception was gratifying, and I am increasingly surprised by its longevity and the uses to which it has been put. The fact that the argument and my evidence was also comprehensively misunderstood or misrepresented by a few readers was mildly annoying. The additional fact that some topics were hardly even mentioned in my overly-long dissertation was an incentive for me to do further work on particular points, where I also responded to critics of the earlier essay.3 But

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2 ‘Crime, Authority and the Criminal Law: Staffordshire 1750-1800’ (1975), 639 pp, based on a complete archive of court records for 1900 cases, a survey of another 2100 cases, and manuscript and printed sources for the decisions of judges, government, manufacturers, magistrates, gentry and peers in the those cases, from prosecution to execution.

meanwhile it continued to be cited, reprinted, used in teaching, praised and condemned for arguments that I had not made as well as ones I had, as happens when a piece of writing is absorbed into a discourse. People who have not read it, or not re-read it, nonetheless believe they know exactly what it says.

WRITING ABOUT CRIMINAL LAW

Looking back, the academic politics that came to surround arguments about the culture of the criminal law of two centuries ago surprise me less than they did at the time. I had been a student of John Beattie at Toronto, then of Edward Thompson at Warwick. Beattie fired my interest in Hanoverian England and the law, as he has for so many others; Thompson made me sensitive to the ways in which those with power work, including the fact that they work to conceal their power. By the time I became his student Edward was becoming deeply interested in the jury, habeas corpus, rights of assembly, and working on the ways in which those protections from the power of the great and of arbitrary government had been incrementally and contingently erected in England. His political writing and speaking was increasingly concerned with re-animating and protecting them from erosion, as guarantors of a space for democratic speech and agitation. The threat was from both increasingly authoritarian governments and security scares on the one hand, and from pure laine Marxist theorists on the other, of various stripes, who scorned the legal inheritance or thought it simply an epiphenomenon, part of the ‘superstructure.’

What was happening in universities was also to be important for social historians of criminal law. The impact of the linguistic turn, and the varieties of postmodernism that followed, increasingly rendered not only discussions of class, but almost any discussion of social inequality other than gender or race, unfashionable, even on the left, in departments of history. The central place of economic inequality in what people still insisted on calling ‘advanced’ societies had always interested me. The fact that the law guaranteed such inequality in upholding the existing distribution of property rights, indeed that our law appears to have been coeval with the state structure and market mechanisms that in large measure created and enforced that inequality, seemed one of the most interesting things about it. But the zeitgeist was emphatically not interested. The effects of economic inequality were increasingly not on the academic agenda (as a generation of scholars and intellectuals reared in
world depression and war retired), and in the next two decades work informed by such concerns began to seem bizarre. The word ‘class’ was expunged from the vocabularies of academics, in the same years that saw the greatest increase since the 1930s in inequalities of wealth and income in the United States, Britain and Canada,, an interesting coincidence for historians of the politics of the academy.

In the same years two theoretical positions were doing battle in the laws schools. Neo-liberal (neo-conservative) economic theory was penetrating elite American (and Canadian, and Australian) law schools as ‘law and economics’, seeking to insert into legal doctrine explicitly neo-classical economic theories of markets. Law always determines rights in markets, but the tenets of Adam Smith, updated, were increasingly also a matter of faith for these proselytisers. Part of that project was to marginalise other visions of law. One reason was the alarm felt at the same time by some faculty members of American law schools in which critical legal studies had become salient. Conservatives claimed that CLS was a project to undermine Law Itself, even in the heart of the citadel, at Harvard. My work was cited by some of the ‘crits’, and clearly I had my own doubts about how far the rule of law was realized in our societies, now as in the past. I did not think of mine as a particularly Marxist position (it had more in common with very old whiggish and democratic arguments) but in the United States more than most other English-speaking countries, delegitimation of an argument is helped by deploying the word Marxist, and writing of ‘conspiracy theories’ and ‘rose-coloured glasses of the deepest hue’ that turn ‘little crooks into class warriors’. So ‘Property, Authority and the Criminal Law’ was more of a provocation than I had ever expected it to be.

In retrospect, the fact that the death penalty lay at the centre of the argument was probably also important to its reception in the late 1970s, by both hostile and

