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Crime and Punishment in Eighteenth-Century England

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BOOK REVIEW

Crime and Punishment in Eighteenth-century England. Frank McLynn. New York: Routledge, Chapman & Hall, 1989. 392 pp. \$45.00 (hardcover); Oxford and New York: Oxford University Press, 1991. 392 pp. \$13.95 (paperback).

*William B. Jones, Jr.**

*Since laws were made for ev'ry Degree,
To curb Vice in others, as well as me,
I wonder we han't better Company,
Upon Tyburn Tree!
But Gold from Law can take out the Sting;
And if rich Men like us were to swing,
'Twould thin the Land, such Numbers to string
Upon Tyburn Tree!*

— John Gay, *The Beggar's Opera* (1728), III, xiii

Eighteenth-century England is often viewed through a distorted lens as the epitome of a one-dimensional Age of Elegance—the era of powdered wigs, ornate snuffboxes, Palladian villas, the operas of Handel, the portraits of Reynolds, and the couplets of Pope. Yet the period also produced the notoriously corrupt politics of Prime Minister Sir Robert Walpole, the wretched urban conditions portrayed in William Hogarth's *Gin Lane* (1751), and most significantly, what William Blackstone called the “multitude of successive independent statues” that by 1769 prescribed the death penalty for “no less than an hundred and sixty” criminal acts.¹

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1. 4 WILLIAM BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND 18 (1769).

This sanguinary statutory scheme was known, with good reason, as "The Bloody Code," and it remained in effect, expanding all the while, from the Glorious Revolution of 1688, when fifty crimes were punishable by death, until the end of the Napoleonic Wars in 1815, when about 225 separate offenses led to the gallows.² It may be timely, in the wake of a new wave of state executions and congressional consideration of legislation that would expand the federal death penalty by an additional fifty offenses,³ to reexamine the most comprehensive body of capital statutes in the history of English law.

Crime and Punishment in Eighteenth-century England, a work by British historian Frank McLynn, offers a scholarly yet accessible overview of the Bloody Code in operation and, for American readers at least, an implicit critique of contemporary arguments in favor of ever more severe criminal penalties. The author employs what he terms an "empirical" Marxist analysis of the factors contributing to the Code's ferocity and longevity.⁴ He explicitly rejects, however, the "vulgar Marxism of base and superstructure, where law is considered 'nothing but' the interest of the ruling class."⁵ Whatever the shortcomings of a class-oriented, economic approach in other contexts (literary criticism, for example), it seems sound enough when applied to a society so often fueled and riven by class motives.⁶

Indeed, the decidedly non-Marxist historian Peter Gay, referring to the Code's "luxuriating jungle of retribution,"⁷ has observed that the rapidly lengthening list of eighteenth-century English capital crimes consisted of "assaults on the comfortable orders" and that "[e]very year, perhaps more than once a year, the wall around property was raised higher still."⁸ McLynn estimates that an average of one new capital offense was added annually to the Code during George II's reign (1727-1760).⁹ Many of the newly classified felonies were, as one standard survey of English legal history informs us, "wrongs to prop-

2. FRANK MCLYNN, *CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND* ix (1991).

3. H.R. 3371, 102d Cong., 1st Sess. (1991).

4. MCLYNN, *supra* note 2, at 341.

5. MCLYNN, *supra* note 2, at xv.

6. *See, e.g.*, E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975); E.P. THOMPSON, *CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE* (1991).

7. 2 PETER GAY, *THE ENLIGHTENMENT, AN INTERPRETATION: THE SCIENCE OF FREEDOM* 427 (1969).

8. *Id.*

9. MCLYNN, *supra* note 2, at ix.

erty" such as stealing railings from buildings, fish from rivers or ponds, goods or merchandise from wrecked ships, and Exchequer bills, bank notes, and dividend warrants.¹⁰

The Bloody Code was a patchwork of acts that, in absurdly precise detail, catalogued those offenses entailing execution. With the celebrated English indifference to consistency, members of Parliament passed a variety of anomalous statutes. As McLynn reveals:

