# England in the Eighteenth Century[[1]](#footnote-1)

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The criminal justice system of England in the eighteenth century presents a curious spectacle to an observer more familiar with modern institutions. The two most striking anomalies are the institutions for prosecuting offenders and the range of punishments. Prosecution of almost all serious criminal offenses was private, usually by the victim.**[[2]](#footnote-2)** Intermediate punishments for serious offenses were strikingly absent. It is only a modest exaggeration to say that, in the early years of the century, English courts imposed only two sentences on convicted felons. Either they turned them loose or they hanged them.

Parts I and II of this chapter describe the institutions for prosecution and the forms of punishment. In part III I offer possible explanations for several features of the legal system, arguing that, contrary to the view of many commenters, then and now, they may have made considerable sense.

## Part I: The Private Prosecution of Crime

England in the eighteenth century had no public officials corresponding to either police or district attorneys. Constables were unpaid**[[3]](#footnote-3)** and played only a minor role in law enforcement. A victim of crime who wanted a constable to undertake any substantial effort in order to apprehend the perpetrator was expected to pay the expenses of doing so. Attempts to create public prosecutors failed in 1855 and again in 1871. When the office of Director of Public Prosecution was finally established in 1879, its responsibilities were very much less than those of an American district attorney, now or then. In eighteenth-century England a system of professional police and prosecutors, government paid and appointed, was viewed as potentially tyrannical–worse still, French.**[[4]](#footnote-4)**

Any Englishman could prosecute any crime; in practice, the prosecutor was usually the victim. It was up to him to file charges with a local magistrate, present evidence to the grand jury and, if the grand jury found a true bill, provide evidence for the trial.

Their system for prosecuting crimes was similar to our (and their) system for prosecuting torts. Under both, the victim initiates and controls the process by which the offender is brought to justice. One difference is that if the tort plaintiff prevails, the tortfeasor is required to pay him damages. If the victim of a crime won his case, the criminal was hanged or possibly pardoned. The damage payment in civil law provides the victim with an incentive to sue. What incentives to prosecute were there in eighteenth-century criminal law?

Modern historians were not the first to consider this question. A central concern of eighteenth-century legal writers was the difficulty of inducing people to prosecute. One solution was to establish substantial rewards for the conviction of criminals charged with particularly serious crimes.**[[5]](#footnote-5)** In 1692, Parliament offered a reward of £40 for the apprehension and conviction of highway robbers. In later decades, the range of felonies to which the reward applied gradually expanded. In 1720, a royal proclamation added an additional £100 reward for the prosecution and conviction of street robbers in and near London. The combined reward of £140 corresponded to about three years’ income for a journeyman, much more for a laborer. The royal reward remained in force, with one brief intermission, until 1745.

Rewards increased the incentive for victims to prosecute. The combined effect of rewards and a free pardon for a criminal whose testimony resulted in the conviction of two others provided an incentive for a member of a criminal gang to betray his associates. Rewards also encouraged thieftakers, private investigators who supported themselves by public rewards for convicting thieves, private rewards offered by victims and rewards for the recovery of stolen property. Jonathan Wild, self-appointed Thieftaker General, supported himself for a decade by a combination of revenues from thieftaking, rewards for the recovery of stolen property and income from the large-scale employment of thieves. He was convicted and hanged in 1725 but lived on in fame as the central figure of a book by Defoe and, in the persona of Mr. Peachum, of Gay’s *Beggar’s Opera*.

Rewards provided an incentive for prosecution but led to new difficulties. In some cases it was alleged that the accused had been framed for an offense that had never occurred. Other cases were said to be the result of entrapment; the perpetrators were persuaded to commit the crimes by confederates whose real purpose was to betray them for the reward.**[[6]](#footnote-6)** The most famous of the resulting scandals involved the McDaniel gang who, when one of their plots miscarried and they were themselves tried, turned out to have been responsible over a period of about six years for the transportation of two men and the hanging of six and to have received a total of £1,200 in state rewards.

Thief-takers constantly attended the Old Bailey proceedings to become familiar with the persons who regularly appeared in the dock, from whom they chose people to give false information about. There was a common saying that anyone discharged from the Old Bailey was bound to reappear after a Session or two. Such persons were befriended by the thief-taker**’**s accomplice, and led into further crime (or indeed the accomplice would commit the robbery himself), for which they would be subsequently sworn against. After the robbery, the confederate and his companion would meet in some pub in Black Boy Alley or Chick Lane, where the thief-taker with some further assistants would arrive and apprehend both of them. When they were carried before a Justice, the thief-taker would get his secret confederate admitted as an evidence and the poor dupe would be convicted; the reward would be shared between the thief-taker and the confederate. Subsequently the confederate would become a thief-taker in his turn, using another confederate to ensnare another innocent dupe.[[7]](#footnote-7)

Casanova, visiting London from 1763 to 1764, observed window signs advertising the availability of false witness.**[[8]](#footnote-8)** Jurors, knowing that witnesses expected to share in the reward from conviction, discounted their testimony accordingly.

John Townsend, one of the more famous of the Bow Street Runners, appearing before a parliamentary committee in 1816, argued that payments to officers ought not to depend on conviction, since if they did the officer would have an incentive to convict a defendant whether or not he was guilty:

“I have, with every attention that man could bestow, watched the conduct of various persons who have given evidence against their fellow-creatures for life or death, not only at the Old Bailey, but on the circuits, and I have always been perfectly convinced that [rewards not depending on conviction] would be the best mode that possibly could be adopted to pay officers, particularly because they are dangerous creatures; they have it frequently in their power (no question about it) to turn that scale, when the beam is level, on the other side; I mean against the poor wretched man at the bar: why? This thing called nature says profit is in the scale; and, melancholy to relate, but I cannot help being perfectly satisfied, that frequently that has been the means of convicting many and many a man.” **[[9]](#footnote-9)**

Perhaps because of such problems, the system of rewards was reduced but not eliminated in the mid-eighteenth century. It was supplemented in 1752 by a provision permitting the court to reimburse prosecutors, especially poor prosecutors, for the expenses of prosecution.**[[10]](#footnote-10)** While such reimbursement reduced the disincentive to prosecute, it did not eliminate it. Even if the defendant was convicted, expenses were not always reimbursed or reimbursed in full. Not until 1778 did it became possible for a prosecutor to be reimbursed for an unsuccessful prosecution.

Dissatisfaction with the perceived problems of private prosecution and concern with what was perceived as a high and rising crime rate eventually led to the introduction of paid police forces, first in London in 1829 and later elsewhere in England.**[[11]](#footnote-11)** The police took over from the private prosecutors much of the cost of locating and convicting criminals. The result, by the end of the nineteenth century, was a system where most prosecution was nominally private but where the private prosecutor was usually a police officer.

It is easy enough now, it was easy enough then, to see why a system of private prosecution could not work. The puzzle is that it did. Whether it worked better or worse than alternative institutions would have is not clear. But we know that, during the eighteenth century, quite a lot of English criminals were charged, prosecuted, and convicted. While property may not have been as secure as its owners wished, it was sufficiently secure to permit a flourishing economy and an impressive amount of economic growth. At the end of the century it was the French state, with its modern system of police and prosecutors, that went down in the chaos of the French Revolution, while England went on to the glories of empire and industrial revolution.

## Part II: Punishment at the Extremes

It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

(Blackstone, *Commentaries*, Book 4 Chapter 1)

Offenses fell into three categories according to their possible punishment: minor offenses (mostly misdemeanors**[[12]](#footnote-12)**), clergyable felonies, and non-clergyable felonies. Minor offenses such as petty larceny, theft of goods worth less than a shilling, typically received punishments designed largely to shame the offender such as public whipping or exposure in the stocks. Those accused of such offenses were subject to summary judgment by a magistrate rather than receiving a jury trial.**[[13]](#footnote-13)**

In addition to offenses that might be expected to be prosecuted by the victim there were what we would classify as victimless crimes, in particular vagrancy, prostitution, and begging. Constables or members of the night watch were supposed to arrest those guilty of such offenses, bring them to a magistrate, and receive a small reward for doing so. The usual penalty was a brief period of confinement at hard labor.

### Benefit of Clergy

Benefit of clergy originated as a legal rule permitting clerics charged with capital offenses to have their cases transferred to a church court, which did not impose capital punishment. “Cleric” came to be defined as anyone who could read, usually tested by having him read a specific verse from the Bible, known for that reason as the “neck verse”–memorizing it could save a defendant’s neck.

By the eighteenth century, the rule had changed in ways that made it entirely secular.**[[14]](#footnote-14)** Statutes in 1623 and 1691 extended the privilege for some offenses to women, with no requirement of literacy. After 1706 men were no longer required to demonstrate literacy.

Under a Tudor statute, a defendant who pled his clergy could be imprisoned for up to a year, but that appears to have been done only rarely.**[[15]](#footnote-15)** Defendants not actually clergymen were entitled to plead clergy only once; branding on the thumb may have originated as a device to identify those who had pled clergy once and so could not do so again. But this restriction does not seem to have been enforced very often. In theory, being convicted of a felony was supposed to result in forfeiture of property and land, with land being restored to a felon who pled clergy and was branded,**[[16]](#footnote-16)** but that also does not seem to have been enforced. Presumably the brand had some stigmatizing effect. That, plus the costs borne by the defendant prior to his conviction,**[[17]](#footnote-17)** seems to have been at some periods the only penalty actually imposed on someone convicted of a clergyable offense.**[[18]](#footnote-18)** That ceased to be true when the transportation act of 1718 made it possible to sentence some defendants who pled clergy (but not peers, actual clerics, or those whose crime was manslaughter) to transportation to America for seven years of indentured servitude.