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5 John Langbein, ‘Albion's Fatal Flaws’ (1983), 98 Past & Present 101 and (on ‘conspiracy’) pasim. The article ignored or misrepresented most of my argument: the distinct and opposed interests of gentlemen (who I said seldom prosecuted) and the middling sort (who I said did); the fact that no conspiracy was necessary (my playful comparison to the curious legal doctrines of conspiracy failed to amuse); my central argument that the system was not purposefully ‘constructed for the purpose of furthering the class interests of the elite’; etc, etc. Perhaps this inattention arose because the article appears to have been composed by soliciting criticisms of my piece, rather than by doing original archival work: see the acknowledgements and notes. Hence also mistakes such as unknowingly using one of the richest manufacturers of London to exemplify the average modest prosecutor, or the claim that recognizance made dropping a prosecution very difficult. I had replied at equal length to the paper on which the 1983 article was based at a meeting of the American Society for Legal History (23 October 1981, Washington DC), pointing out some of the errors and misrepresentations; I sent Langbein my written comments. When his revised paper was subsequently accepted by Past & Present, an initial decision to allow me equal space for reply was withdrawn (after a political and personal disagreement on the board, of which I heard several versions), on the grounds that the journal had a policy of very short comments on articles, with a right of reply to the author. I declined the offer to submit a short comment. A subsequent editor invited a full reply, which I submitted in 1985, but in May 1986 the journal’s reviewers suggested revisions and substantial cuts. It was 11 years since Albion; it did not seem worth the time required to make them.
supportive critics. Capital punishment raises important questions for historians of law because of the centrality of the death penalty and its cultural history in our societies. It inevitably colours all criminal law. It is always there, either as the ultimate sanction, or (after repeal) in the threat of its return. What the rule of law means, as aspiration or practice, seems particularly salient when we summon up the will to look at what happens on the gallows, or in the electric chair, or at that travesty of medical procedure lately favoured in the United States, execution by the injection of drugs. Capital punishment has generated deeply different streams of discourse in our politics and consciousness for hundreds of years. It made a spectacular return to American political culture just after publication of *Albion's Fatal Tree*. Executions had declined to very low levels in the United States even before the moratorium in 1967, and in 1972 the Supreme Court had ruled that the death penalty was unconstitutionally arbitrary, capricious, and discriminatory in its application. Then in 1976 the court handed down *Gregg v Georgia*, re-animating the death penalty at a period of increasing prosecutions. Canada, where the last hanging took place in 1962, abolished capital punishment with small exceptions in the year that *Gregg* was decided. Australia last used capital punishment in 1967, with full abolition in 1984. But the executioner was again finding work in the United States by the early 1980s.

Arguments about eighteenth-century hangings, and even the eighteenth-century jury, suddenly had a wider relevance, and not only there. Just before the last but one attempt to restore the death penalty in Britain in May 1982, the somewhat eccentric Tory Nicholas Fairbairn, former Solicitor-General for Scotland, called for legislation to make it possible to prosecute any indictable offence as a capital one, including rape, burglary, robbery, and lots of others. The jury (as in the eighteenth century) would decide whether a guilty verdict should be a capital one. In his opinion piece in *The Times* on 27 April he argued that the death penalty was not only a specific deterrent to particular crimes. Fairbairn praised particularly their symbolic importance: ‘When the death penalty existed the law had awe. In the most junior court in the land the juvenile tiptoed in before the justice of the peace for, while he could not be hanged for the petty offence with which he was charged, he knew he was in the chamber of life and death’. Clearly Fairbairn was not a believer in the garbage-collection theory of criminal justice.6 When I read his piece I worried: was I responsible? Or was John Beattie the guilty party? Perhaps both of us.

Writing about capital punishment is necessarily a political act. There is a tension here among historians. Like the opponents of the death penalty in the eighteenth and nineteenth centuries, some execrate capital punishment as an institution which inflects public and private values throughout the polities which still preserve it. We are interested in the overt and more subliminal messages it conveys about authority, power, law, justice – and social inequality. We are also interested in the purposes of

6 Langbein, above n 5, 119: ‘From the standpoint of the rulers, I would suggest, the criminal justice system occupies a place not much more central than the garbage collection system.’
those who propagate such messages, now, and in the past. Others write about capital punishment and the criminal law largely as a function of government (although fortunately few make reductive analogies to waste collection), focusing on its bureaucratic history and place in state evolution, with little overt reference to the debates of our own day. Yet others (though they do not widely advertise the fact) undoubtedly believe that the death penalty is both normal and necessary, that it always has been, and either yearn for its return or are delighted that they have the good fortune to live in a jurisdiction which still inflicts it (including many of the fifty United States). In short, the historiography of capital punishment ineluctably is part of an inherited discourse of moral critique and moral apologetics, and in this it is an instance (albeit one of the most emotive) of the epistemological problems of writing about law in general. Our writing of history is deeply conditioned not only by our personal political and moral histories, but also by the times in which we live, and where we live. But as scholars and as citizens, when we as historians think that we are not choosing a position in this universe of moral discourse, I believe we are quite mistaken. We take stands by our choice of words, handling of evidence, and analytic categories. And also by our silences.

There is a larger problem in writing about law, perhaps the criminal law in particular, which comes into conflict with our moral choices. Because law is such a powerful presence in our consciousness as citizens (or historians, or law professors), to see our own law as a ‘peculiar institution’, a highly distinctive practice, is very difficult. We take so many of the cultural assumptions of our own system for granted that it is hard to see outside it. It is a belief system rather like a religious cosmology, and we attribute to the powerfully attractive (and important) idea of the rule of law the perfection of a universal church and promised salvation. We may criticise deficiencies, while at the same time being hardly aware of how deep our assumption that our particular form of law is good, runs. The danger of importing unexamined beliefs about current law, and our valuations of it, into our accounts of past law is correspondingly great. If we then use our sources to justify our inherited law, rather than critique it, we risk writing apologetics rather than history.

WRITING ABOUT PARDONS

John Beattie asks in his contribution that I comment further on my view of the pardon, in light of later work, particularly his own and that of Peter King.

