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Tyburn Thanatos and Marxist Historiography: The Case of the London Hanged

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REVIEW ESSAY

TYBURN, *THANATOS*, AND MARXIST HISTORIOGRAPHY: THE CASE OF THE LONDON HANGED

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INTRODUCTION

Peter Linebaugh's *The London Hanged: Crime and Civil Society in the Eighteenth Century*[1] is a powerfully written and passionately argued book. Linebaugh's purpose is to understand the people who were hanged at Tyburn, the public hanging ground of the City of London for much of the eighteenth century. Linebaugh's sources for this history are primarily religious and legal—the *Account* of the Ordinary of Newgate,[2] a sort of prison chaplain to the condemned, and the *Sessions Papers* of the London courts.[3] From these records Linebaugh

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1 PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY (1992) [hereinafter THE LONDON HANGED].

2 Linebaugh draws the great bulk of his history from this periodical entitled *The Ordinary of Newgate, His Account of the Behaviour, Confession, and Dying Words of the Malefactors who were Executed at Tyburn (Account)* [hereinafter *Account*]. Linebaugh briefly discusses the Ordinary's *Account* as an historical source in THE LONDON HANGED, *supra* note 1, at xix-xxi, 89-91. Linebaugh has elsewhere provided a far more detailed analysis of this document. *See* Peter Linebaugh, *The Ordinary of Newgate and His* Account, *in* CRIME IN ENGLAND: 1550-1800, at 246 (J.S. Cockburn ed., 1977). The Ordinary's *Account* was published periodically, had the general appearance of a newspaper, and was sold publicly by street-hawkers. *Id.* at 247-48. The *Account* contained five basic sections: The first section described the trial of the condemned; the second provided a synopsis of sermons the Ordinary preached to the condemned; the third furnished biographical details of those about to be hanged; the fourth allowed the condemned the opportunity to confess his or her crimes to the public; and the final section described "the events of the hanging itself." *Id.* at 248.

3 Linebaugh relies upon the *Sessions Papers* of the London courts as a means of supplementing and confirming his account. For analyses of the *Sessions Papers* of the London courts as historical documents, see John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources* 50 U. CHI. L. REV. 1, 3-18 (1983) [hereinafter Langbein, *Shaping the Eighteenth-Century Criminal Trial*]; John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 267-72 (1978) [hereinafter Langbein, *The Criminal Trial Before the Lawyers*].

constructs a sociology of the condemned—a project that he calls "Tyburnography."[4]

But Linebaugh's purposes are larger than merely reconstructing the lives of those hanged at Tyburn. He uses his sources to build what he calls a "history of making" and a "history of taking."[5] Literally understood, it was the "working class" that made London, and it was the working class whose members died on the gallows largely for taking things that "belonged" to others.[6]

Linebaugh finds ideas such as "making," "taking," and "belonging" to be controverted concepts in eighteenth-century England, which leads him to consider the nature of eighteenth-century rule. The eighteenth-century English state, Linebaugh argues, was a "thanatocracy"—literally, a government of death.[7] It ruled by means of the discipline inculcated by the gallows.[8] The spectacle of public hanging was central to the maintenance of power by the English elites. By focusing on the spectacle of the public hanging, and the lessons the laboring poor were supposed to draw from it, Linebaugh argues that even though fewer executions occurred in the eighteenth than in the seventeenth century, the carrying out of capital punishment was of greater significance to the state.

In making these arguments Linebaugh adopts, quite forthrightly, a Marxist analysis of history.[9] According to the Marxists, eighteenth-century England witnessed a growing class struggle between an urban proletariat, dispossessed not only of landed property, but even of its customary right to share in the fruit of its labor, and a propertied ruling class that grew ever richer through the exploitation both of the domestic working class and of that part of the non-Western world unlucky enough to fall under the control of English colonizers. This struggle was played out in London through the criminalization of conduct that was formerly legal and the enforcement of an ever-expanding body of criminal law imposing capital penalties for offenses against property.[10]

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4 THE LONDON HANGED, *supra* note 1, at 89 ("As demography originated in records designed to take private property under the sanction of public law (taxation), Tyburnography is based on records designed to warn people to respect property when privately taken against public law (hangings).").

5 *Id.* at xxv.

6 *See id.* at xxi.

7 *Id.* at 50 ("[T]he term thanatocracy [means] . . . a government that rule[s] by the frequent exercise of the death penalty.").

8 *Id.* at xx.

9 *Id.* at xxii-xxiii.

10 *Id.* at xv-xxv. *See generally* Peter Linebaugh, *(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein*, 60 N.Y.U. L. REV. 212 (1985) (defending a Marxist interpretation of eighteenth-century criminal law in England).

Linebaugh's adoption of a Marxist framework for his analysis of the "London hanged" has, however, at least three negative consequences: (1) it obscures the role of religious belief in the shaping of eighteenth-century capital punishment; (2) it reduces the significance of transportation as an alternative to capital punishment; and (3) it caricatures the independence and integrity of the judges, juries, prosecutors, and counsel who participated in England's criminal justice system.