Clergyable offenses were offenses for which, absent benefit of clergy, the punishment was death. Manslaughter, for example, was a clergyable felony. Its definition included many offenses that we would define as murder. A killing in a tavern brawl, even if done with a deadly weapon, was manslaughter as long as there was no evidence of premeditation or previous enmity. The killer was allowed to plead his clergy, branded on the thumb, and released.**[[19]](#footnote-19)**

### Transportation

Large-scale use of transportation as a criminal punishment began about 1663. It was imposed both on defendants convicted of capital non-clergyable felonies and pardoned on condition of transportation and on some defendants convicted of clergyable felonies. Until the literacy requirement was abolished a judge who wished to transport such a felon could choose to test it strictly and find that the defendant was not literate and thus not entitled to benefit of clergy or, if the defendant was already branded for a previous offense, the judge could enforce the rule forbidding non-clerics to plead clergy more than once.

Transportation was by private merchants. A merchant who wished to transport a felon was required to pay the sheriff “a price per head that included jail fees, the fees of the clerk of the appropriate court, fees for drawing up the pardon, and so on.”**[[20]](#footnote-20)** After transporting the felon to the New World, the merchant could sell him into indentured servitude for a term depending on his offense. This was a profitable transaction if the felon was young and healthy or had useful skills, but many felons did not bring enough return to pay the merchant's cost. The result was that felons who had been sentenced to transportation but whom nobody was willing to transport accumulated in jails intended as temporary holding places.

Another problem was with the colonies to which the felons were sent; in the 1670's both Virginia and Maryland passed laws prohibiting transportation. John Beattie, a leading historian of the period, concludes that “transportation to the mainland colonies was being seriously curtailed by the 1670's.”**[[21]](#footnote-21)** While some transportation continued, it seems to have become an uncommon punishment by the end of the seventeenth century.

The second period of transportation began in 1718. This time the government made no attempt to charge merchants for the privilege of transporting convicted felons, instead offering a subsidy of £3 per transportee. On those terms transportation was profitable. The system was continued until the American Revolution removed most of the places to which transportees were being sent from the authority of the crown.**[[22]](#footnote-22)**

After 1776, a variety of temporary measures were used to deal with prisoners who would otherwise have been transported. Some, confined in hulks moored in the Thames, were used as convict labor for work on improving the river. Others were held in jails. None of these expedients proved satisfactory and they were eventually replaced by transportation to Australia. At about the same time, there were attempts to expand and regularize the use of long-term imprisonment. While initially frustrated by the unwillingness of local governments to build the necessary facilities, such attempts were ultimately successful.

### The Range of Punishments

Along with the broadening of the class of defendants permitted benefit of clergy came a narrowing of the range of clergyable offenses. Under the Tudors, a variety of serious offenses**[[23]](#footnote-23)** were made non-clergyable. Starting in the late seventeenth century, many more were added.**[[24]](#footnote-24)** The result was a legal system in which the only punishment for some capital offenses was a branded thumb while for many others the only punishment a judge could impose was hanging.

While hanging was, for much of the century, the only punishment that a judge could impose for serious non-clergyable felonies, that did not mean that everyone charged with such a felony, or even everyone convicted, was actually hanged. Some charges were dismissed by the grand jury’s failure to indict.**[[25]](#footnote-25)** A substantial fraction of defendants were acquitted. Of those convicted, many were convicted of a lesser offense. A jury might find a defendant guilty of an offense that was punishable by whipping or the pillory either to keep the offender from pleading his clergy and being released or to prevent him from being convicted of a capital offense and hanged. After 1717, they might find him guilty of a clergyable rather than a non-clergyable felony in order to convert the punishment from hanging to transportation.

In some cases the verdict was clearly an act of “pious perjury” by the jury. The fiction was clear when a jury found a defendant guilty of stealing from a house goods of value 39 shillings although the goods included more than that in cash; 40 shillings was the value that would make the theft non-clergyable.**[[26]](#footnote-26)** In other cases the jury failed to include in its verdict features of the crime, such as the fact that the theft was from a house at night or involved breaking and entering, that would have made it non-clergyable. The combined effect of acquittals and convictions for a lesser (non-capital) offense was that, in the sample examined by Beattie,**[[27]](#footnote-27)** fewer than 40% of those charged with capital property felonies and fewer than 25% of those charged with murder were actually convicted of those offenses.

Conviction did not necessarily result in hanging. It was quite common for a defendant to be convicted and then pardoned. In some cases the reason was that the judge disagreed with the jury's verdict and recommended a pardon in order to avoid the execution of an innocent person. In many other cases, the pardon was the result of petitions by the convicted defendant's relatives, friends, employer, and anyone else willing to petition the crown on his behalf.

Some pardons resulted in the convict going free. Others were a device for substituting a lesser but still serious punishment. The convicted criminal was pardoned conditional on his agreeing to be transported or to enlist in the army or navy. Multiplying the fraction of those indicted for capital offenses who were convicted of them by the fraction of those convicted who were hanged, in Beattie’s sample the fraction of defendants charged with a capital felony who were actually hanged was less than 16%.

The overall picture of punishment for serious offenses was fairly simple. For clergyable felonies, the convicted offender was either branded on the thumb and sent home or, especially after 1718, transported. For non-clergyable capital offenses, of which there were a great many, the convicted offender was either pardoned, pardoned and transported, pardoned on condition of enlistment, or hanged. Jails were used to confine defendants awaiting trial or convicts awaiting punishment.**[[28]](#footnote-28)** Occasionally something went wrong with the system and convicted prisoners started to accumulate in the jail system. Toward the end of the century there were proposals to expand the use of confinement as a punishment and some efforts begun in that direction.

## Part III: Three Puzzles

While contemporaries, then as now, worried about rising crime rates, there seems to be little evidence that crime rates were actually rising. Beattie's figures, based on homicide indictments per capita, suggest that rural homicide rates fell more than fourfold and urban about ninefold between 1660 and 1800. Combining that information with data for the nineteenth century,**[[29]](#footnote-29)** it seems likely that much, perhaps most, of the drop in the crime rate between 1660 and 1900 occurred prior to the introduction of paid police.

Such conclusions must be qualified by the fact that the seventeenth- and eighteenth-century data reflect homicide indictments, not homicides. If the fraction of homicides resulting in indictments felt sharply from 1660 to 1800, that could explain the data without any decrease in the murder rate. But there seems to be no evidence for a decline on that scale. Beattie concludes that while some of the decline in the indictment rate may reflect a change in what events were prosecuted as homicide, at least some is due to a real drop in the murder rate.**[[30]](#footnote-30)**

To understand how and why the system worked as it did, there are at least three puzzles to be solved. The first is why private individuals chose to bear the cost of prosecution even when there was no prospect of a reward. The second is why the legal system used the limited range of punishments it did, with very little use of imprisonment. The third is why the legal system imposed high punishments with low probability.**[[31]](#footnote-31)** If execution was the correct punishment for anyone who stole goods worth forty shillings or more from a house, why were only a small minority of those caught committing that crime hanged? If it was too high a punishment, why did the legal system not set a lower punishment and actually inflict it?

### The Incentive to Prosecute

Two features of the system may help solve the first puzzle: deterrence as a private good and compounding, out-of-court settlement of criminal charges.

#### Deterrence as a Private Good

Consider the situation from the viewpoint of a potential victim of crime. He would like potential thieves to believe that if caught stealing from him they would be prosecuted to the full extent of the law. But if he actually caught a thief, he would be strongly tempted not to file charges. Carrying the case through as a private prosecutor might cost many times the value of the goods stolen.**[[32]](#footnote-32)** The prosecutor not only had to pay legal fees, he also had to pay transportation and lodging expenses for his witnesses to attend court, often at a distance of a day's travel or more from their homes. A successful prosecutor might be reimbursed for expenses by the court but such reimbursement was unlikely to cover all expenses.**[[33]](#footnote-33)** If the criminal had to be located and apprehended before he was prosecuted there would be additional costs, possibly including the cost of advertising and paying a reward. Potential victims wished potential criminals to be deterred. But in order to achieve that result, it had to be in the interest of actual victims to prosecute actual criminals. 

One solution was reputation. A merchant who expected to be a frequent target of theft might prosecute one thief to assure others of his resolve. But most potential victims would be lucky to catch one thief in a lifetime. How could they commit themselves in advance so that potential thieves would know they would be prosecuted?

The solution was to join an association for the prosecution of felons. Most such associations consisted of between twenty and a hundred members, all living in the same general area.[[34]](#footnote-34) Each contributed a fixed payment to a common pool, money that could be used to pay the cost of prosecuting a crime committed against any member. The list of members was published in the local newspaper.

Thousands of prosecution associations were established in the eighteenth and early nineteenth centuries.[[35]](#footnote-35) I interpret their main function not as insurance but commitment.**[[36]](#footnote-36)** By joining such an association, a potential victim committed himself to prosecute. The money had already been paid out. That was why the list of members was published in the local newspaper–for the felons to read.

Not everyone joined such an association. While it is impossible to make any very exact estimates, members and their households were surely a minority, quite possibly a small minority, of the population. There were at least two different reasons not to join, corresponding to two different groups of non-members. The first consisted of potential victims for whom deterrence was already a private good. Wealthy individuals, firms that were either large or particularly subject to theft, were repeat players with an adequate private incentive to follow through on their commitment to prosecute. The second group consisted of those for whom private deterrence was not worth its price: potential victims whose expected costs of crime were low enough to make the value of deterrence less than its cost.**[[37]](#footnote-37)**

Private deterrence cannot be the full explanation for why offenses were prosecuted, since surviving court records reveal many cases where the prosecutor was neither associated with a prosecution association, wealthy, nor representing a firm. What, in such cases, was the incentive to prosecute?

One answer popular at the time was that prosecutors were motivated by a desire for vengeance. Another possible answer is that prosecution was sometimes a necessary step towards recovering stolen property.[[38]](#footnote-38) Another is that prosecutors began prosecutions in the hope of being paid not to complete them.