In ‘Property, Authority and the Criminal Law’ I argued that the eighteenth-century criminal law was not the illogical, capricious, inefficient, and messy *bricolage* portrayed by the parliamentary reformers of the early nineteenth century, and by historians like Radzinowicz. Rather, it served the interests of the governors of England well, even if its enforcement (at historically low levels of prosecution) did

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not appear to offer a great deal of protection to those, mainly farmers and tradesmen and manufacturers, who used it most. A central aspect of the eighteenth-century law was the sentencing to death of many property offenders, sentences mitigated by the royal pardon, usually conditional on the lesser penalty of transportation. The gentry and aristocracy valued their influence in the pardoning process, even if they were not always able to persuade judges and the executive with respect to a particular case. When they wished, and succeeded, in saving a convict from the gallows, they shared some of the aura that still surrounded the mystical idea of the benevolent prince – an idea imbedded in law, in religious expression, and, I thought, one deliberately enhanced by the statements and practices of politicians, judges and monarchs in the eighteenth century. I also suggested that when the judges on provincial assize circuits outside London decided to leave a convict for execution, and a petition or petitions for a conditional pardon were subsequently submitted, that such appeals against execution were particularly effective when passed up a chain of patronage connections to a member of the aristocracy.

There was almost nothing published on these aspects of the pardon at the time I wrote, and my conclusions were based on research in the state paper and Home Office series, and other archival collections. Ensuing research, and debate, has covered a lot of ground. Here I will confine myself to a few observations on the significance of upper class interventions, including patronage connections, for the
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fate of condemned women and men in the eighteenth century, and for the nature of Hanoverian criminal law.¹⁰

What I wrote in 1975 provoked dissent. Evidence adduced against it in 1983 included the argument that Chief Justice Ryder’s circuit notes in 1754 and 1755 (which I had cited on a different point) showed that ‘principled’ judges tried ‘to take into account factors that ethical sentencing officers still consult’.¹¹ Peter King’s then unpublished 1981 analysis of pardons from the 1780s was used to show that ‘respectable’ background or support ranked low on the scale of deciding factors that influenced judges who saved the condemned from the gallows; that most petitioners were ‘middling men’; and that hence my emphasis on elite influence was deeply misleading.

I had focused on such influence because my argument was an explanation of gentry and aristocratic reluctance to give up the pardon, as Beccarian theory advised they should. There was also a fundamental misunderstanding of my point, which rumbled on in subsequent writing. My remark that the claims of class saved more convicts from hanging than did claims of poverty and distress aroused particular annoyance. I did not, of course, mean that youth, previous good character, lack of violence, and the other ‘factors’ later counted by King were not important in such decisions. I had read hundreds of judges’ reports, and knew how important they were in hanging decisions: in my dissertation I noted the salience of these factors, and that the judges ‘undoubtedly gave great weight to all these considerations’. But it was true that ‘respectable’ family background was mentioned more often than poverty or distress, and that was an interesting comment on contemporary sensibilities.¹²

My essay in Albion had a different point. I wrote four times as much on respectable connection as on respectable convicts because my argument was that gentry and peers themselves had an interest in intervening in pardons, and therefore in preserving their ability to do so, and hence in not reforming the system along Beccarian lines. The evidence of their exertions on behalf of poor prisoners, through chains of what contemporaries called ‘connection’, was striking. Patronage appeals and other forms of networking litter eighteenth-century correspondence; it

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¹⁰ There is also a debate about similar issues in the early nineteenth century: see in particular the work (above n 9) of Gatrell and Devereaux, who contest Gatrell’s conclusions, particularly with respect to the hanging proclivities of Sir Robert Peel.

¹¹ Langbein, above n 5, 113, citing Harrowby MSS, vol. 1197, 19f/13, legal notebook of Sir Dudley Ryder, typed transcript (henceforth ‘Ryder notebook’). This and other Harrowby MSS were used in my 1975 dissertation and later publications with the permission of the Harrowby MSS Trust and the assistance of the sixth Earl of Harrowby.

¹² Hay, above n 2, 496 and 492-510; above n 1, 44-5 (for discussion of convicts of respectable background), 45-49 (for the importance of respectable support in petitions). The word ‘ostensibly’ (ibid, 43) also confused some readers: I was referring to what Beattie later called judicial ‘doubletalk’ in reports on petitions. See below, n 28 and accompanying text.
was not surprising to find them in discussions of gallows decisions, but it cast much light on genteel and aristocratic attitudes to the law.\textsuperscript{13}

But what had King (and Sir Dudley Ryder) actually told us about upper class interventions in the pardon process? And what do we know now?

We should distinguish three kinds of capital pardons, which were usually conditional on another punishment such as transportation.\textsuperscript{14} First there were what John Beattie has usefully called ‘administrative’ pardons by the judges on assize circuit, in which they were given virtually full authority by the early eighteenth century to reprieve after trial with a recommendation for pardon, which would be acceded to by the monarch.\textsuperscript{15} Secondly, there were cases where the assize judge initially left the convict for execution, whose friends and patrons subsequently petitioned for his or her life; in these cases the judge was asked to report to the king on the facts of the case and hence the suitability of a pardon. Let us call such pardons, when granted, ‘petition’ pardons. Third, after 1689 there was a unique practice with respect to London cases, tried at the Old Bailey, discussed below.

King’s cases were all or mostly ‘petition’ cases, as were those I had considered in 1975. His 1981 attempt (published in 1984) to quantify what I had broadly summarised in ‘Property, Authority and the Criminal Law’\textsuperscript{16} was a count of aggravating and mitigating ‘factors’ such as youth, previous good character, lack of violence and so forth, mentioned in pardon petitions and in judges’ responses to them for a few years in the 1780s. One problem with his results, and also with evidence drawn from Ryder’s notebook, was that the administration of the pardon underwent sharp vicissitudes, and the early 1750s and the 1780s were both periods when the government actively discouraged pardons, and petitions for them.