Linebaugh, furthermore, wishes to avoid a crucial corollary of the Marxist analysis: the contention that law is merely "superstructure," built upon a "foundation" of economic relations. The classical Marxist contends that there is no such thing as the "rule of law." The lawyer who believes that he or she is acting autonomously is deluded since the law itself is a product of class interest.[11] Contemporary Marxist scholars, however, disagree on whether one can speak of a rule of law,[12] and Linebaugh believes that by taking as his starting point the actual persons hanged at Tyburn he does not need to take sides in this dispute.[13]

This review essay considers each of these issues in turn. Part I asserts that while "Tyburnography" is probably the strongest part of Linebaugh's book, "thanatocracy" is its Achilles' heel. Part II argues

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11 Harold J. Berman has observed:

> [L]aw for Marx and Engels is "superstructure," an unconscious or semiconscious ideological reflection of economic relations. "The economic structure of society," wrote Engels, "always forms the real basis from which, in the last analysis, is to be explained the whole superstructure of legal and political institutions, as well as of the religious, philosophical, and other conceptions of each historical period." And again, "The jurist imagines that he is operating with *a priori* principles whereas they are really only economic reflexes."

HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 16 (rev. ed. 1963).

12 *Compare* E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258-69 (1975) (defending the rule of law) *with* Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977) (Book Review arguing that law is not an "unqualified social good") *and* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 998 (1985) ("There is . . . a long tradition of insisting that executive officers and judges under capitalism often twist, or plain break the rules in order to do in oppressed groups, thereby furthering their class interests."). Linebaugh sees Thompson and Kennedy as representing an "antinomy" between the possibility that law, and the rule of law can embody and serve transcendent purposes, on the one hand, and the conception of law as power exercised to advance class interest on the other. *See* THE LONDON HANGED, *supra* note 1, at xxii-xxiii.

13 Linebaugh states:

> "This [antinomy] *can* be a useful way to understand the problem. . . . But this [antinomy] is limited and false, if not comic. Its starting-point is law and its idol-like power to entrance the intellect. Our starting-point is neither law nor 'critical law' but the hanged men and women whose views and actions continually challenged both law and their own class."

THE LONDON HANGED, *supra* note 1, at xxiii.

that Linebaugh's reliance on Marxist historiography distorts the role played by religion and transportation in the criminal-justice system, and unfairly characterizes the activities of such "decision-makers" as juries and judges. Part III argues that it is not possible to avoid the issue of the "rule of law" as easily as Linebaugh would like to, and that he has, in fact, opted for the classical Marxist "superstructure-foundation" dichotomy. The review closes by reflecting briefly on the theme of "Tyburnography Today." It assesses some lessons today's lawyers might draw from eighteenth-century execution practices.

It must finally be noted that while this review will at points be critical of Linebaugh's book, this criticism does not aim to detract from the book's positive accomplishments. In assembling data about eighteenth-century executions and economic conditions, Linebaugh has performed a very useful scholarly service. His work is the product of a long and intimate acquaintance with the sources and will stand as a landmark in the history of capital punishment.

I
TYBURNOGRAPHY AND THANATOCRACY

A. Tyburnography

The strongest part of *The London Hanged* is Linebaugh's treatment of "Tyburnography." A conscious pun on "demography,"[14] Linebaugh's "Tyburuography" is a close analysis of the "1,242 men and women hanged on 243 hanging days in London between 1703 and 1772."[15] Relying chiefly on the periodical pamphlet, *The Ordinary of Newgate, His Account of the Behaviour, Confession, and Dying Words of the Malefactors who were Executed at Tyburn*,[16] Linebaugh begins his story of Tyburuography with numbers—a deliberate effort at reducing the "social siguificance of the individual . . . to . . . statistical generalizations."[17] But "Tyburnography" is far more than a statistical account of the London hanged. Rather, it uses statistical generalization as a canvas upon which to paint a vivid series of portraits of the ways particular condemned men and women lived, the social background from which they came, and the crimes for which they died.

This section of the review employs roughly the same method Linebaugh utilizes to recount his story of the London hanged. It begins with statistics, but then moves on to the larger social background. It will be seen that the London hanged formed an international, interracial group drawn largely from a surprisingly mobile working class

14 *Id.* at 88-89; *see supra* note 4.
15 *Id.* at 91.
16 For a discussion of this document, see *supra* note 2.
17 THE LONDON HANGED, *supra* note 1, at 88.

that in many ways helped to "make" London and were hanged for crimes that amounted to unauthorized "taking."

More than 1242 people were hanged in London between 1703 and 1772; Linebaugh studies only a large cross-section of the total.[18] Of this number, 483 were born in London, 429 were born in England (outside of London), 171 were Irish, 30 Scottish, 21 Welsh, 42 were born elsewhere, and 66 were of unknown origin.[19] As these numbers suggest, the representatives of the London hanged Linebaugh examines were migratory and mobile. Annual death rates in eighteenth-century London, thanks to poor sanitary conditions and periodic outbreaks of diseases like typhoid and typhus, far exceeded birth rates.[20] Over these same years, however, the population of the London metropolis actually increased as it was replenished by newcomers arriving from outside the city. Significant numbers of these new arrivals found their way to the gallows.[21]

Furthermore, most of those hanged were members of what might be broadly considered the urban working class.[22] Newcomers and native Londoners alike worked at a variety of occupations. Butchers, bakers, weavers, spinners, shoemakers, tailors, hatters, and wheelwrights were among the many occupations represented in the pages of the Ordinary's *Account*.[23] These were the people who in their daily labors quite literally made the City of London.