To commit a theft in a furnished house which was let as a whole was not an offence. Pickpocketing carried the death penalty but child-stealing, despite its high incidence, was not even an offence. It was a capital felony to steal goods worth more than forty shillings from a ship on a navigable waterway, but not on a canal. To steal fruit already gathered was a felony; to steal it by gathering it was a mere trespass. To break a pane of glass at 5 p.m. on a winter's evening with intent to steal was a capital offence; to housebreak at 4 a.m. in the summer when it was light was only a misdemeanour. To steal goods from a shop and to be seen to do so merited transportation; to steal the same goods "privately," that is, without being observed, was punishable by death. In extreme cases parricide might receive the same punishment as the theft of five shillings.¹¹

The mystifying irrationality of the Code, according to McLynn, was intended to serve the purpose of deterring criminal behavior among the lower orders by its "awful example and warning."¹²

Contemporary critics of the Code disputed its deterrent effect. In a Parliamentary address in 1778, Sir William Meredith launched an attack on the system in which he pointed out that only half of all convicted felons were hanged and that while forgers and coiners were almost always executed, they remained among the most common criminals.¹³ Sir Samuel Romilly, in 1786, insisted that execution for property offenses was excessive and that the very harshness of the Code actually contributed to the spread of crime.¹⁴ On a less theoretical level, judges and juries frequently bent the Code's provisions to avoid imposing the death penalty, convicting on lesser offenses or valuing stolen property at lower rates; in some instances where a finding of guilt on a capital charge was clearly required, jurors would mumble their

10. 11 SIR WILLIAM HOLDSWORTH. A HISTORY OF ENGLISH LAW 530-31 (1938).

11. MCLYNN, *supra* note 2, at xi.

12. MCLYNN, *supra* note 2, at xi.

13. MCLYNN, *supra* note 2, at xii.

14. MCLYNN, *supra* note 2, at xii.

verdicts and judges would take the hint, adjusting the sentences accordingly.¹⁵

Even with these exercises of discretionary mercy, though, the number of executions was appallingly high, especially during postwar crime waves such as the one that followed the return of demobilized veterans of the American Revolutionary War; between 1783 and 1787, 348 hangings occurred, marking an eighty-two percent increase over the previous five years.¹⁶ McLynn accurately focuses upon the impact of war as a major element in the cycle of eighteenth-century English crime and punishment—from the pressing of criminals into the ranks of the British armed forces to the failure of the peacetime economy to accommodate unemployed soldiers and sailors. The chapter devoted to the subject is one of the most persuasive in the book.

McLynn examines as well the relationship of population growth and economic development to English society's fluctuating crime rate and the state's increasingly brutal remedies. Although one would naturally expect this portion of the study to be drenched in academic Marxist jargon, it is, apart from an obligatory nod or two in the direction of "alienation" and "labour-time,"¹⁷ remarkably free of reductive polemics. In any case, it is difficult to argue with the author's emphasis on urbanization and industrialization as keys to understanding the nature of eighteenth-century criminality.¹⁸

The population of London increased, McLynn calculates, from about 575,000 in 1700 to 675,000 in 1750; by the time of the first official census in 1801, the city claimed 900,000 inhabitants.¹⁹ These figures reflect not only a declining death rate,²⁰ but also what the author characterizes as a population "implosion"²¹ resulting from an accelerating migration from rural areas to urban centers. Before this transformation of the English city, property crime had been rare, but, McLynn comments, "the actual circumstances of life in an urban environment, where over crowding and competition for space, jobs, and amenities went hand in hand with vastly increased aspirations, can al-

15. MCLYNN, *supra* note 2, at 261-62.

16. MCLYNN, *supra* note 2, at 260.

17. MCLYNN, *supra* note 2, at 301, 312.

18. For an eighteenth-century perspective, see Oliver Goldsmith's inverted pastoral, *The Deserted Village* (1770).

19. MCLYNN, *supra* note 2, at 1.

20. MCLYNN, *supra* note 2, at 2.

21. MCLYNN, *supra* note 2, at 299.

most be said to have propelled the poor into crime."²²

At the same time, the rise of Britain's commercial, financial, and industrial empire created new forms of wealth and new demands for security. English society, however, lacked the means to afford the propertied classes much in the way of protection. Wary of "professionalism," the English resisted the concept of a centralized law enforcement authority along continental lines, regarding it as a threat to traditional liberties.²³ Hence, the responsibility for apprehending criminals was divided among various local officials such as justices of the peace, parish constables, and, in London, the parish beadle and watch, from which a metropolitan police force was later to evolve.²⁴