Thus in 1754 the Lord Chancellor told the judges before they left on their circuits (which was Ryder’s first) that the king was so shocked by the recent great increase in crime that they were asked to apply the rules of the 1751 Murder Act (25 Geo II c.37) to other capital felonies, as far as reprieves were concerned; that is,

\begin{quote}

to grant such reprieves only in cases where reasonable cause shall appear from the nature and circumstances of each particular case. I am sure your Lordships will not forget that mere importunity is none of these reasonable causes.\textsuperscript{17}
\end{quote}

\textsuperscript{13} A similar disproportion turned up in King’s ‘factor’ count also.

\textsuperscript{14} There were also pardons for sentences less than capital.

\textsuperscript{15} Beattie, Policing, above n 9, 287ff.

\textsuperscript{16} King fairly noted in 2000 the fuller discussion in my 1975 dissertation: King, Crime, above n 9, 300 n7.

\textsuperscript{17} Harrowby MSS, vol 1197, 179 ff (document 19g/1 to 6 shorthand), ‘the Chancellor’s speech to the Judges verbatim’, by Sir Dudley Ryder; I have found copies in other collections of this presentation to the judges of the 28 February 1754 order of the council. The Harrowby transcription, from shorthand, gives ‘opportunity’ (apparently a mistranscription of ‘importunity’) here, although not in the Ryder notebook, above n 11: see below, n 39. ‘Causes’ appears in the original as ‘cases’, clearly another mistranscription.
The newly-minted Chief Justice, Sir Dudley Ryder, faithfully did so. Langbein quoted Ryder's comments on the 'factors' in several cases of highway robbers and horse thieves on that circuit, noting Ryder's refusal to listen to appeals from 'elite' petitioners.\footnote{Langbein, above n 5, 112-13, citing Ryder notebook, above n 11, at 13, 17-18: see n 39 below.} What Langbein did not quote was Ryder's further comment on the cases, justifying his decisions by noting that highway robberies were 'particularly included in His Majesty's late commands to his judges' and that 'Another principal reason with me was the King's late injunction to his judges not to let importunity prevail'.\footnote{Ryder notebook, above n 11, 16-17: see n 39.} Government had been resisting judicial mercy for several years, and some judges longer on the bench than Ryder did not like the new policy. Sir John Willes, Chief Justice of Common Pleas since 1737, expressed annoyance in 1750 when asked to report on highway robbers to whom he had already given administrative reprieves: 'I am sorry to find ... that the same credit is not given to the present judges, as hath been given to their predecessors for many years last past. However, it is my duty to submit, and to obey the commands of the Lords Justices'.\footnote{Willes to John Leveson Gower (first Earl Gower), lord justice, 21 July 1750, National Archives (henceforth NA), SP 36/114 fol.49. The Lords Justice had the powers of the king in such pardons when he was in Hanover.}

The great alarm about crime levels in the 1750s hence generated an unusually high level of resistance, both in the judicial practice of 'administrative' pardons, and in government responsiveness to subsequent petitions to save those who had been left to hang. The 1780s, from which all of Peter King's evidence originally came, are similarly notable in this respect. Transportation to the colonies (the usual consequence of a clemency appeal) had been interrupted by the American war; prosecutions were at a high post-war level from 1783; the pardoning system was also interrupted by the king's illness from November 1788 to February 1789. It was widely advertised in the press from the early 1780s that appeals for clemency now would not be welcomed by government.\footnote{Hay, above n 2, 521-23; Hay, 'The laws of God and the laws of man', above n 3, at 99-106, and Devereaux, 'Imposing', above n 9.} In an attempt to meet what he now saw was a sampling problem, King reworked the figures in 2000, using 1787 and 1790, with results that he characterises as 'a crude map of the pardoning terrain'.\footnote{King, Crime, above n 9, Table 9.1 at 299, and related discussion. The analysis is of 136 petitions and 97 judges' reports (presumably on the same cases, although it is not clear) in those two years. However, the sample is again one of two years, separated by only two years and near the end of the century, in a book covering the period 1740 to 1820. Yet pardoning policy undoubtedly changed, not only cyclically but over the secular trend. King notes other problems with the new sample: the ambiguous criteria for identifying 'factors', and the fact that he could not disentangle multiple, overlapping factors, and their relative importance. Both questions are susceptible to analysis – the first through techniques common in modern questionnaire design, the second through a multiple regression analysis of factors and outcomes. For the reasons given below, I doubt it is worth doing so.}
But the real problem is that counting ‘factors’ in this way, notably in judges’ reports, is to misconceive the nature and purpose of a judge’s report to the king. Why, for example, is the language of judges’ reports sometimes ‘opaque’, ‘cryptic’, ‘ambivalent’, and ‘defensive in tone’? These judicial reactions reflect the tensions within the pardoning process. The royal pardon was a delicate constitutional nexus between reasons of law and reasons of state, the latter including issues of ‘interest’ and ‘connection’ as well as general public policy. The King and his advisors, and the royal judges, were equal players, often fully agreed, but sometimes at odds. But whether in agreement or conflict, the constitutional and political significance of pardoning meant that the language in judges’ reports often had to be opaque, and, more important, often directly misleading – not least to historians taking it at face value.