The vast majority of the 1242 cases Linebaugh examines were hangings for offenses against property.[24] Most convicts, like "Mary

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18 Linebaugh explains this cross-section as follows:

> I have studied 237 different issues of the *Account* describing 1,242 men and women hanged on 243 hanging days in London between 1703 and 1772. This is not a comprehensive figure. It amounts to an average of 3 or 4 hanging days a year, when, in fact, sometimes there were as many as 8 in a single year (excluding special hangings), though 6 would be more common. Nor does my study include hangings that took place near London, such as those Surrey hangings performed on Kennington Common. But although the sample is not absolutely comprehensive, it is large enough that patterns derived from it would not be much altered were the lacunae in the evidence filled.

Id. at 91 (footnotes omitted).

19 *Id.* at 92.

20 *Id.* at 142 ("Demographically speaking, London in the early eighteenth century was a killer because deaths far exceeded births.").

21 *Id.*

22 *Id.* at xxi. On the growth and development of the "working class" in eighteenth-century England, see ROBERT W. MALCOLMSON, LIFE AND LABOUR IN ENGLAND, 1700-1780 (1981); JOHN RULE, THE LABOURING CLASSES IN EARLY INDUSTRIAL ENGLAND, 1750-1850 (1986); E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (Vintage Books ed. 1963); E.P. Thompson, *Eighteenth-Century English Society: Class Struggle Without Class*, 3 SOC. HIST. 133 (1978).

23 Linebaugh supplies an exhaustive list of occupations in THE LONDON HANGED, *supra* note 1, at 103-05.

24 *Id.* at 79.

Goddard, hanged for picking a pocket,"[25] had committed offenses that were truly trivial. A few, like John Weskett, a domestic servant to the Earl of Huntingdon who succeeded in bilking the Earl out of several thousand pounds, had committed crimes of some seriousness.[26] Far scarcer were those hanged for committing crimes against the person.[27]

A large part of *The London Hanged* is devoted to exploring these two themes: the migratory, even international, character of those executed at Tyburn, and the relationship between making and taking. The richness and detail with which Linebaugh treats these themes is a triumph of energetic, even dogged, research and a significant amount of historical imagination. The next section addresses Linebaugh's explication of these themes.

1. *The Migratory and International Character of the London Hanged*

"On March 14, 1722 James Appleton, alias Appleby, alias John Doe, age 29, was hanged for stealing three wigs."[28] We learn about James Appleton that he first went to sea at the age of twelve, and that he spent by far the largest part of the remaining seventeen years of his life "before the mast."[29] The Ordinary tells his readers that Appleton had been treated with extreme severity while serving as a sailor:

> [He was] scourged and lashed and salted which hardn'd his Mind, and made him hate and defy almost all Mankind. So that returning to England . . . he cast his Mind how most easily to keep himself at the Expense of others, and by spoiling and preying on all whom he thought he could with security.[30]

At least seventy-six sailors were hanged at Tyburn between the years 1703-1772.[31] Many had careers not unlike that of James Appleton's. By anecdotally recounting the life and death struggles of James Appleton and others like him, Linebaugh sheds light on the harsh

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25 *Id.* at 144.

26 *Id.* at 249-50.

27 Linebaugh's treatment of those hanged for crimes against the person is relatively thin. On at least one occasion, Linebaugh leaves the impression that a condemned party was hanged for an offense against property when in fact the crime was against the person. *See* Keith Thomas, *How Britain Made It*, N.Y. REV. OF BOOKS, Nov. 19, 1992, at 35, 38 ("[Linebaugh] lists one John Masland as an example of a sailor brought to Tyburn by unemployment . . . . He does not tell us that Masland was hanged for rape and had been guilty of child abuse, infecting his own daughter with venereal disease.").

28 THE LONDON HANGED, *supra* note 1, at 130-31.

29 *Id.* at 131.

30 *Id.*

31 The number of 76 is arrived at by adding 39, the number of Irish sailors hanged at Tyburn and 37, the number of English sailors born outside of London. The actual number of sailors hanged at Tyburn no doubt was more than 76, since Linebaugh does not provide figures for sailors born in London, or for non-English or non-Irish sailors hanged at Tyburn. *See* THE LONDON HANGED, *supra* note 1, at 95, 97.

conditions of maritime service, and the use of execution as a means of enforcing a strict discipline.[32]

The sailor's lot was "a damned hard life, full of strife."[33] Drawn from a variety of different walks of life,[34] sailors were thrown together for months at a time, sleeping in berths sometimes no more than fourteen inches wide. The work was dangerous. Large numbers of sailors died of disease or were killed in shipboard accidents.[35] Shipboard work was also demanding. The sailor had to be dexterous in a wide variety of skills, from tying knots to climbing rigging.[36] Prematurely aged by the demands of nautical life, many sailors were rendered unfit to serve by their late thirties or early forties, and were often forced to lead destitute lives on shore.[37]

The crew, furthermore, had to work as a team. Breakdowns in discipline could pose great danger to the officers, to the ship's mission, and even to the lives of all on board. Breaches of discipline were accordingly treated harshly. Flogging, keel-hauling, and other forms of frequently lethal corporal punishment were generously administered by captains given largely unchecked powers to discipline transgressions.[38]

Made to lead ascetic, if not spartan, shipboard lives, sailors posed a threat to good order on shore. They were "lords of six weeks" apt to cause all sorts of problems:

> You may . . . see them accompanied with three or four Lewd Women, few of them Sober, run roaring through the streets by broad Daylight with a Fiddler before them: And if the Money, to their

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32 *Id.* at 122-38.