#### In Defense of Compounding Felonies

One way of resolving a civil suit is by an out-of-court settlement. The equivalent in a system of privately enforced criminal law is for the prosecutor to compound the offense, agree in exchange for compensation not to press charges. Compounding a misdemeanor was legal in eighteenth-century England. Magistrates seem to have felt that part of their job was to encourage private settlements between the offender and the injured party, thus keeping disputes out of the courts.

“It is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery ... , for the court to permit the defendant to *speak with the prosecutor*, before any judgement is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice ... prosecutions for assaults are by these means too frequently commenced rather for private lucre than for the great ends of public justice.”[[39]](#footnote-39)

Compounding a felony was illegal once charges had been filed but appears to have been common. A potential prosecutor could agree not to file charges in exchange for compensation, even an apology. Once he had filed his charges, he was subject to a fine if he failed to carry the case through to trial.[[40]](#footnote-40) He could, however, show up and offer a deliberately weak prosecution or fail to show up and hope to be let off the fine. One of the criticisms of the system of private prosecution, especially during the nineteenth-century attempts to establish a system of public prosecutors, was that many cases were dropped because of agreements between the prosecutor and the defendant.[[41]](#footnote-41)

What both modern and contemporary commentators seem to have missed is that, however corrupt such arrangements might be from a legal standpoint, they helped solve a fundamental problem of private prosecution. The possibility of compounding provided an incentive to prosecute. It converted a criminal prosecution into something more like a civil suit, where a victim sues in the hope of collecting money damages. And while compounding might save the criminal from the noose, he did not get off scot-free. He ended up paying the prosecutor what was in effect a damage payment. The appendix offers evidence that the same mechanism provided part of the incentive for private prosecution in the form of appeals of felony five centuries earlier.

Viewed from this standpoint, cases that went to trial represent failures, not successes, of the system. As a rule, the loss to the criminal of being hanged or transported was considerably greater than the resulting gain to the prosecutor. Between the two values there was a bargaining range. Sometimes bargaining would break down, perhaps because of differing opinions concerning the probability of conviction or the assets available to the defendant, perhaps due to mutual stubbornness in trying to get the most favorable possible outcome. But under normal circumstances, if my conjecture about how the system worked is correct, some payment in cash or kind, offered by the defendant himself or others on his behalf, would be agreed on.[[42]](#footnote-42) That payment would punish the defendant, reward the prosecutor, and compensate the victim if, as was usually the case, the victim was the prosecutor.

We do not know how common such arrangements were. One study of eighteenth-century cases found that “28 of the 227 prosecutors bound by recognizances to appear at the Essex quarter sessions failed to bring an indictment, but only two had their recognizances estreated.”**[[43]](#footnote-43)** The fact that the penalty for a prosecutor who failed to indict was rarely enforced is consistent with the view that compounding a felony was a practical option for a prosecutor. The small percentage of cases dropped, on the other hand, is evidence against. It does not, however, include either those prosecutors who were bought off before filing charges or those who brought an indictment, perhaps in order to avoid the risk of legal penalties for not doing so, but deliberately lost the case, perhaps by making it clear to the jury that they now considered themselves satisfied or, if the jury convicted, persuaded the judge that the defendant deserved a pardon.

One reason a case might go to trial was a breakdown in bargaining. Another was that the prosecutor's objective was deterrence rather than compensation. Execution, even transportation, would impose a larger cost on most criminals than the largest payment they could make. A prosecutor seeking deterrence would have to balance that benefit against whatever the criminal was willing and able to pay.

One advantage of such institutions, compared to either civil law or criminal fines, was their superior flexibility. The fine was determined not by the court's estimate of what the defendant owed or could pay but by bargaining between the parties most immediately concerned. Defendants might be less eager to appear judgment-proof if the consequence of that status was being hanged. Of course, a criminal system could also offer the defendant the choice between hanging and paying a fine. As we will see in Part VI below, such a transaction may have been implicit in the pardoning system, although the payment took a non-pecuniary form. But the court might be less competent at finding the right fine-the highest that the criminal (and, possibly, his friends and family) were prepared to pay-than a private prosecutor pursuing his private interest.

Controlling undesirable acts by treating them as crimes under a system of private prosecution has another advantage over the alternative approach of treating them as torts. For many offenses, the victim is also the best witness. In a civil system, where legal success produces a damage payment from tortfeasor to victim, the victim has an incentive to perjure himself, a problem familiar enough in modern tort law. A jury, recognizing that incentive, may be skeptical of evidence offered by the plaintiff on his own account or by witnesses provided by the plaintiff.

A victim who hopes to be paid to drop charges before the trial has an incentive to threaten to perjure himself in order to secure a conviction. But unless he has some way of committing himself to carry out such a threat, it will not be believable. [[44]](#footnote-44) Paradoxically, the result may be to make prosecution more profitable than it would be under a civil system. If the case goes to trial the prosecutor gets nothing, so his reservation price, the lowest price at which settlement makes him better off than trial, is lower than under a civil system. But the defendant's reservation price, the highest amount he can pay and still be better off than if the case is tried, will be higher under the criminal system, since the greater credibility of prosecution testimony under such a system makes conviction more likely. And such a system, by reducing the victim's incentive to commit perjury, may do a better job than would a civil system of distinguishing guilty from innocent.

Concerns with profitable perjury and its potential effect on the willingness of juries to believe witnesses are not entirely theoretical, nor are they based only on modern experience with plaintiffs who abandon their wheelchairs immediately after being awarded large damage payments for permanently disabling injuries. The problem was discussed in the eighteenth century in the context of rewards for the conviction of criminals guilty of certain crimes. As mentioned earlier, it was widely believed both that such rewards led to entrapment and attempts to frame innocent parties and that such concerns were reflected in jury skepticism. Those were among the reasons for the partial abandonment, in the middle of the century, of the system of public rewards.[[45]](#footnote-45)

The conjecture I have offered is relevant not only to why crimes were prosecuted but also to another issue raised in modern discussions of eighteenth-century English law: its relation to the system of class and authority. Some authors view the law as a class-neutral instrument employed by rich and poor alike to protect themselves against the small criminal minority.**[[46]](#footnote-46)** Others argue that it was primarily a device by which the rich protected themselves from the poor or by which the ruling class established and maintained its legitimacy.[[47]](#footnote-47)

One argument for the latter view is that those with more resources were better able to prosecute crimes committed against themselves. That is surely true to some extent, although writers on the other side of the argument have offered evidence that many private prosecutors were ordinary members of the working class. But what both sides have missed is the tendency of the system to discriminate in favor of poor criminals and against rich ones.

The tactic of starting a prosecution in order to be paid to drop it is familiar in the literature on malicious prosecution.[[48]](#footnote-48) One implication is that the incentive to prosecute criminals is greater the greater their ability to pay to have charges dropped. A victim who catches an obviously penniless thief is probably best off giving him a beating and turning him loose, at most insisting on a public apology. A victim who catches a well-dressed thief has more to gain by prosecuting. The eventual out-of-court settlement leaves the thief better off than if he had been tried and convicted but worse off than if the victim had not bothered to prosecute because it was not worth the cost. Hence private prosecution added to the system an incentive for selective prosecution of those who could pay to avoid the risk of trial.**[[49]](#footnote-49)**

One issue that a system of private prosecution must deal with is the allocation of property rights to prosecute particular offenses. This is not a problem if the only incentive is deterrence–I am happy to have you bear the cost of prosecuting, and thus deterring, offenders who injure me. But it may be a problem if the incentive for prosecution is the opportunity to be paid to drop charges or if one possible prosecutor is an accessory of the criminal who wishes to control the prosecution in order to make sure that it fails. Conspiracies between poachers and informers were alleged to have occurred in the enforcement of the game laws.

“If a friend laid an information before the keepers could, it prevented their prosecuting, for the informer had rights in the fine. Five pounds sterling went from the poacher to the JP, then to the friend (as informer) and back again to the poacher over a pint in the alehouse.” [[50]](#footnote-50)

Rewards avoided this problem, since their allocation was determined by the judge, divided among those he believed to have had some hand in securing the conviction.

In order to either obtain an out-of-court settlement or protect a confederate, a prosecutor who drops charges must be able to prevent another prosecutor from taking up the case. A victim who was himself the chief witness or who could control other essential witnesses was in a position to do so. Other potential prosecutors were not. The only way they could provide the offender reasonable security against prosecution was to carry the process far enough forward to make the charges *res adjudicate* and thus invoke the double jeopardy protection.[[51]](#footnote-51) That might be risky since, once a trial started, it was controlled by the judge, not the prosecutor.

If two people did wish to prosecute the same offense, what would happen? One possibility is that the conflict would be resolved by the magistrate. The usual first step of prosecution, filing charges with the magistrate, required his approval, although a prosecutor had the option of instead proceeding directly to the grand jury. Another possibility is that the rule “first in time, first in right” would have applied to such cases, as it seems to have applied to the related case of informers entitled to collect a share of the penalty prescribed under penal statutes. [[52]](#footnote-52)

### Punishment and Punishment Cost

We come next to the puzzle of why the legal system used execution, transportation, and for minor offenses humiliation by whipping or exposure in the stocks but not, with a few exceptions, imprisonment.

In considering the choice among alternative punishments, a useful concept is punishment inefficiency: the ratio of punishment cost to amount of punishment.[[53]](#footnote-53) A costlessly collected fine or damage payment has an inefficiency of 0; what one person loses another gets, so no net cost. Execution has an inefficiency of about 1; the criminal loses his life and nobody gets one.[[54]](#footnote-54) Imprisonment as practiced in modern societies has an inefficiency considerably greater than 1. The criminal loses his liberty, nobody gets it, and the state must pay for the prison.