What was the constitutional and political context? The judges, routinely deciding ‘administrative’ pardon cases after the assizes, were faced, when a petition was subsequently submitted on behalf of a condemned convict, by an implicit criticism (unless new evidence was adduced) of their decision to hang. Particularly when a judge had been appealed to informally at the assizes (probably a common occurrence), and had resisted mercy, to be presented later with the same claim but supported by more influential people, could be annoying. He was being asked to consider repudiating his earlier decision. That decision had been a public one, often privately justified in conversations at the time of trial. But a judge could not openly resist such appeals in reporting to the king, particularly if the social position or influence of individual petitioners, or a new current of feeling among the local gentry, meant that the king probably wished to pardon. Some London recorders, like some circuit judges, did resist requests to reconsider their initial decisions more than did others. Beattie instances the case of Recorder, later Baron of the Exchequer, Sir William Thompson, in the 1720s and 1730s. In 1776 the then recorder of London also complained that his advice ‘did not meet with due attention’ at council. The neatly ambiguous reply from Lords Weymouth and Suffolk was that ‘any such idea so far as they are concerned is, they trust, a total misapprehension; as it is both their opinion and inclination, in regard to you personally and to the execution of your office, to give as much weight to your recommendations as has and ought to have been given to your several

23 Ibid 298, 301, 311-12, attributing these reactions to perverse jury verdicts, to new evidence that called into question their conduct of the trial, and their own uncertainty about the weight of evidence.

24 See below, text following n 38.

25 A practice adopted by Sir Michael Foster, a puisne justice of King’s Bench since 1745 and expert on the criminal law, may have served to avoid the embarrassment of having his choice of reprievs publicly upset. Ryder noted that when Foster expected that in the end he would report in favour of a particular prisoner if there was a reference from the king (ie, after a petition), he ordered the execution of all the condemned, but ‘a week perhaps longer than usual’. (Ryder notebook, above n 11, 15-16.) In other words, the (somewhat) favoured prisoner would hang unless there was a petition in that period, on which Foster then would give a favourable report.

26 Beattie, Policing, above n 9, 455-56; see also the comments of Chief Justice Willes in the other direction, above n 20.
predecessors." Possible conflict was an inescapable issue, although inevitably compromised. For there was no question that the constitutional prerogative of mercy rested with the monarch, and there were important political, as well as symbolic, issues served by the extension of that mercy in specific instances.

Hence the rather strangulated or opaque language of some judges' reports. But more important, it meant that in order not to box the king in (to use Beattie's phrase), when asked for a report a judge felt obliged to offer a selection of acceptable excuses for a pardon - youth, good character, an offence not aggravated by violence - those that Beattie, King (and Hay) agree informed their day to day decisions in 'administrative' pardons immediately after trial. Hence the irony of King's counting: he is counting the incidence of claims of youth and other 'factors' in precisely those cases (after petition) where such factors were originally found insufficient by the judges. A young man is condemned to death and left for execution. He is subsequently pardoned, after petition, on the grounds of his youth. But he has not grown younger in the meantime. The determining 'factor' in this case is not his youth, but the fact that sufficiently powerful interest has been exerted on his behalf. Yet that outside influence is not counted as a 'factor'; his youth is.

But the real question is who had influence over the pardoning process, one in which I suggested that the chain of connection - as it moved upward from middling sort to gentry to aristocracy - greatly increased in effectiveness. King's book addresses this question more directly, and includes an analysis that sounds rather like my own conclusions in 1975. He concedes that the bottom 50% of the population were probably absent from the petitioning process, as they had no influence, a confirmation of the importance of having what I called 'respectable' support. He agrees with my argument in 1975 that aristocratic influence, although exercised in a 'small number' of cases (the number is not given), was particularly effective, and could override the objections of a judge to extending a pardon. He is a bit opaque on the relative roles of the very different groups below the aristocracy, the gentry and 'middling sort'. There were middling petitioners in over 50% of his cases in these two years, but it appears on close reading of King's text that in almost half of those cases there were also petitioners of a higher social class (presumably gentry or higher, although King does not identify them, nor give a more precise quantitative breakdown). It would appear, then, that 'middling' petitioners appeared alone in a little more than one-quarter of petitions. Their success rate, King tells us,

28 Beattie refers to instances of 'doubletalk': Policing, above n 9, 455 n 82.
29 King, Crime, above n 9, 317-19.
30 King (above n 9, 308), interrogates the contemporary meanings of the term, but the issue is the judgements about social standing by those with the power to make decisions: see for example note 35.
31 The 'middling sort', a contemporary term which can mislead by visual analogy, probably included few below the top 30% of the income structure of the population, and thus enjoyed considerably above median and average levels of income in that society: D Hay and N Rogers, English Society in the Eighteenth Century: Shuttles and Swords (1997) 22-31.
was about the same as in those petitions where more influential names also appeared, but whether in similar or different kinds of cases is not discussed.\textsuperscript{32}

John Beattie suggests that although the crucial factors were character, the nature of the offence, and the perceived need for examples, judges also bowed to superior ‘connection’, especially when the pressure came from the aristocracy. This was true even in London.