33 MARCUS REDIKER, BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750, at 14 (1987) (quoting the journal of Edward Barlow, a seventeenth-century sailor).

34 On the social background of sailors, see *id.* at 12-14; RALPH DAVIS, THE RISE OF THE ENGLISH SHIPPING INDUSTRY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 110-32 (1962). A large number of men were involuntarily impressed into naval service. *See* DANIEL A. BAUGH, BRITISH NAVAL ADMINISTRATION IN THE AGE OF WALPOLE 160-62 (1965).

35 THE LONDON HANGED, *supra* note 1, at 130-31. Ralph Davis has observed:

> The seafaring life was . . . a dangerous one. Most seamen who left their life stories have some story of wreck, fire or accident, of which they were the lucky survivors, to relate. If the annual rate of loss of ships by wreck and burning was as much as four per cent, and it might well be more, the chances of a seaman ending his life in such a catastrophe were high; and many a man fell from the rigging, was washed overboard, or was fatally struck by falling gear.

DAVIS, *supra* note 34, at 156.

36 THE LONDON HANGED, *supra* note 1, at 130.

37 *Id.* at 126. *See* DAVIS, *supra* note 34, at 156-57.

38 *See, e.g.*, REDIKER, *supra* note 33, at 212-13.

> thinking, goes not fast enough these ways, they'll find out others, and sometimes fling it among the Mob by handfuls.[39]

While flogging and keel-hauling were means of maintaining ship-board order, hanging was a means of maintaining order on shore. The number of indictments issued ebbed and flowed with the arrival of the West Indian and East Indian merchant fleets,[40] and a certain number of sailors were regularly hanged as "examples" to others.[41]

Soldiers also figured among those hanged at Tyburn. Prominent among the soldiers executed at Tyburn were "Wild Geese," Irish mercenaries who fought in many of the wars of the eighteenth century.[42] In a migration that commenced in earnest with the Irish defeat at the Battle of the Boyne, many Irishmen travelled to the Continent and enlisted in the armies of France, Spain, Russia, and Poland, while others crossed the Atlantic and fought in the American War for Independence or sided with Simon Bolivar in the Latin American wars for independence.[43] Mindful of the depredations Oliver Cromwell and other Englishmen visited upon the Emerald Isle, large numbers of "Wild Geese" made it a point to enlist in the service of any principality opposed to British interests.[44]

Eight percent of the Irish executed at Tyburn were "Wild Geese."[45] Some, like Thomas Reynolds, hanged on November 7, 1750, served as mercenaries for political reasons. Others, like John Cassady, fought only as a way of supporting themselves, and quite eagerly allied with Protestants in the London underground.[46] What Reynolds, Cassady, and others like them had in common, however, was the experience of brutalizing combat in battles that left thousands dead and wounded from the Baltic to the Mediterranean and across the Atlantic to the New World.[47]

Linebaugh, however, says more than simply that sailors and soldiers had particularly brutalizing experiences in their respective callings and subsequently figured prominently among those hanged at Tyburn. He also asserts that sailors and soldiers formed elements of a culture that was international, even cosmopolitan, in its own right,

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39 THE LONDON HANGED, *supra* note 1, at 131 (quoting BERNARD DE MANDEVILLE, THE FABLE OF THE BEES 207 (rev. ed. 1970)).

40 THE LONDON HANGED, *supra* note 1, at 131-33.

41 *Id.* at 126.

42 *Id.* at 297.

43 *See generally* MAURICE HENNESSY, THE WILD GEESE: THE IRISH SOLIDER IN EXILE (1973) (assessing the international role played by Irish mercenaries).

44 THE LONDON HANGED, *supra* note 1, at 300.

45 *Id.* at 297.

46 *Id.* at 300.

47 *Id.* at 299-300.

both distinct from and opposed to the dominant British culture. He has, to a significant extent, succeeded in making this case.