One explanation for the pattern of criminal punishments in eighteenth-century England is that imprisonment of convicted criminals was little used because it was too expensive.That fits the similar pattern in Chinese criminal punishment.**[[55]](#footnote-55)** The later shift to extensive use of imprisonment can be interpreted as in part a consequence of economic growth. A punishment too costly for a poor country might be appropriate for a rich one.

This conjecture suggests several questions. The first is whether imprisonment in the eighteenth century was necessarily more inefficient than execution; a penal system that was willing to hang sheep-stealers had no moral qualms about setting them to hard labor instead. If the output that could be extracted from prisoners was more than the cost of guarding and maintaining them, then imprisonment, although still less efficient than a fine, would be more efficient than execution.

Apparently it was not. One piece of evidence is the attempt to use prison labor for improvements on the Thames when transportation was interrupted by the American Revolution. The conclusion of modern historians[[56]](#footnote-56) is that the value of the work done was much less than the cost of maintaining the prisoners.

A more interesting attempt occurred on the other side of the channel. French criminals sentenced to the galleys became part of an elaborate system of state-run slavery.[[57]](#footnote-57) Until 1748 they were sent to the arsenal at Marseilles, where the galley fleet was based. Those in sufficiently good condition were assigned to galleys as rowers. The rest were used in the arsenal to produce goods for government use under the direction of private employers. The private employers paid a small wage to the galley slaves, presumably for incentive purposes, and received a subsidy from the state. According to Andrews, the system provided the state with goods at below market prices.[[58]](#footnote-58)

During the winter months the galleys were kept at dock. Their oarsmen were rented out, with guards, to employers in Marseilles. Other prisoners ran small businesses in shacks on the dockside, paying off the officers of their galley with a share of the profits.

In 1748, the galleys were abolished; the galley slaves were shifted elsewhere, many to Brest, the chief base of the Atlantic fleet. At Brest, an elaborate prison was constructed for the galley slaves, implementing the latest ideas in eighteenth-century penology. Each slave worked eight days outside of the prison and eight days in. The outside work was mostly heavy labor on behalf of the fleet, but prisoners with useful skills were allowed to use them. The eight days in prison were devoted to a mix of prison maintenance and production of goods and services. The latter were sold to the public in the prison courtyard, which functioned as a sort of bazaar, with sellers of goods and providers of services chained in place.

The interesting question for our purposes is whether this elaborate system of slave labor showed a profit or at least covered its costs. Nobody seems to have worked out the relevant accounts, but there is indirect evidence. While the French state exploited the labor of its galley slaves, it made little attempt to exploit the labor of the much larger number of prisoners not sentenced to the galleys. If the galley slave system had been a clear success, it is hard to believe that the eighteenth-century French state, perennially short of cash, would not have applied a similar approach to the rest of its prison population or at least as much of it as was in suitable physical condition.

A second piece of evidence comes from the role played by galley slavery in the history of imprisonment.[[59]](#footnote-59) At about the end of the 15th century, Mediterranean states with galley fleets began using condemned prisoners as oarsmen.[[60]](#footnote-60) In some cases, states without galley fleets commuted capital sentences in order to provide rowers for the fleets of their Mediterranean allies. The result was a substantial shift away from capital punishment in favor of galley slavery.

That sequence of events suggests that rowing a galley was a job sufficiently well suited to slave labor to convert imprisonment from a punishment less efficient than execution to one more efficient than execution. There are at least two reasons why that might have been the case. One is that galley labor is relatively easy to supervise. Since the oarsmen are all rowing together under the observation of a free officer, any slacking will be immediately obvious and can be immediately punished.[[61]](#footnote-61) The other is that it is difficult for a chained prisoner to escape from a galley at sea.

I conclude that galley slaves, at a time when galleys were still militarily useful, probably produced services worth more than the cost of guarding and maintaining the slaves but that in other employments France, like England, found that prisoners cost more than they could be made to produce.

If imprisonment had a positive cost, the next question to ask is how it compared with what the British government was willing to pay for other punishments. We can get some evidence on that from the history of transportation. One reason the seventeenth-century experiment with transportation failed was that the government was unwilling to pay for it. The second experiment, begun in 1718, succeeded in part due to a subsidy of three pounds per convict. That suggests that the amount the government was willing to pay for transportation reached three pounds per transportee in about 1718.[[62]](#footnote-62)

Three pounds per transportee was a one-time cost in exchange for which the transportee was removed from England for at least 7, in many cases at least 14, years.[[63]](#footnote-63) I have no figures for the cost of prisons in England save the very high figure for confinement of prisoners in hulks during the American Revolution. But the cost per prisoner at one of the contemporary French prisons was the equivalent of about four pounds sterling (75-79 *livres tournois*) a year.[[64]](#footnote-64) That suggests that imprisonment cost substantially more than the English state was willing to pay.

One exception was imprisonment for debt, but it was an odd sort of imprisonment. Debtors, unlike felons, were unlikely to run away. The King’s Bench prison in London allowed its occupants to move pretty freely in and out, with a considerable minority living outside the walls in the neighborhood of the prison. The cost to the government was close to zero, since prisoners were responsible for paying their own expenses.**[[65]](#footnote-65)**

One further element in the pattern of punishment in England in the eighteenth century is implied by the conclusions of Part III above. Punishments for serious crime were not limited to execution and transportation. There was also the possibility of a payment, in cash or kind, worked out between criminal and prosecutor. The punishments provided by law were default outcomes providing the background against which such bargaining occurred. A fine is an efficient punishment, since what one party loses another gains. The legal punishments of transportation and hanging were less efficient than fines but still more efficient, and less costly to the state, than imprisonment.

And, in addition to those payments, there were payments of a different sort …

### Pardons

A further oddity in the pattern of punishments in eighteenth-century England was the extensive use of pardons. In Beattie's study of Surrey between 1660 and 1800, he found that only about 40% of those convicted of capital felonies were actually executed. For many of the rest, especially after 1718, a pardon was conditional on transportation. But for some the pardons were unconditional. Having been charged, jailed, tried, convicted, and jailed again while waiting execution, they were released. “Go home and don’t do it again.”

Pardons were sometimes used to correct what the judge regarded as an erroneous verdict. But in most cases, guilt was not the issue. The pardon was based on character evidence about the defendant, offered either during the trial or in later petitions. In some cases petitions came from people who knew the defendant and could provide information on how likely he was, if pardoned, to reform. In others what qualified the petitioner seems to have been not his personal knowledge of the defendant but his influence over the officials who decided which defendants were to receive royal pardons.[[66]](#footnote-66)

There are at least three different functions that the system of pardons may have served. The most obvious is avoiding unnecessary punishment costs. If the experience of being jailed, tried, convicted, and almost hanged is sufficient to discourage this particular defendant from any future crimes, then execution serves no incapacitative function. If the defendant is unlikely to reform in England but has better prospects in the harsher environment of the New World, transportation may be a better punishment than execution. And if most potential criminals who are similar to this defendant can be deterred by something less than a certainty of being executed if convicted, then by pardoning some of them, with or without transportation, the state reduces punishment cost substantially at only a small price in deterrence.**[[67]](#footnote-67)** Similar arguments can be used to justify judicial discretion in sentencing in a modern court system.

A second function is taking account of the negative externalities imposed by execution. Hanging almost always imposes a large cost on the person most directly affected–that is one of the reasons for hanging people. It may also impose substantial costs on others: friends, relatives, employers, and taxpayers potentially responsible for supporting the convicted criminal's dependents. Those costs serve little deterrent function. If many such people are willing to testify in favor of the criminal at trial or petition for a pardon, that is evidence that such costs are substantial and so a reason for avoiding them by pardoning the convict.

So far I have assumed that pardons are based on information the court system receives about the prisoner. An alternative way of looking at them is as a good sold on a market. A petition from the convict's employer might provide information about the character or productivity of the convict. A petition from a politically influential nobleman who had never met the convict provided no such information. Yet such a petition would probably have more effect on the outcome of the case than one from the convict's closest friends.

Imagine that you are an ordinary Englishman who wishes to save the life of a friend convicted of a capital felony–say sheep stealing. One way of doing so is to go to some high-status person you know, perhaps the local squire, and ask him to intervene on your friend's behalf. If he does so, it will be as part of an exchange of favors. Low-status people sometimes have opportunities to benefit high-status people and you have implicitly committed yourself to do so, whether by being suitably deferential to the squire in public or by supporting the parliamentary candidate he recommends.

The local squire has more influence with the authorities than you do but not enough to save a convict from the gallows. He accordingly writes to a politically influential local peer, requesting him to intervene in behalf of one of the squire's people, a worthy young man led astray by bad companions. Here again, the exchange is not of information but of services. One of the things that makes local peers politically influential is the support of local squires.

The legal system, by considering and acting on such petitions, is implicitly offering the convicted felon a choice between a fine and execution. The fine is paid not by the felon but by his friends**[[68]](#footnote-68)** and takes the form not of money but of favors. It is paid, possibly through intermediaries, to people who can influence the granting of pardons. To the extent that those paying the fine are in a position to prevent their friends from committing felonies, such a system gives them an incentive to do so. It then functions as a collective punishment similar to those observed in some primitive legal systems, where fines are paid in part by the offender, in part by other members of his kinship group.[[69]](#footnote-69)

Pardons procured in this way substitute an efficient punishment–a fine–for a less efficient punishment–execution. In doing so, they provide resources to the state and those who control it. Officials who give out pardons are selling them for non-pecuniary payments. Thus the legal system, in addition to providing a mechanism to reduce crime, also increases the ability of the state to maintain its authority. Considered from the standpoint of public relations, it is an elegant way of doing so. Nobody is threatened save the guilty convict. The squire is not oppressing his tenants but doing them a favor at their request. The knowledge that such favors may occasionally be needed gives everyone in the village an incentive to be polite to the squire.[[70]](#footnote-70)

#### In Search of a Pardon: A True Story**[[71]](#footnote-71)**

James Boswell, best known for his biography of Samuel Johnson, was a Scottish attorney who practiced at length in the Scottish courts and more briefly in the English. He maintained a journal through much of his life, most of which survives. It contains, among many other things, a first-hand account of his attempt to obtain a pardon for a convicted client. **[[72]](#footnote-72)**

John Reid, found in possession of stolen sheep and charged with stealing them, was Boswell’s first client. Several months after he was acquitted the Lord Justice-Clerk, head of the Scottish Supreme Court for criminal matters, delivering a judgment in another case, mentioned the Reid case as one where an obviously guilty man had been gotten off by a clever lawyer.