Beattie has shown in detail the evolution there after 1689 of what came to be called the ‘hanging council’ then ‘hanging cabinet’: the fact that in London there was no ‘administrative’ pardon by the royal judges or recorder (who sat together at the Old Bailey to hear cases). Instead the practice developed of the recorder reporting orally on cases to the king in council, shaping the outcomes of pardons. The written notes from which the recorder spoke gradually became more complete, and could serve as a dossier when they had to be forwarded to an absent monarch. Such a procedure, in which the council considered at the same time all the cases from one of the eight yearly sessions of the Old Bailey (or of several sessions, as became the recorder’s practice) would seem on the face of it less likely to result in anomalous dispositions of cases, or the play of favouritism. Pardons were decided against a common background (high crime or low, public alarm or complacency, transportation working well or interrupted by war). And each case was decided in the context of all the others: was this burglary worse than that? Was this rioter more deserving of death than the others involved? Was the criminal young and inexperienced, or an old offender?\textsuperscript{33}

It is true that at the assizes in the counties, outside London, judges also made these decisions in the context of local opinion and local knowledge, and selected examples to hang from among the convicts that emerged from the prosecutorial and trial decisions. But we have seen that the assize judges’ decisions not to pardon could be reversed by subsequent petitioning by men of influence. Successful pardon appeals of this kind upset the pattern of retribution the judges had thought appropriate to the particular group of cases they had tried in a given county. Occasionally a judge took the trouble to try to restore the balance, out of his own sense of justice, fear of the appearance of injustice, or annoyance at having his

\textsuperscript{32} King, \textit{Crime}, above n 9, 318 n 65, noting also that ‘information on the social background of petitioners is often very inadequate’. King’s 1984 evidence of the prevalence of ‘middling’ petitioners was used to show that success could be had without a great man’s support. My point in 1975 was that it was much more likely to succeed with it, something King finds also in 2000 (text above at n 29). Counts of status of course tell only so much; equally relevant are contemporary assessments of known individuals, and their ‘connection’. As Baron Hotham observed in 1792, ‘As to the signatures to the inclosed petition, I know nothing of them, but I know how easily they are obtained on such occasions.’ The eight petitioners dismissed by the judge included the rector, churchwardens, and overseer of Thordon in Suffolk. NA, HO 44/14 Sir Beaumont Hotham re Smith et al, Chelmsford assizes, 1792, cited in Hay, above n 2, 498.

\textsuperscript{33} Beattie, \textit{Policing}, above n 9, 298-99, 354-55, 357-60; and see his earlier account, Beattie, \textit{Crime}, above n 9, 432-6, 443.
decision reversed. In London the recorder controlled most of the information that would inform the council’s decision to hang or offer a conditional or free pardon, and there was probably therefore much less variation than on the assize circuits, where twelve judges of differing views were at work. But what of influence on cases in London, both in terms of general local opinion, and specifically the demands of powerful interests that the law be more merciful in particular cases?

Beattie’s emphasis has changed a bit in recent work, I think. In 1986 he argued that it was ‘likely that local interests were not engaged one way or another in the case of most offenders, particularly in the courts in and around London’, and cited King’s ‘factor’ count. In his most recent book, Beattie suggests that even in London, ‘support from an influential patron or from someone whose rank demanded that their intervention be taken seriously would be an advantage if only because such patronage would ensure that the case was taken seriously’. And although he stresses the dominance of the issues of character and the nature of the offence, he also now argues that aristocratic intervention at the Old Bailey could be decisive. ‘There was always...a place for personal judgment and influence, for favour, and for political considerations; one could never rule out the importance in the process of decision-making of the intervention of an influential patron or the play of sheer prejudice.’

Beattie’s account of the recorder’s report is very rich, and I can only suggest a few ideas about the ways in which influence worked, the ways in which decisions to hang a capital convict, or not, were mediated by things other than law.

All scholars working on the pardon system should sense that they know only part of what went on, on two grounds. One is that we will never know much about the conduits of influence that have left no documentary evidence. Were they important? We know that at the assizes, persuasion and pressure was brought to

34 A pardon was granted after petition in August 1738 for James Green convicted of highway robbery at Chelmsford, in spite of the doubts of Mr Justice Willes (few favourable circumstances, threats, a large robbery – but since very young, probably drawn in by older experienced men), ‘as the gentlemen of the county [Sir Robert Abdy was among them] are so very desirous to save his life.’ At the same time Willes asked for a pardon for Joseph Lightbourne, whom he had also left to hang, who had also petitioned. Lightbourne had been condemned for a much less serious instance of the same offence at the same assizes, but had had the support of only his victim and his master, as ‘the Gentlemen of the County did not seem to be so solicitous to save the life of Lightbourne as of Green’. NA, SP 36/46 fols. 46-7, 75.

35 Beattie, Crime, above n 9, 432 n 50, 447.

36 Beattie, Policing, above n 9, 357-8. For wealthy individuals unfortunate enough to be convicted themselves, there were also ‘special’ pardons, passed individually under the Great Seal, and at great expense. Above n 9, 288-9.

37 Beattie, Policing, above n 9, 357-8 and 452-4, citing my argument in Albion’s Fatal Tree, and the intervention of Lord Montagu in a 1728 case (which I had quoted, 46). At the same time, Beattie also refers again to King’s second version of his ‘factor’ count as a demonstration of the motives for pardons and their ‘individualized nature’ (an echo of Radzinowicz’s view: History, above n 8, 116, 137).