Sailors spoke a brand of English nearly undecipherable to those not familiar with it.[48] They formed a tightly-knit group with distinctive customs, including even distinctive marriage practices, and were deeply suspicious of outsiders.[49] English merchant and naval crews were broadly international in their composition, including not only native Englishmen, but also continental Europeans and Africans. Africans, indeed, played an important part in eighteenth-century maritime culture,[50] and were also among those hanged at Tyburn.[51]

The Irish constituted a second element in this "oppositional culture." Largely Roman Catholic, the Irish in London were separated from the English by religion as well as by langnage. Although often surprisingly well-educated (some Irish laborers executed at Tyburn knew both Latin and Greek), many Irish residents of London shunned regular work and did not share the "Protestant work ethic" of the English.[52] The Irish were especially contemptuous of execution and their practice of celebrating the wakes of executed men and women with drinking and festivity grew up as a way demonstrating indomitability.[53]

So far so good. That sailors, soldiers, and the Irish comprised distinct communities variously at odds with the mainstream seems clear. Linebaugh, however, wishes to take his argument one step further by contending that sailors and soldiers and other workers were "exploited" in the sense that they were excluded from sharing in the means of production.[54] Their collective experience of oppression

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48 *Id.* at 134-35; Peter Linebaugh, *All the Atlantic Mountains Shook*, 10 LABOUR/LE TRAVAILLEUR 87, 109-11 (1982). *Cf.* William Matthews, *Sailors' Pronunciation in the Second Half of the Seventeenth Century*, 59 ANGLIA: ZEITSCHRIFT FÜR ENGLISCHE PHILOLOGIE 193 (1935). Marcus Rediker has observed: "Language, a pivotal part of any culture, held a special significance in the wooden world, the solitary vessel of seafaring life. To learn and finally to master the peculiar argot of the sea was to become a seaman." *See* REDIKER, *supra* note 33, at 162.

49 On "marriages of the Fleet," see THE LONDON HANGED, *supra* note 1, at 141-42; on the cohesiveness of sailors generally, see REDIKER, *supra* note 33, at 288-98.

50 *See* Linebaugh, *supra* note 48, at 108-10.

51 THE LONDON HANGED, *supra* note 1, at 135-36.

52 *Id.* at 293.

53 *Id.* at 325-26.

54 Linebaugh states:

> Men and women of the eighteenth century wanted money, most certainly. This is not quite the same, however, as the enthusiastic embrace of wage-labour which was so often accompanied by the kiss of death. As for "the needs of capitalism" one might recall, indeed, the words "Capital is dead labour, that, vampire-like, only lives by sucking living labour, and lives the more, the more labour it sucks", or "Accumulate, accumulate! That is Moses and the prophets!"

Id. at xxiv (quoting KARL MARX, DAS KAPITAL 216, 600 (Ben Fowkes trans., 1976)).

consequently endowed them with a class consciousness that allowed them to challenge the capitalist classes which were beginning to consolidate power in England. Tyburn thus became a stage upon which class oppressors might teach docility to the proletariat, even while the occasional brave soul might shout defiance.

This argument will be dealt with more fully below.[55] It suffices here to note that the differences and the frictions that existed between different classes and groups need not be evidence of class struggle in a Marxian sense. Consistent with their belief that labor is the only source of value in the production of commodities, Marxians understand exploitation to exist and class struggle to be necessarily present whenever the means of production are not held in common.[56] But work in a capitalist system need not be viewed as necessarily exploitive. Work is a basic human need, a source of individual identity, and an expression of "our human essence."[57] Even members of an "oppositional culture" need to satisfy the human urge to work, not only to survive, but also to create a sense of identity. The solidarity of sailors, even those impressed into service, or the camaraderie of mercenaries, even those forced to fight by economic hardship, need not be evidence of resistance to class oppression, but rather a sign of shared identity and purpose and a suspicion, if not contempt, for those who have not shared the risks and the exhilaration of good seamanship or soldiering. This alternative reading of "oppositional culture" does not excuse those who took advantage of the poor and destitute, nor does it justify the savagery that was often shown to them; but it does suggest that class struggle in the Marxian sense may not be the most fruitful basis from which to analyze the differences and frictions found among the various groups and classes of eighteenth-century London.

2. *Making and Taking in Eighteenth-Century London*

In February 1722, James White was convicted of stealing twenty-eight pounds of tobacco from Micajah Perry and forty pounds of tobacco from William Dawkins. White was transported to the American colonies to serve a sentence of seven years forced labor.[58] He managed to jump ship in Jamaica during his transport and subsequently made his way first to the American colonies and then back to England

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55 *See infra* notes 113-32 and accompanying text.

56 *See* SIDNEY HOOK, TOWARDS THE UNDERSTANDING OF KARL MARX: A REVOLUTIONARY INTERPRETATION 200-07 (1933).

57 JOHN C. RAINES & DONNA C. DAY-LOWER, MODERN WORK AND HUMAN MEANING 15 (1986). Raines and Day-Lower note that work remains a basic human need even where the work environment is an "alienated" one. *Id.* at 16. *Cf.* A. R. Gini & T. Sullivan, *Work: The Process and the Person*, 6 J. BUS. ETHICS 649 (1987).

58 THE LONDON HANGED, *supra* note 1, at 153-54.

in December 1722. Apprehended in October 1723, White was hanged for violating the Transportation Act.[59]

In the 1720s, a period of English history that would see the ascendancy of Robert Walpole and the "Robinocracy" in English politics,[60] as well as James White's hanging, Micajah Perry was undergoing a financial crisis. One of the wealthiest tobacco merchants in the Anglophone world, Perry suffered serious business losses as the result of a general depression in prices brought about in part by "gross frauds and abuses" that had crept into the tobacco trade.[61] Perry responded to his personal financial crisis by bribing custom officials to short-weight his tobacco imports into England to reduce his duty.[62] When his losses continued, he petitioned the House of Commons to restrict the trade of his competitors, the Scottish tobacco merchants of Glasgow. Perry survived the crisis and later was elected first to Parliament and then to the lord-mayoralty of London.[63]

The irony is palpable. White, the small-time thief, is hanged, while Perry, the merchant who cheats on a grand scale, gains status within the British mercantile establishment. Who was the greater thief? It is this paradox that Linebaugh explores with considerable success in his treatment of making and taking. The makers of London, according to Linebaugh, were the working classes. Butchers, shoemakers, tailors, watchmakers, silk weavers, hatters, coal-heavers, itinerant laborers, and domestic servants were among the many occupations responsible for building London, meeting its daily needs, and outfitting the "better" classes. They also comprised the large majority of the London hanged.