Eight years later Reid was again found in possession of stolen sheep, again tried for stealing them. Boswell again defended him, this time unsuccessfully. Reid was sentenced to hang. Boswell petitioned the King for a pardon to convert the sentence from execution to transportation–arguably an appropriate sentence if Reid, as he claimed, had received the stolen sheep but not himself stolen them.

In seeking support from people who might be able to influence the king’s decision, Boswell offered arguments, but not very persuasive ones. With some, such as the Earl of Pembroke, an old friend of Boswell’s and a Lord of the Bedchamber to George III, he asked for support as a favor. Colonel Webster, a friend of Boswell and fellow believer in Reid’s innocence, knew Lord Cornwallis, another intimate of the King, so Boswell got Webster to write Cornwallis. In a letter to Lord Richford, Secretary of State for the Southern Department and an important figure at court, Boswell appealed to their common concern over the French suppression of the Corsican rebellion**[[73]](#footnote-73)**–which, of course, had nothing to do with John Reid’s guilt or innocence. His planned letter to the Lord Advocate–he ended up speaking to him instead, unsuccessfully–included the phrase “I would ask a transportation pardon from him as a favour which I should consider as a serious obligation for life,” a clear offer of a quid pro quo. Reid’s father-in-law had been a tenant of the Earl of Errol, so Boswell wrote the Earl asking his help. The response: “I should be very willing to show any favour in my power to a client of yours, but … .”**[[74]](#footnote-74)** The petition to the king included the argument that Reid received the sheep but did not steal them, but appealed mostly to the idea that an act of mercy by the king would make him popular with his Scottish subjects.

“The prerogative of dispensing mercy is the brightest jewel in the British crown, and several late instances of it in this part of the United Kingdom have endeared Your Majesty to your more northern subjects. Your petitioner flatters himself that he also shall have cause to bless the goodness of the King and shall not be singled out as a miserable exception to Your Majesty’s beneficent lenity.”**[[75]](#footnote-75)**

Despite Boswell’s effort, Reid was hanged. The reason, by Pembroke’s account, was the opposition of the Lord Justice-Clerk. Pembroke and Cornwallis spoke for Reid but could not overcome the strong opposition of the judge. In a later letter, Pembroke wrote: “Lord Rochford would have urged for mercy had he been able to do it, but he and the King too indeed think the judge must resign if, after his report, any mitigation of the sentence should take place.”**[[76]](#footnote-76)**

#### The Market for Mercy

We are left with one final puzzle: Why did the legal system set a high level of punishment and impose it on only a minority of offenders–in most cases a minority of convicted offenders?[[77]](#footnote-77)

One answer is suggested by part of my explanation of pardoning–a market for mercy. The analysis applies beyond the issue of pardons. The probability of favorable outcomes for a defendant depended in large part on his ability to get people to speak in his favor–his employer, his neighbors, his landlord, his victim/prosecutor. The victim had the option of not prosecuting, of accepting instead an apology. He had the option, in the course of the trial, of recommending mercy to judge and jury. So did others who might speak as character witnesses for the defendant. That gave anyone who might someday be accused of a crime an incentive to be on good terms with those he interacted with; their good opinion of him might literally save his life.[[78]](#footnote-78)

So one possible interpretation of the system is that it was designed to give potential defendants an incentive to maintain good relations with those they associated with, especially the status superiors whose word was likely to carry the most weight with judge and jury, and thus to reinforce the existing social structure.

#### Eighteenth-Century Behavioral Economics

There is at least one other possible explanation. From the standpoint of a modern economist, what matters for deterrence is expected punishment, roughly speaking the probability that a crime will result in punishment multiplied by the size of the punishment. That does not seem to be what contemporary commenters on the legal system had in mind. What mattered was that punishment be striking enough to impress itself on the minds of potential offenders and imposed often enough to keep potential offenders aware of it.**[[79]](#footnote-79)**

It was sufficient to hang an offender from time to time, preferably a particularly wicked offender. Once enough were hanged to make a suitable public impression, those less deserving of punishment could be let off with transportation or even a free pardon. Hanging ten men might have no more effect on expected punishment than transporting fifty or flogging five hundred, but it made a much more memorable spectacle. Hanging too many might even weaken the effect by reducing the emotional impact of any single execution.

That approach does not fit the conventional economic analysis of law but does make some sense in terms of behavioral economics,[[80]](#footnote-80) the approach that tries to take account of the pattern of imperfect rationality produced by the rules of thumb used to reduce the problem of making sense of the world to a size the individual can deal with. One conclusion from research in behavioral economics is that individuals do a poor job of evaluating low probabilities and overweight striking outcomes, fear airplane crashes more than auto crashes even though the expected mortality per mile is much higher for the latter. One possible explanation of the pattern of punishment in eighteenth-century England is that the men responsible for constructing that system had a good intuitive feel for the imperfect rationality of those it was designed to control.

## Change Over the Century

The legal system as it existed at the end of the seventeenth century had a number of problems obvious to contemporaries as well as to us. The legal history of the eighteenth century is in part a story of attempts to deal with those problems, with varying degrees of success.

The first was the lack of intermediate punishments for anything approaching serious crime. Minor crimes, which did not require a jury trial, could be dealt with by a whipping, exposure in the pillory or a week in the workhouse. For anything more serious, it was hanging or nothing. The obvious solution was long-term imprisonment at hard labor, seen as both an intermediate punishment and a way of reforming criminals by teaching them to work. But imprisonment required prisons and, until the end of the century, neither the central nor the local governments were prepared to bear the cost of creating them on a sufficient scale.

A second problem was giving victims an adequate incentive to prosecute. One alternative was for the victim to buy back his property via a middleman with suitable contacts. Doing so was made illegal but remained a common practice. Rewards created an incentive for prosecution but also additional problems, as already discussed.

A different approach was to shift the responsibility to prosecute away from the victim, to move to something like a modern system of police and public prosecution. One part of law enforcement, dealing with victimless crimes such as vagrancy or prostitution, was already in large part publicly enforced. The enforcers, constables and, in London, members of the night watch, were ordinary householders drafted by their local government into a year’s unpaid service and given a small reward for each offender they brought in. Early in the century there was also a substantial effort by the Societies for the Reformation of Manners, private organizations attempting to clean up London and a number of other cities by gathering incriminating information on offenders, especially bawdy houses and prostitutes, and reporting it to the magistrates for summary judgement.[[81]](#footnote-81) Eighteenth-century reformers saw minor crime, often by juveniles, as the gateway drug that led to more serious crime, believed that drinking, prostitution, and gambling produced young men driven to robbery because they had wasted their time and money.

The magistrates responsible for dealing with offenders, both minor offenders and accused felons, were unpaid members of the local elite who volunteered their time for a prestigious role in the legal system. Over time that approach tended to break down, with fewer people willing to fill the required roles.

For constables and watchmen the solution was to hire substitutes, creating a group of semi-professionals. By the end of the century, at least in the City of London, that had developed into a system of constables and watchmen paid out of local taxes.**[[82]](#footnote-82)** For magistrates, the problem was that the fewer who volunteered, the more onerous the task became for those left to do the work. One result was the development of “trading justices,” magistrates who treated the office as a source of income, at least in part via corruption. And even honest magistrates, being unpaid volunteers, had no commitment to be available to the public at regular times and places. By the end of the century, those problems were being dealt with in London by the creation of stipendiary magistrates, paid and organized by the central government, committed to regular hours, provided with a small staff of constables also paid, a system modeled in part on the system that the Fieldings had developed earlier with the assistance of a modest subsidy from the central government.

After the breakdown of transportation to North America, the authorities faced a particularly difficult problem in dealing with increases in the crime rate. To deter more crimes it was necessary to arrest, prosecute, and convict more criminals. Unless they were willing to hang them all–and they were not–convicting more criminals meant more convicted criminals accumulating in a system that had no adequate place to put them. The eventual solution was twofold: more prisons and Australia.

## Conclusions

I have attempted to show that the institutions used in eighteenth-century England to discourage serious crime may have been well adapted both to that purpose and others. The preference for execution and transportation reflected the greater cost of imprisonment and was relaxed as the society became richer. The system of private enforcement worked both because deterrence could be produced as a private good and because compounding provided an incentive to prosecutors and a punishment for criminals. The system of severe punishments threatened but often not imposed provided an incentive to maintain systems of deference and good reputation, perhaps also a way of scaring potential criminals out of becoming actual criminals. We do not know enough to say whether the institutions chosen were the best possible. But they functioned better than one might expect from the arguments usually offered against them, then and now.

## Appendix: A Thousand Years of Back and Forth

Anglo-Saxon law in the seventh century was a privately prosecuted legal system along lines similar to the legal system of saga-period Iceland discussed in Chapter XX[Iceland]. The victim or, in the case of a killing, his kinsman sued the offender and, if successful, collected damages. Starting in the late tenth century, that system was replaced by one of publicly prosecuted criminal law in which damages went to the crown. By the thirteenth century it had again become in large part privately prosecuted, this time in the form of the appeal of felony, a private criminal prosecution. By the end of that century the appeal of felony was mostly gone. But by the eighteenth century criminal prosecution was again almost entirely private, usually by the victim, this time in the form of an indictment of felony, a nominally public prosecution. The best explanation I have found for that history is by Daniel Klerman, a legal historian who has written extensively about thirteenth-century legal institutions.**[[83]](#footnote-83)**

At the beginning of that century there were two different forms of criminal prosecution, presentment by the jury and appeal by a private party.**[[84]](#footnote-84)** If the private prosecutor withdrew the prosecution or never showed up, the judges could either acquit the defendant or turn the case over to the jury for trial. If they were expected to choose the former alternative, the prosecutor could bargain with the defendant for an out-of-court settlement, offering to drop the prosecution in exchange for compensation. The more likely the latter alternative, the less willing a defendant would be to settle, hence the weaker the incentive to initiate prosecution.