38 A point also made by Beattie in his contribution here.
bear on the judges to include particular convicts among the ‘administratively’
pardoned. Sir Dudley Ryder, unexpectedly raised to the bench as Chief Justice in
May 1754, learned on his first circuit in August that the clerk of assize and the high
sheriff were conduits for such appeals immediately after trials, or while he was still
hearing cases at other towns, before the circuit letter of administrative pardons was
prepared. (He resisted on this circuit, as we have seen, in part because of the
government’s recent policy decision to discourage appeals for pardons). \(^{39}\)

At Maidstone the following summer while on circuit he received letters from a clerical
JP and a baronet to reprieve a man he had left to hang a few days before at
Chelmsford. \(^{40}\) Occasionally we can see attempts to exploit this avenue at trial or
before sentencing, as at Stafford in 1743, when a more promising candidate was
successful. \(^{41}\) The judges also dined with the grand jurymen, and enjoyed the tables
and other hospitality of the local aristocracy, where they doubtless got a good sense
of what ‘opinion’, particularly the opinion of the great, was with respect to certain
prisoners. None of this advice turns up in pardon petitions.

Beattie similarly suggested in 1986 that in London the jailer and chaplain of
Newgate provided information about character relevant to pardon decisions; if so,
they might well also have been conduits for unrecorded appeals by petitioners such
as those made in person to the judges on the circuits. In his recent book Beattie
recognizes that the recorder of London in fact had a role analogous to that of the
clerk of assize and the sheriff on the circuits, in passing on to the council the wishes
of powerful interests. \(^{42}\) It seems likely that we shall never know how often he did
so. Chief Justice Ryder noted in the 1750s that ‘At Old Bailey the recorder always
pronounces sentence and makes his report [to council], though the judge tries the
prisoner, and then he [the recorder] takes his report from the shorthand writer’s

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\(^{39}\) Ryder notebook, above n 11, 13: ‘The clerk of assizes [at Horsham] pressed me much to
transport Millet, the hosteller [mistranscription for ‘horsestealer’?], but I refused it because it
seems to have been his practice, and two instances are included in this case by stealing the
same horse, and nobody spoke to his character.’ At Guilford, the high sheriff presented the
application of himself, the Speaker and Lord Onslow, on behalf of a highway robber ‘the son
of a considerable farmer’, which Ryder refused, as he did also a highway robber who although
young and recommended by his master, he also left to hang, highway robberies being
‘particularly included in His Majesty’s late commands to his judges’. ‘Another principle reason
with me was the King’s late injunction not to let importunity prevail.’ Above n 11, 16, 17.

\(^{40}\) Above n 11, 21, 25.

\(^{41}\) William Hathaway confessed at his examination to horse theft, when William Pershouse JP
promised ‘to intercede for mercy for him if he would discover the whole truth concerning the
said felony.’ At his trial at Lent 1743 assizes, he was told that the prosecutor would be very
favourable, having received satisfaction for the horse, which of course was also a full
admission of guilt. He was advised that given his previous good character, ‘all that can be done
for him is to move the judge to transport him and in order to induce the judge to have some
compassion on the defendant he has a certificate signed by fifty neighbours and gentlemen of
worth and several of them are personally acquainted with his Lordship.’ (My emphasis.) The
defendant brought only six character witnesses to the trial, ‘as he thought the certificate as [sic]
the gentlemen have signed would have been sufficient without.’ It was. Hathaway was
convicted, but reprieved by the judge and transported for 14 years. Staffordshire Record
Office, D1798/618/47, and D1798/617/56, no date.

account of it'. How the recorder shaped that information in his oral report, and how often he was pressed by others to favour particular prisoners, is unknown. Since it was more difficult to reverse a decision in council than to influence the recorder after trial, before he reported, appeals for mercy probably went mostly to him; he was usually the only hope. In a case raised by the Lord Mayor, William Beckford, in 1763, the reply was that it was not usual, after the report to council, to grant pardons 'unless very particular and strong circumstances have appeared to induce such an alteration.' The king did not think that was true in this case.

For the reasons given, for the most part informal influence in the disposition of a particular case is lost to us. Yet contemporaries must have been aware that directly and personally influencing what Beattie called ‘administrative’ pardons, those decided by the judge himself immediately after trial at the assizes, or as they were planned by the recorder before he made his report to council, would be the most effective approach, because there would be no need, as there was in the case of ‘petition’ pardons, to overcome a previous adverse decision. This was even more the case in those periods when policy decisions tried to limit the extent of petitioning.

A more general problem in assessing ‘influence’ is that as the century goes on it is, I suspect, expressed less openly, but without necessarily becoming less important. We can find very frank demands for mercy earlier in the century, and cases of difficult political decisions in refusing it. But in the 1750s or the 1780s, when the