In the last years of the seventeenth century and the opening years of the eighteenth, much of the compensation provided such workers was customary and "in-kind." Hatters, for instance, might engage in "bugging," taking a beaver pelt or other premium fur intended for a hat and substituting an inferior material.[64] Tailors, similarly, might take "cabbage," scraps of cloth of greater or lesser size left over from a particular job.[65] Those engaged in the tobacco trade might practice "socking," keeping a certain customary amount of tobacco for per-

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59 *Id.* at 154.

60 The regime of Robert Walpole received the title "Robinocracy" because of its perceived corruption. *Id.* at 115. *See, e.g.*, LEWIS NAMIER, THE STRUCTURE OF BRITISH POLITICS AT THE ACCESSION OF GEORGE III (2d ed. 1957). This view of Walpole has been substantially qualified by JOHN T. NOONAN, JR., BRIBES 765-66 n.76 (1984).

61 THE LONDON HANGED, *supra* note 1, at 158.

62 *Id.* at 155-56.

63 *Id.* at 155. Perry's career did not meet with uniform success. *See* JACOB M. PRICE, PERRY OF LONDON: A FAMILY AND A FIRM ON THE SEABORNE FRONTIER, 1615-1753, at 63-90 (1992).

64 THE LONDON HANGED, *supra* note 1, at 237-39.

65 *Id.* at 245-48.

sonal use or for resale.[66] Household servants, for their part, jealously guarded the "perquisites" and "vails" that went with their positions.[67] Still other occupations had their own customary takings, usually related to the trade they were practicing.[68] Generally speaking, these practices display notions of property and compensation that were ambiguous and fluid, thus allowing the laboring classes to share directly in the fruits of their labor.

This situation changed in the course of the eighteenth century as rights-bearers were steadily purged of their customary rights. The means of deprivation took various shapes. In the tobacco trade, for instance, laborers were deprived of their customary rights by the enactment by Parliament of the Bulk Container Act in 1699, requiring that all tobacco shipped across the Atlantic be contained in a large barrel called a "hogshead." The chief purpose in enacting the bill, according to its supporters, was the curtailment of "presumptive Custom" and "accustomed privilege."[69] "Bugging" was made the repeated target of parliamentary legislation in the 1740s and again in the 1770s.[70] Likewise, gentlemen and ladies of proper breeding steadily sought, in the middle decades of the eighteenth century, to reduce the amount of the "perquisites" and "vails" their domestic servants

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66 *Id.* at 170-76.

67 Perquisites and vails were sources of monetary and non-monetary income, in addition to a salary, that related to the particular tasks of the servant. *Id.* at 250-55. For example, the "butler customarily received old bottles and candle-ends." *Id.* at 251.

68 Dockyard workers, for instance, practiced the custom of taking "chips," fragments of wood used in the manufacture of ships. *See id.* at 378-82. *Cf.* E. P. THOMPSON, CUSTOMS IN COMMON 97-184 (1991); BOB BUSHAWAY, BY RITE: CUSTOM, CEREMONY AND COMMUNITY IN ENGLAND, 1700-1880 (1982). Customary takings were part of a larger economic world view that was under assault in the eighteenth century. What one saw in eighteenth-century England was a conflict between two types of manufacture: one small-scale and diffuse, centered upon the family as the basic means of production (called generally the "putting out" system, since those who wanted work done would contract—"put out"—the work with the families that agreed to perform it), the other large and impersonal, based on a central workplace at which employees would perform their particular tasks (a forerunner of the "factory" system). Customary takings were part of the fabric of small-scale domestic production. Craig Becker provides a helpful discussion of the legal implications of customary takings within the "putting out" system:

> During the early stages of the transformation of small-scale domestic production, workers had significant legal, customary, and functional interests in the materials they processed. Under the common law, it was not larceny or any other criminal offense for workers to take materials over which they had been given physical custody. Workers in many industries customarily appropriated some more or less explicitly defined portion of their materials. The legal and customary status of such "takings" augmented workers' autonomy within the putting-out system. Confiscation gave labor a distinct form and degree of control over both its remuneration and the work process.

Craig Becker, *Property in the Workplace: Labor, Capital, and Crime in the Eighteenth-Century British Woolen and Worsted Industry*, 69 VA. L. REV. 1487, 1490 (1983).