Early in the century judges almost always set non-prosecuted defendants free, possibly because they realized that doing so made settlement more likely and so provided an incentive for private prosecution. By the end of the century judges almost never set non-prosecuted defendants free, possibly because the introduction of a new legal form, trespass, the ancestor of modern tort law, provided a substitute for an appeal, with tort damages as an incentive. By the end of the century the rate of appeal was down to about a fifth of its level at the beginning of the century. From the fourteenth century on, most criminal prosecution was by indictment, typically by the presenting jury, the ancestor of the modern grand jury.

Through the end of the thirteenth century, jury trial depended on a largely self-informing jury, a group of neighbors assumed to already know the facts of the cases brought before them or able to learn the facts for themselves. That shifted during the fourteenth and fifteenth centuries to something more like the modern system, where trial juries relied on evidence that the parties presented in court. **[[85]](#footnote-85)** That in turn led to a shift back to private prosecution of nominally public criminal cases, there being no adequate body of public officials to do the job, although coroners and, later, Justices of the Peace, played some role in the process.

That brings us back to the system discussed in this chapter, private prosecution motivated in part, like the appeal of felony five hundred years earlier, by the potential for out-of-court settlement.

Klerman offers data to support the link between the potential for out-of-court settlement and private prosecution. The figure below, from Klerman 2001, graphs over the course of the thirteenth century the number of appeals of felony and the percentage of unprosecuted defendants who were acquitted rather than tried. The fit is not perfect**[[86]](#footnote-86)** but the relation is reasonably clear. The less willing judges were to acquit a defendant when the private prosecutor either withdrew charges or failed to show up, the less willing defendants were to pay prosecutors not to prosecute, hence the fewer private prosecutions.



1. An earlier version of this chapter was published as "Making Sense of English Law Enforcement in the Eighteenth Century," *The University of Chicago Law School Roundtable* (Spring/Summer 1995). [↑](#footnote-ref-1)
2. Some less serious crimes were prosecuted by constables or magistrates, a pattern that became increasingly common at the end of the century and thereafter. (Smith 2006). “The party aggrieved is generally the person bound over to prosecute; but, in the Police Offices, if no other person is ostensible for that object, we always bind over one of the Police officers, or a constable, to do it;” (Sir Nathaniel Conant, Chief Magistrate at Bow Street, Report 1816, p. 5) Crimes viewed as actually committed against the government might be prosecuted at government expense. Thus “Offences against the gold and silver coin were distinctive, in that finance and direction were provided for prosecutions by the Mint.” (Brewer and Styles p. 183) [↑](#footnote-ref-2)
3. Starting in 1792, a few constables associated with magistrates’ offices in London received a small salary while supporting themselves in part on reward money and, in some cases, a second profession: “One is a coal merchant, another a glazier, and another a green grocer.” (Report 1816 p. 109) [↑](#footnote-ref-3)
4. “I have had such an abhorrence of the very name of a public accuser, from its existence at the time of the French revolution, that I have taken no opportunity and have had no inclination to cogitate up such a matter …” (William Fielding, Magistrate and son of the more famous William Fielding, magistrate and novelist, Report 1816 p. 191). “As early as 1863, in reflecting on “the absence of a public prosecutor” in England, James Fitzjames Stephen proclaimed that the French system of prosecution, which relied upon “elaborate inquiry” by professional police and magistrates prior to trial, “would never be endured” by the English. Writing in 1983, Douglas Hay surmised that the attachment of English political elites to private prosecution “probably derived above all from their abhorrence of the alternative”-namely, “state prosecution.” More recently, Allyson May has claimed that “[a]n historic, deep-rooted mistrust of an authoritarian state, and fear of abuses of state power . . .explains why criminal prosecutions [in England] remained in the hands of private individuals well into the nineteenth century.”'“ (Smith pp. 30-31). One possible explanation is the English experience in the seventeenth century–two civil wars, a military coup (Pride’s Purge), a military dictatorship, the Restoration and the Glorious Revolution. [↑](#footnote-ref-4)
5. The first such reward, of £40 for a successful prosecution for highway robbery, was established in 1692. “In the next decades further legislation extended such offers to burglary and housebreaking, coining, theft of certain livestock, and other offences.” The statute was vague about exactly who got the rewards; the prosecutor often shared them with witnesses and informers. Ruth Paley, “Thief-takers in London in the Age of the McDaniel Gang, c. 1745-1754,” in Hay and Snyder (1989) pp. 316-322. [↑](#footnote-ref-5)
6. In one case of entrapment, the prosecutors who had set up the offense stood to gain rewards that totaled £120. Ruth Paley, “Thief-takers in London in the Age of the McDaniel Gang, c. 1745-1754,” in Hay and Snyder (1989) p. 302. For a vivid account of the misdeeds of the McDaniel Gang, including both framing and entrapping, see Jackson 1795 pp. 91-99. See also Norton p. 18.

Contemporary writers seem to have taken it for granted that entrapment was a bad thing. They may not have considered that even if a particular act of entrapment created a crime that would otherwise not have occurred the net effect might be to reduce crime by making criminals less willing to trust potential confederates. [↑](#footnote-ref-6)
7. Norton p. 17. [↑](#footnote-ref-7)
8. “The ease with which false witnesses can be found in London is really scandalous. One day I saw a notice put up in a window and bearing in capital letters the one word ‘witness.’ It meant that the person who lived in the apartment was a professional witness.” Casanova 1970, Vol. 9 p. 341. [↑](#footnote-ref-8)
9. Report 1816.

According to a magistrate testifying before a parliamentary committee in 1816, “It is very common for an individual who has suffered any great injury to offer rewards of a very large amount; a banker will sometimes offer £500 for the apprehension of his clerk, who may have absconded with thousands.”. (Report 1816 p. 204)