Private rewards proved more effective than public agents in snaring criminals, a circumstance that led to the ambiguous eighteenth-century institution of the thief-taker. Foremost among the breed was Jonathan Wild (1683-1725), who worked shamelessly and successfully on both sides of the law for more than a decade, evading even an act of Parliament aimed specifically at him, until he overplayed his hand and was sent to the gallows at Tyburn.²⁵ Borrowing Wild's organizational techniques, the novelist and London magistrate Henry Fielding established the "Bow Street runners" in 1749, sending them outside his jurisdiction in pursuit of criminals; with this popular band of "glorified bounty-hunters," McLynn notes, Fielding helped to domesticate that troublesome foreign word "police" and to lay the foundation for Scotland Yard.²⁶

If the idea of a police force seemed alien to the English for much of the eighteenth century, so too did the theory and practice of incarceration. Conviction on a major felony charge generally meant either "to dance the Paddington frisk" or to receive a royal pardon.²⁷ Transportation was utilized as an alternative to hanging for certain serious offenses.²⁸ Corporal punishments, such as the pillory and whipping, were available for lesser offenses.²⁹ Not until the Penitentiary Act of 1779, though, did imprisonment become a truly viable option for the

22. MCLYNN, *supra* note 2, at 300.

23. MCLYNN, *supra* note 2, at 17.

24. MCLYNN, *supra* note 2, at 18-19.

25. MCLYNN, *supra* note 2, at 22-29.

26. MCLYNN, *supra* note 2, at 32-35. Fielding also borrowed Wild himself, making him the antihero of his ironic novel, *THE LIFE OF MR. JONATHAN WILD THE GREAT* (1743).

27. MCLYNN, *supra* note 2, at 264, 280.

28. MCLYNN, *supra* note 2, at 287.

29. MCLYNN, *supra* note 2, at 281-82.

English criminal justice system, which had previously used jails for housing prisoners awaiting trial, debtors, and the unemployed poor.³⁰

By the end of the eighteenth century, imprisonment had largely supplanted transportation as the penalty for minor property crimes,³¹ and only about ten percent of those condemned to death in London were executed.³² McLynn credits the changes in the administration of justice to a combination of factors, including the influence of such Enlightenment thinkers as Beccaria and Montesquieu on individual reformers³³ and the new industrial enterprise's need for regularity and predictability in the application of the law.³⁴

The waning of the Bloody Code, then, is for McLynn a consequence of both culture and economics, just as the conditions producing crime are multifaceted: "Economic factors create the necessary substratum for crime, but its nature depends overwhelmingly on cultural factors."³⁵ As for the Bloody Code's long life, the author asserts that its defenders resisted reform for more than a century in part because they subscribed to the myth of deterrence, but primarily because the "complex network of hierarchy, authority, and deference could be held in being only if the elite reserved the ultimate weapon as an awful example."³⁶

Here, McLynn attributes to the representatives of the eighteenth-century ruling class more subtlety and foresight than they may in fact have possessed. The Bloody Code's eccentric evolution suggests limited, localized aims rather than a grand, "ideological" design. Still, as McLynn shows, with few (mostly symbolic) exceptions,³⁷ its operation clearly favored the privileged, giving the lie to the era's equality-before-the-law rhetoric. *Crime and Punishment in Eighteenth-century England* may provoke reflection on some of the unspoken assumptions of modern American criminal law.

30. MCLYNN, *supra* note 2, at 294-96.

31. MCLYNN, *supra* note 2, at 314.

32. MCLYNN, *supra* note 2, at 309.

33. MCLYNN, *supra* note 2, at 314.

34. MCLYNN, *supra* note 2, at 315.

35. MCLYNN, *supra* note 2, at 318.

36. MCLYNN, *supra* note 2, at 256.

37. The author discusses, for example, the cases of Lord Ferrers, hanged for murdering his steward, and Lords Lovat, Balmerino, and Kilmarnock, beheaded for the participation in the Jacobite rebellion of 1745-46. MCLYNN, *supra* note 2, at 150-51, 159.