69 THE LONDON HANGED, *supra* note 1, at 160.

70 *Id.* at 238-41.

might claim, either by negotiating strict terms of employment or by agreeing among themselves not to satisfy certain "customary" claims.[71] Only "cabbage" seems to have survived into the nineteenth century.[72]

In this way, the earlier ambiguities of compensation were clarified and earlier customary practices criminalized. "Socking" is an example of the process of clarification and criminalization at work. While James White was apparently the only laborer to have hanged in the 1720s for asserting what were once his customary rights to socking (and he hanged for violating the Transportation Act, not the Bulk Container Act),[73] many others were certainly punished for taking what had arguably been theirs only a few years before. "Bugging" is another example of the criminalization of a customary taking. Linebaugh reminds his readers that in the mid-eighteenth century the ownership of the fur used in the manufacture of hats was disputed, and that the "Bugging Acts" were intended not only to clarify ownership but to outlaw customary practice.[74]

It is this documentation of the ways in which the ambiguities surrounding eighteenth-century conceptions of property were clarified that is a particular strength of *The London Hanged.* Linebaugh also helpfully situates these transformations within the larger context of eighteenth-century economic developments. Eighteenth-century Britain has been described variously as undergoing an "industrial revolution"[75] or as witnessing the birth of a "consumer society."[76] However one characterizes eighteenth-century Britain, it is clear that vast economic changes were taking place, and in the specific area of wages, there was a steady movement away from in-kind compensation to compensation tendered exclusively in the form of cash.[77]

Linebaugh sees this shift as having a decidedly negative impact on the working class. The informal takings previously enjoyed by workers provided a useful means of cushioning their lot in life. Wages, on the other hand, were quantitatively fixed and certain, and their fixed nature often led to a reduction in a worker's standard of living. This intensified the class struggle as workers, desperate from

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71 *Id.* at 251-52.

72 *Id.* at 248.

73 *Id.* at 170.

74 *Id.* at 239-40.

75 The expression "industrial revolution" was coined by Arnold Toynbee in 1884. Toynbee's lectures on the subject have been reprinted as TOYNBEE'S INDUSTRIAL REVOLUTION (1969).

76 *See generally* NEIL MCKENDRICK ET AL., THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND (1982); P. G. M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756 (1967).

77 See RICHARD BROWN, SOCIETY AND ECONOMY IN MODERN BRITAIN, 1700-1850, at 312-13 (1991).

their economic plight, angry at the loss their of rights, and resentful at the new class distinctions, were driven to commit crimes against property which in turn led them to the gallows.

The final phase of this shift occurred in the last years of the eighteenth century and the first years of the nineteenth, as new emphasis was placed on both efficiency and law enforcement. Linebaugh uses the careers of Samuel Bentham (Jeremy's brother), Inspector-General of Naval Works, and Patrick Colquhoun, "receiver" for the Thames River Police, to illustrate these developments.[78]

Bentham was named Inspector-General in 1795, twenty-three years after the terminus of Linebaugh's "Tyburnography." Nevertheless, Bentham's career is important to Linebaugh's argument as a means of showing how some trends evident in the years 1703-1772 played out. Bentham's great quest as Inspector-General was efficiency. Shipyard workers were accustomed to taking "chips"—pieces of timber used in shipbuilding—as in-kind compensation, even though this practice had a deleterious effect on the quality of ships thereby produced.[79] Bentham sought to eliminate this practice and limit compensation to the existing level of cash payments. Bentham was in no way concerned that the elimination of chips might lead to a general reduction in the standard of living of workers. In fact, he thought that such living-standard reductions would be a good way of stimulating industriousness among the working classes.[80] Bentham also saw some additional usefulness in manipulating wage levels. Concerned with increasing output, his system of compensation was intended to create different wage levels based on performance.[81] Bentham's actions, Linebaugh suggests, were the result of his "commit[ment] to crush[ ] the power of shipyard workers."[82]

Patrick Colquhoun, who held an ambiguously defined position with the Thames River Police, played an important role in designing a modern police force for the City of London. As such, Colquhoun also participated in the class struggle. As Linebaugh puts it: "If a single individual could be said to have been the planner and theorist of class struggle in the metropolis it would be he. Melville Lee called him the 'architect' of the police. The Webbs called him its 'inventor.' "[83]

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78 For a discussion of Bentham's career, see THE LONDON HANGED, *supra* note 1, at 396-401. Sir Leon Radzinowicz provides an extensive biography of Patrick Colquhoun at 3 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 211-51 (1957). Colquhoun was a Glasgow businessman who left Scotland under mysterious circumstances in 1789. His position with the Thames River Police, which he assumed in 1792, was, it seems, always left deliberately vague. *Id.* at 211-14.

79 THE LONDON HANGED, *supra* note 1, at 390.

80 *Id.* at 396.

81 *Id.* at 399.

82 *Id.*

83 *Id.* at 427.