It was argued that juries were reluctant to trust the testimony of officers whose reward depended on persuading the jury to convict (Report 1816, p. 179 and elsewhere). In 1818 Bennet’s act replaced rewards on conviction with a more generous reimbursement of costs. (Beattie pp. 1986 pp. 58-9) [↑](#footnote-ref-9)
10. This did not entirely eliminate the problem. In the nineteenth century there were charges that police sometimes conspired with attorneys to convict defendants. The attorneys would be reimbursed by the court for their services and would then kick back some of the money to the police. Such a scheme depended on the court being willing to pay more in expenses than the real cost to the attorney of the services provided. [↑](#footnote-ref-10)
11. The process was more gradual than a single date suggests. Beginning in the 1750’s, “rotation offices” were established in London at which a magistrate could routinely be found. Over time, groups of constables formed associated with particular rotation offices, especially the Bow Street office occupied by first Henry Fielding and then his blind brother John. The constables were coordinated by the magistrates but supported themselves on rewards for successful prosecutions and for the return of stolen property. In 1785 there was an unsuccessful attempt to set up a police organization in London (Beattie 1986 p. 66). In 1792, rotation offices were provided with up to six salaried constables each, although they were expected to make much of their income on rewards. The change did not entirely eliminate the problems that had been associated with amateur thief takers. Paid constables, one of them a Bow Street Runner, were involved in an entrapment scandal in 1816 and several Bow Street runners seem to have accumulated substantial fortunes, presumably from some combination of rewards and payments for compounding (Radzinowics 1957 Volume II, pp. 268, 333-337). Juries distrusted police testimony in the early nineteenth century for the same reason they had distrusted private prosecutors and their witnesses in the mid-eighteenth century, the suspicion that it was given in the hope of receiving a reward for conviction. (Radzinowicz 1957 II, pp. 344-346.) Similar problems of entrapment and official perjury are not unknown today, even though police rewards take more indirect forms. [↑](#footnote-ref-11)
12. Blackstone classifies petty larceny as a non-capital felony rather than a misdemeanor, asserting that “FELONY, in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods.” But he also writes “THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law implies that it shall be punished with death, *viz*. by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have unless the same is expressly taken away by statute. (Book IV, Chapter 7). [↑](#footnote-ref-12)
13. Sometimes these punishments became more than minor; a sufficiently unpopular convict might be attacked in the pillory, sometimes even killed. Beattie 1986 pp. 466-468. [↑](#footnote-ref-13)
14. In 1576 “the requirement that the clergied offender be turned over to the ordinary to undergo purgation was abolished. Henceforth, the successful pleading of clergy was to be followed by immediate discharge.” (Beattie p. 142) The church courts still played a role in “wills and marriages and occasional cases of slander.” Douglas Hay, “Property, Authority and the Criminal Law,” p. 30 in Hay et. al. 1975. [↑](#footnote-ref-14)
15. Beattie 1986 p. 492. [↑](#footnote-ref-15)
16. Blackstone: “the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.”(Bk IV, Chapter 14). But “AND, we may observe, 1. That by his conviction be forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender. … That by the burning, or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.” (Bk IV, Ch. 28). Mathew Hale, whom Blackstone references, appears clear: “3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithstanding his burning in the hand. … 5. That presently upon his burning in the hand he ought to be restored to the possession of his lands …” (Hale pp. 388-9) [↑](#footnote-ref-16)
17. A defendant might spend as much as six months in jail waiting to be tried. The jails were both unpleasant and unhealthy; see Beattie 1986 pp. 298-309. “Indeed 1750 saw the most memorable outbreak (of jail fever) of the century because it carried away not only dozens of prisoners but, following the April session at the Old Bailey, more than fifty people who had been in court, among them the Lord Mayor of London, two judges, an alderman, a lawyer, a number of court officials, and several members of the jury.” (p. 304) [↑](#footnote-ref-17)
18. Beattie 1986 p. 88, Beatie 1986 p. 471. [↑](#footnote-ref-18)
19. Starting in the 1760’s, however, there was some use of imprisonment for manslaughter. Beattie 1986 p. 88. [↑](#footnote-ref-19)
20. Beattie 1986 p. 479 [↑](#footnote-ref-20)
21. Beattie (1986) p. 480 [↑](#footnote-ref-21)
22. Beattie suggests that transportation had begun to go out of favor a few years before the revolution. His explanation is that it was no longer believed to provide either adequate punishment or adequate incapacitation. Trans-Atlantic voyages became substantially safer and less expensive during the fifty years after 1720. A transportee could escape from his indenture or (if he had money) avoid it by paying off the captain who transported him and return to England illegally. [↑](#footnote-ref-22)
23. By the end of the sixteenth century, clergy had been removed from, among other offenses, petty treason (killing one's “lord, master or sovereign immediate”), murder, housebreaking (when there was someone in the house who was “put in fear”), highway robbery, horse stealing, theft from churches, pocket-picking and burglary. Most forms of larceny remained clergyable. (Beattie 1986 p. 144) [↑](#footnote-ref-23)
24. Taking goods from a house when the owner was present and put in fear and breaking into houses, shops, and warehouses and stealing to the value of five shillings (1691); shoplifting to the value of five shillings and thefts to the same value from stables and warehouses (1699); theft from a house or outhouse to the value of forty shillings, even without breaking in and even if no one was present (1713), sheep stealing (1741), cattle theft (1742), theft from a bleaching ground of linen or cotton cloth worth ten shillings or more (1731, 1745), theft from a ship in a navigable river or from a wharf goods valued at forty shillings or more (1751), theft from the mails (1765). (Beattie 1986 pp. 144-145). [↑](#footnote-ref-24)
25. Beattie has computed for the period 1736-53 that about 10 per cent of the bills submitted to the Surrey grand jury in urban cases of capital crime were dismissed (Beattie 1977). [↑](#footnote-ref-25)
26. Examples cited by Beattie (1986 p. 424) include “ theft of twenty-three guineas from a house ...; lace valued at more than a hundred pounds in the indictment ...; gold rings and jewelry ... valued by the owners at more than three hundred pounds ... .” All of these were “found by the jury to be thirty-nine shillings' worth.” [↑](#footnote-ref-26)
27. The figures quoted here are based on the assize files of the Home Circuit and the quarter sessions rolls of Surrey, and limited to those years from 1660 to 1800, a total of about a hundred, for which complete indictment evidence was available. The sample is described in detail by Beattie in his Appendix, Beattie 1986 pp. 639-643. [↑](#footnote-ref-27)
28. I am not considering here the use of workhouses and other forms of confinement for those not guilty of serious offenses, such as vagrants. Also, a judge who wanted to punish a minor offense with imprisonment could impose a fine the defendant could not pay, hold the defendant in jail for not paying the fine, and drop the fine after what the judge considered an adequate term of imprisonment. [↑](#footnote-ref-28)
29. The rate of homicides known to police in England from 1906-1910 was 0.8 per 100,000. Ted Robert Gurr, “Historical Trends in Violent Crimes: A Critical Review of the Evidence,” in *Crime and Justice: An Annual Review of Research* v. 3, Michael Tonry and Norval Morris eds. Homicide indictment rates reported by Beattie fell from 8.1 per 100,000 (1660-1679) to 0.9 (1780-1802) in the urban parishes of Surrey, from 4.3 to 0.9 in the rural parishes of Surrey, and from 2.6 to 0.6 in (rural) Sussex. [↑](#footnote-ref-29)
30. Beattie 1986 pp. 108-109. An interesting project, which so far as I know has not been done, would be to examine statistics for homicide indictments during the period just before and during the introduction of professional police in an attempt to determine whether there was a significant change in the ratio of indictments to homicides. [↑](#footnote-ref-30)
31. The probability here is for individuals who had been apprehended and charged. We do not know what fraction of crimes resulted in the criminal being apprehended, but there is evidence suggesting that it was low. Contemporary sources describe pick pocketing as common but “in 61 years, only 92 indictments for picking pockets laid before the Surrey magistrates.” (Beattie 1986 p. 180) Contemporary accounts describe some criminals as practicing for many years before being finally caught and tried. [↑](#footnote-ref-31)
32. Philips cites the case of Mr. James Bailey, a member of an association for the prosecution of felons, who succeeded in recovering his stolen horse and prosecuting the thief. His total outlay on the case came to £66.9s.7d. Philips p. 115. A horse was “worth from £10 to £50.” Philips 1989 p. 116. [↑](#footnote-ref-32)
33. Of the £66.9s.7d laid out by James Bailey, £38.8s.6d were repaid by the court. [↑](#footnote-ref-33)
34. My description here is based on Philips 1989 and King 1989 and ignores considerable variation in the actual institutions. A few covered more than a local area. Some charged different amounts to members of different status. [↑](#footnote-ref-34)
35. Philips 1989 offers estimates of the number of such associations ranging as high as 4000 associations around 1839, and thinks “at least 1000” a good working figure. [↑](#footnote-ref-35)
36. An additional incentive was that the secretary of the association was likely to be an attorney with some expertise in catching and prosecuting criminals. [↑](#footnote-ref-36)
37. A related reason for not joining would be the imperfect privatization of deterrence. The less prominent a potential victim was, the less likely it was that a potential thief would know enough about his commitments to be deterred by them. And private deterrence would be useless against crimes, such as most highway robberies, committed by criminals who did not know who their victims were. [↑](#footnote-ref-37)
38. Ryder Shorthand documents, p. 33 : *R. v. Ann White*:

“She came again on Monday when she came and asked for her gown, and she would have it where she found it, but I would not unless she would prosecute the prisoner.” (testimony of Francis Smith, pawnbroker)

“On a conviction of larceny, in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII, c. 11.” 4 Blackstone \*362 Bk IV Chapter 27. [↑](#footnote-ref-38)
39. 4 Blackstone \*363. Book 4, Chapter 27.

Beattie (1986 p. 457) argues that fines for minor offenses were largely token payments to show that the two parties had reached agreement. “A larger fine might well result when such agreement was not forthcoming, and its threat, along with the further threat that the nonpayment of a large fine could result in a period in jail, was clearly used by the courts as a way of persuading a recalcitrant prisoner to come to terms with the complainant.” Beattie cites the Recorder of London in 1729, ... “In discussing an assault and battery, he said that it was `usual in these cases for the Defendant to make satisfaction to the Prosecutor for his wounds, and costs and charges–before the Court sets the fine ... which is usually greater if a Defendant won't make a Prosecutor easy as the Court directs.’ ... ‘...and then if he forbears to appear and prosecute [the defendant] will be discharged, and all charges of a Tryal saved, which would be a greate expence.’” (Beattie 1986, pp. 457-458).

“In contrast, for most prosecutions for offenses against the person at Quarter Sessions, Quarter Sessions is a mere nominal presence. The decisive action–the settlement of the case–takes place out of the range of the justices’ hearing and usually outside the walls of their court. In this light, Quarter Sessions is merely an institution structured so as to encourage disputes to be settled extra-institutionally.” Landau 1999, p. 533. [↑](#footnote-ref-39)
40. “The compounding of penal actions, originally allowed, was made illegal by 18 Eliz. c. 5, made perpetual by 27 Eliz. c. 10.” Radzinowicz, volume II p. 138 fn 2. Also see Blackstone, Bk IV, chapter 10 parts 10 and 14. [↑](#footnote-ref-40)
41. “Public Prosecutions In England, 1854-79: An Essay in English Legislative History” by Philip B. Kurland and D.W.M. Waters, *Duke Law Journal*, 1959 number 4, p. 512. [↑](#footnote-ref-41)
42. The following are a few examples I have come across:

“Ainsworth was caught stealing, begged Blundell repeatedly not to prosecute, and entered into negotiations to work on one of his master's houses in return for forgiveness.” *Albion's Fatal Tree*, p. 41.

“Mrs. Woodb. asked Ann Wh. to pay the money and she said she would provided there would be no more trouble afterwards.” Ryder Old Bailey Notes, p. 34, *R. v. Ann White*. This was from the testimony of Francis Smith, pawnbroker. Mrs. Woodburn was the owner of the stolen gown; Ann White was the mother of the accused thief, also named Ann White. The money was being paid to Smith in order to redeem the gown, in order that it could be returned to its owner. The elder Ann White paid the money, but her daughter was nonetheless charged and convicted.