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43 Ryder notebook, above n 11, 15-16.
44 Case of William Champ. SP 44/87, 162-3; Proceedings of the Old Bailey online r17630114-5. But see also text at above n 27.
45 Thus to prevent ‘the trouble’ of petitions in cases where no mercy was desirable, the judges were instructed in Dec 1728 and March 1731 to cut short the opportunity for petitions. They were to report immediately to the secretaries of state cases in which some favourable circumstances appeared, to allow for a respite, and not to set ‘an unusual distant time’ for execution, or grant reprieves, unless they thought a pardon fitting. SP 36/9 fols. 149-50; SP 36/22 fol.214. Apparently this was thought better than a policy a year or so earlier (endorsed ‘not used’ ‘abt 1727’) for the judges to ‘make their reports more full’, taking account of reasons advanced in petitions. SP 36/4 fols. 192-3. See also Beattie, Crime, above n 9, 432 n 49, who discusses the 1728 memo as evidence for the establishment of ‘administrative’ pardons following the Transportation Act of 1718, and Devereaux, ‘Imposing’, above n 9, for later problems with conditional pardons, and legal interpretations of the effect of such offers.
46 Jacobitism was a relevant consideration in the reign of the first two Georges. Just after the accession of George II, a fellow of Wadham college wrote the secretary of state, recommending a pardon, noting that the convict’s brother was ‘a clergyman well-affected to government’; Mr Justice Probyn reported favourably on his character and the support he had from ‘substantial men.’ SP 36/6 fol. 36-7, R. Thistlethwayte to Duke of Newcastle, 14 Apr 1728. On the other hand, two years after the 1745 rising, in a case in which a drummer at Chester named Hayes stabbed and killed the huntsman of Lord Barrymore (a jacobite), allegedly for speaking derogatory words of the king (an allegation later denied), the Lord Chancellor advised against a pardon, in spite of strong petitions for clemency from loyal local whigs who argued that a pardon would strengthen the government cause. He gave two reasons for hanging Hayes. The case was ‘a very bad one’, he wrote the Duke of Newcastle, and the judge was ‘well-affected’, not a jacobite sympathizer. But the main consideration was that it was necessary to have a considerable body of troops in England for the protection of the royal
king and government announced that such appeals would be resisted, and increasingly later in the century, when a sharpened sensitivity to patronage games was part of the growing critique of capital punishment itself, quiet influence was probably becoming even more important than written appeals. There were undoubtedly cycles and reversions in this new sensibility – the reign of the prince regent may have been such a period, with a return to practices more common early in the century.

The exercise of influence, particularly in a patronage relationship, is always a delicate game, with an understood etiquette, even when not complicated by the constitutional issues at the heart of pardoning. At the highest level, when a duke or a countess intervened, the significance of their intervention was plain (and they often also explicitly deferred to the constitutional proprieties.) Farther down it gets murkier. People sufficiently well connected ‘knew’ other such people: knew their family backgrounds, their other patronage connections, and hence the weight of their influence. But such ‘connection’ often would not be expressed in correspondence; it would be known, its significance understood. When contemporaries did not know what they ought to have known, because they were not well enough connected, they were not very successful at the patronage game. Very pressing patronage appeals in any correspondence in the century tend to be written by people who did not understand or play the game very well, or had little influence. And you may not find any evidence at all in the cases where a powerful but unstated ‘connection’ was known to all the players, and very often passed through intermediaries known to represent them, or by word of mouth.

My interest in the pardon in ‘Property, Authority and the Criminal Law’ was primarily in explaining how the rulers of England could think it important to preserve such influence. Although a nuisance at times, connection continued to play a role in capital punishment. It brought additional information about a case, but it also confirmed the influence and benevolence of the petitioner to wider publics, advertising their share in the greatest benefit monarchy could grant, life itself. And it served gentlemen and peers more directly. Patronage is a two-way street: both parties benefit. A local gentleman or a local magnate instrumental in obtaining a pardon shared in the benevolence of the crown, celebrated by Blackstone and countless other writers and sermonisers, that arose from acts of executive clemency. He also pleased people whom he owed, in that calculus of shared benefits that lay at the heart of patronage connections. Failing to get a pardon, at least earlier in the century, could be experienced as embarrassment, a loss of status.

Accounts of class influence and other inequities in capital cases confront defenders of capital punishment with a difficult issue. From the point of view of an ideal rule of law, nothing but mitigating or aggravating circumstances recognised by the law, and given their appropriate weight, should decide penalties, and particularly the

family, ‘and, if it should be propagated among the people, that, by an ill-placed mercy, the soldiers are to be indulged in such disorders, it will tend to make the army very unpopular, and to make the support of it more difficult.’ SP 36/101 pt 1 fols. 12, 48ff; SP 36/102 fols.13, 19.
Writing about the Death Penalty

deadh penalty. Some of the writing on the historical evolution of the pardon seems to suggest or imply that the eighteenth- and early nineteenth-century English criminal law substantially met this ideal. From an anthropological or social/historical perspective, this seems extremely unlikely. All major social institutions mirror and help replicate a host of influences. Moreover, we know that in modern societies such extra-legal influences have deeply compromised precisely this institution: capital punishment. Strange and Avio have provided compelling evidence that ethnic, class, gender, and racial bias inevitably distorted the application of the death penalty, notably in the exercise of executive clemency by cabinets, in nineteenth- and twentieth-century Canada and Australia.47

This should not surprise us. A wealth of evidence showing that the criminal law replicates and reinforces other fields of social force informs a very large body of literature in the social sciences. The fact that such bias may not be the result of conscious intent, that it can arise from deeply held beliefs by those with power to decide who is trustworthy and who is dangerous, is also clear. But whether consciously articulated, hypocritically concealed, or so fundamental to the actors’ view of the world that they are largely unexamined, such beliefs and their outcomes are uncomfortable facts. They are particularly uncomfortable for those who want us to believe that the application of the death penalty in any period has been determined solely by legitimate considerations, duly recognized, impartially and equitably enforced, and exemplifying the rule of law.