Jo. Watkins, father of prisoner. “The prosecutor has been with me, and wanted money to stop the proceedings, he having been at great expense. But I refused. ... He said, would I give nothing to save my child?” Ryder Old Bailey Notes, p. 53. The girl, who was accused of having stolen and pawned a laced waistcoat, was acquitted, apparently because too young (11) to have sufficient discretion to be held guilty of a felony. [↑](#footnote-ref-42)
43. Peter King, “Decision-makers and Decision-making in the English Criminal Law, 1750-1800,” 27 *The Historical Journal* 25-58 (1984). Beattie asserts that “the vast majority of those committed by magistrates to stand trial for felonies were charged and brought to court, ...” but does not provide any actual numbers. (Beattie 1986 p. 401) [↑](#footnote-ref-43)
44. This may or may not be true if the prosecutor's principle objective is deterrence. Using perjury to convict a defendant who potential offenders believe is innocent does not deter. Using perjury to convict a party who potential offenders believe is guilty does. [↑](#footnote-ref-44)
45. The problem was also recognized by the law in the related context of informers who were entitled to a part of the fine paid by those they informed against. “When suing for a penalty, an informer was considered an incompetent witness unless made competent by statute.” Radzinowicz, Volume II p. 139. [↑](#footnote-ref-45)
46. John Langbein, “Albion's Fatal Flaw,” 98 *Past & Present* 96-120 (1983). [↑](#footnote-ref-46)
47. This argument is made repeatedly in *Albion's fatal tree*, in particular in “Property, Authority and the Criminal Law” by Douglas Hay. It is persuasively rebutted by John Langbein in “Albion's Fatal Flaw,” 98 *Past & Present* 96-120 (1983). For a re-rebuttal, see Linebaugh, Peter. “(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein.” New York University Law Review 60 (1985): 212-43. I offer a different version later in this chapter. [↑](#footnote-ref-47)
48. See Douglas Hay, “Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850” in *Policing and Prosecution in Britain: 1750-1859*, Douglas Hay and Francis Snyder, Eds. [↑](#footnote-ref-48)
49. The same phenomenon in modern civil law is described as searching for potential defendants with deep pockets. [↑](#footnote-ref-49)
50. Douglas Hay, “Poaching and the Game Laws on Cannock Chase,” p. 198 in *Albion's Fatal Tree*. Hay asserts that this was a common trick, citing *Some Considerations on the Game Laws, and the Present Practice in executing them; with a hint to th*e non-subscribers, 1753 , p. 26. I know of no similar example in the context of more serious offenses. [↑](#footnote-ref-50)
51. A defendant could defend himself against prosecution by a plea of autrefoits acquit or autrefoits convict--having been either acquitted or convicted in one trial, he could not be tried again (4 Blackstone \*335-336). It is not clear whether any similar defense existed for a defendant who had been charged but not tried due to the failure of the prosecutor to show up at the trial. The equivalent situation in a civil case resulted in a non prosiquiter being entered; the plaintiff owed costs to the defendant and a fine to the crown, but could reinstitute his suit after paying them (3 Blackstone \* 296). [↑](#footnote-ref-51)
52. According to Blackstone, 2 Comm. \*437, where a statute provides a penalty payable to the informer, the first person who brings an action “obtains an inchoate imperfect degree of property by commencing his suit: but it is not consummated till judgement; for, if any collusion appears, he loses the priority he had gained.” As I discuss in the appendix, Klerman found evidence in the 13th c. context that the more likely it was that a prosecution dropped by the prosecutor would be transferred to the jury by the judge, the less private prosecution occurred. [↑](#footnote-ref-52)
53. For more detailed discussions of punishment inefficiency and its relevance to the choice of punishment, see D. Friedman, “Reflections on Optimal Punishment or Should the Rich Pay Higher Fines?,” *Research in Law and Economics*, (1981); “Should the Characteristics of Victims and Criminals Count? *Payne v Tennessee* and Two Views of Efficient Punishment,” XXXIV Boston College Law Review No.4, pp.731-769 (July 1993). [↑](#footnote-ref-53)
54. The inefficiency is slightly greater than one if we include the cost of hiring the executioner. It might be less than one if the state obtained some direct benefit from execution, such as a corpse to be sold for dissection. [↑](#footnote-ref-54)
55. “Since the penalties of exile and penal servitude in the Yüan dynasty stressed the utilization of labor, the function of the jail during the Yüan was not to deprive an offender of freedom per se, but rather to put a suspect in custody before or during a formal trial or to detain a sentenced person before the final imposition of a sentence.” Ch’en 1979 p. 73. [↑](#footnote-ref-55)
56. “Duncan Campbell was paid about thirty-eight pounds a year for each prisoner on board his ships. The government got the benefit of their labor, but it came nowhere near that figure in value. Beattie (1986) p. 593, citing Johnson, English Prison Hulks, p.9. [↑](#footnote-ref-56)
57. My description of the galley slave system is based on Andrews 1994. [↑](#footnote-ref-57)
58. Andrews 1994 p. 326. He does not offer either the evidence for that conclusion or data that could be used to compare the gains with the associated costs. [↑](#footnote-ref-58)
59. John Langbein, “The Historical Origins of the Sanction of Imprisonment for Serious Crime,” *JLS* 5 (1976) 35-60. [↑](#footnote-ref-59)
60. Langbein asserts in a footnote that “the use of captives in the galleys had been known in antiquity, and may have been a more or less continuous process in the Eastern Mediterranean into the Renaissance,” and cites Paul Masson, *Les galères de France*, 20 *Annales de la Faculté des lettres d'Aix* 7, 72 ff note 24 at 8-10. According to Casson (pp. 322-328) this is mistaken. In a careful and convincing discussion he argues that, in classical antiquity, neither slaves nor convicts were used to row warships save in rare emergencies.

The military use of slave rowed galleys may have been an innovation due to the increasing use of cannon in naval warfare. As long as the usual form of combat involved boarding and hand-to-hand combat, as seems to have been the case both for classical naval engagements and during the Viking period, a ship whose rowers could not be trusted with weapons was at a serious disadvantage. [↑](#footnote-ref-60)
61. Similar considerations appear in the literature on plantation slavery in the new world; there too it has been argued that particular activities were well suited to slavery because they involved groups of workers working together at tasks that were easily standardized and supervised (the “gang system”). Foley 1994, pp. 21-45, 72-80. [↑](#footnote-ref-61)
62. Beattie suggests that the reason for the change in policy was that the financial situation of the English government had improved considerably by 1718. (1986 p. 504) [↑](#footnote-ref-62)
63. This ignores those transportees who returned illegally before their sentences were up. According to Beattie (1986), pp. 540-541, that became a significant problem during the second half of the century. Seven years was the usual sentence of transportation (and term of indenture) for clergyable felonies, fourteen for non-clergyable felons pardoned on condition of transportation. Presumably many of the transportees either died before completing their terms or chose to remain in the new world. [↑](#footnote-ref-63)
64. Law, Magistracy and Crime in Old Regime Paris, 1735-1789, by Richard Mowery Andrews, pp. 354-5. [↑](#footnote-ref-64)
65. Joanna Innes, “The King’s Bench prison in the later eighteenth century: law, authority and order in a London debtor’s prison,” Chapter 6 in Brewer and Styles 1980. [↑](#footnote-ref-65)
66. For a detailed analysis of the arguments that judges offered for and against pardons, and the source of character testimony in favor of pardons, see Peter King, “Decision-makers and Decision-making in the English Criminal Law, 1750-1800,” 27 *The Historical Journal* 25-58 (1984). [↑](#footnote-ref-66)
67. For a more detailed discussion of price discrimination in punishment, see David Friedman, “Reflections on Optimal Punishment or Should the Rich Pay Higher Fines?,” *Research in Law and Economics*, (1981). [↑](#footnote-ref-67)
68. Of course, the friends may expect to be repaid by the felon in future favors. [↑](#footnote-ref-68)
69. Posner 1981 pp. 193-195. For one example, consider the diya-paying group in the Somali system. [↑](#footnote-ref-69)
70. This point is made in “Property, Authority and the Criminal Law” by Douglas Hay in *Albion's Fatal Tree*, pp. 48-49. [↑](#footnote-ref-70)
71. Wimsatt and Pottle 1959, pp. 276-338. [↑](#footnote-ref-71)
72. The Scottish legal system was based not on English common law but on the Dutch interpretation of Roman law–Boswell, his father and grandfather all studied law in Holland. Royal pardons, however, came from the English king, Scotland being part of the United Kingdom. Hence in trying to obtain one, Boswell was part of the same system as an English attorney acting in behalf of an English client. [↑](#footnote-ref-72)
73. Boswell had visited Corsica during the revolt against Genoan rule, become a friend and admirer of General Paoli, leader of the revolt, and written a popular book in support of it. Rochford, as British ambassador in Paris, had tried unsuccessfully to prevent the agreement by which France took over the rule of Corsica from Genoa, leading to the suppression of the revolt. [↑](#footnote-ref-73)
74. Wimsatt and Pottle 1959, pp. 303-4. [↑](#footnote-ref-74)
75. Wimsatt and Pottle 1959, p. 290. [↑](#footnote-ref-75)
76. Both comments are on p. 337. [↑](#footnote-ref-76)
77. “It does not seem that at any time in the eighteenth century, in any part of the country, more than sixty per cent of those sentenced to death were actually executed, and over much of the century and in many places a figure of one-third is more typical.” Tobias 1979 p. 140 [↑](#footnote-ref-77)
78. The pardon was given by the king but in practice almost guaranteed by a request from the judge. [↑](#footnote-ref-78)
79. Along a related line … “It has been well observed, that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible fight, than as the necessary consequence of transgression.” (Blackstone, Book IV, Chapter 32) [↑](#footnote-ref-79)
80. For a fascinating presentation of the approach, see Kahneman (2011). [↑](#footnote-ref-80)
81. For details see Norton. Conviction on the relevant charges did not require a jury trial. [↑](#footnote-ref-81)
82. The process is described in detail in Beattie 2001, which limits its description almost entirely to London. [↑](#footnote-ref-82)
83. For Klerman’s full account of the history, see Klerman 2001, pp. 5-8. [↑](#footnote-ref-83)
84. “In fact, until the turn of the fourteenth century, presentments were confined almost exclusively to homicide and theft, and nearly all accusations of rape, mayhem, wounding, false imprisonment, assault and battery were brought by way of appeal, as were large numbers of homicide and theft cases.” P. 7 Klerman 2001 [↑](#footnote-ref-84)
85. Klerman offers evidence for the self-informing jury in the early period and an explanation of the shift in Klerman 2003. [↑](#footnote-ref-85)
86. For possible explanations of the divergences, see Klerman 2001 pp. 41-42. [↑](#footnote-ref-86)