Among their other duties, the police enforced the wage system by monitoring the comings and goings of shipyard workers and searching them for now illicit takings. The police were even charged with enforcing a dress code designed to eliminate hidden pockets and other devices that might be used for concealing "improper" takings.[84]

Historians have long debated whether the economic compensation extended to the working class was rising or declining in the latter years of the eighteenth century.[85] In focusing attention on the role played by the criminal law in the attack on customary takings and in suggesting that the standard of living was thereby diminished, Linebaugh has offered a new and fresh perspective on this question. Again, however, as the description of Patrick Colquhoun as the chief "planner and theorist" of the class struggle would indicate, Linebaugh's argument is distorted by its Marxist prism. The Marxian concept of class struggle rests fundamentally on Karl Marx's assertion that only labor has value and that management and capital add nothing. Profit thus represents an illegitimate surplus that the class of capitalists aggregates to itself.[86] The class struggle arises from the competition over this surplus and the consequent need to keep wages artificially low in order to maximize the surplus. On this analysis, the laboring classes of London were exploited, and the ritual of public hanging was meant to keep them that way.[87]

But one need not rely on Marx for one's interpretation of eighteenth-century economic developments. One might turn instead to Adam Smith[88] who wrote not only on the subject of economics, "making and taking," to use Linebaugh's expression, but also on the general question of what constitutes the morally just society. In his

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84 *Id.* at 430.

85 *See, e.g.*, BROWN, *supra* note 77, at 315-17; WALTER W. ROSTOW, THEORIES OF ECONOMIC GROWTH FROM DAVID HUME TO THE PRESENT 131-32 (1990).

86 *See* HOOK, *supra* note 56:

> Like all commodities the use-value of labor-power is different from its exchange-value. But in one respect it is absolutely unlike other commodities. Its specific use-value lies in the fact that it creates more exchange-value than it is itself worth. If labor-power produced no more exchange-value than what it receives in money wages, then the value of the commodities produced would be equal merely to the value of the raw material, machinery and labor-power which entered into its manufacture. Where would profit come in? . . . [The capitalist] can remain in business only so long as there is a difference between the value of the labor-power he has purchased and the values which that labor-power creates.

Id. at 201. *Cf.* ROSTOW, *supra* note 85, at 130-34 (arguing that Marx misunderstood the relationship between profits and wages because he failed to detect the steady rise in wages in England during his lifetime).

87 It follows logically that only by holding the means of production in common is the problem of surplus value eliminated, since the value of the commodities produced would then equal the labor expended in production.

88 The few quotations to Smith found in THE LONDON HANGED are caricatures. *See, e.g.*, THE LONDON HANGED, *supra* note 1, at 97.

economic thought, Smith rejected the then-prevalent belief that economic competition was a zero-sum game, proposing instead that surplus capital might be a key to economic growth.[89] In his moral thought, Smith proposed that the good society consisted not of unrestrained, "greedy" capitalist exploiters, but of self-interested economic actors who would nevertheless be tightly constrained in their behavior by their practice of virtuous self-restraint.[90] Generous compensation to workers was one manifestation of the virtuous conduct expected of the "capitalists."[91]

A "Smithian" view of eighteenth-century class relations would recognize that class relations were not necessarily adversarial and that capitalists were themselves among the "makers" of London. It would also provide a moral basis upon which to condemn "passionate," unrestrained behavior that betrayed the virtues one was expected to practice. The imposition of capital punishment for minor infractions might thus be condemned as immoral. While Adam Smith is hardly the final word on either economics or moral reasoning, such an approach might produce both a sounder analysis of "Tyburnography" and a sturdier foundation on which to criticize the harsh treatment of property offenders.

B. Thanatocracy

Despite its Marxist framework, "Tyburnography" is *The London Hanged*'s greatest strength. It provides the reader with a thorough and subtly drawn picture of the social backgrounds of those who were

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89 *See, e.g.*, ROSTOW, *supra* note 85, at 35.

90 *See* JERRY Z. MULLER, ADAM SMITH IN HIS TIME AND OURS: DESIGNING THE DECENT SOCIETY 93-98 (1993). Muller stresses that Smith saw himself as much a moral philosopher as an "economist." Muller calls Smith's vision of society "commercial humanism." Muller states:

> Smith was not the first to suggest that commerce promoted the development of more 'civilized' behavior—that was almost a commonplace of eighteenth-century enlightened thought. But perhaps no other thinker devoted as much attention to describing how the market and commercial society could be structured to develop that constellation of self-control, industry, and gentleness which moralists from the humanists through David Hume had valued.

Id. at 95 (footnote omitted). *Cf.* MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM 77-80 (1982) (interpreting Smith as proposing an economic system offering freedom for human creativity, so that the accumulated ideas of individuals would create a mass rationality).

91 Smith stressed that it was "but equity" to provide amply for one's employees. Furthermore, Smith argued, generous compensation had its rewards. "[W]here wages are high . . . we shall always find the workman more active, diligent and expeditious than when they are low . . . ." BROWN, *supra* note 77, at 314 (quoting ADAM SMITH, THE WEALTH OF NATIONS 73 (Everyman ed., 1910)).

hanged from London's "fatal tree." "Thanatocracy,"[92] on the other hand, is probably the book's most significant weakness.

Linebaugh's discussion of "Thanatocracy" has two components. First, he asserts that in the eighteenth century the British theory of sovereignty changed in a way that made capital punishment central to its definition. Second, he maintains that the administration of the death penalty was structured in a way designed to teach the "humbler" classes to be docile before their rulers. Tyburn became, in effect, a theater meant to teach obedience and respect. Both of these assertions will be analyzed in turn.

1. *Political Power and the Death Penalty*

Linebaugh puts his discussion of political power and "Thanatocracy" in a literally diabolical context: The *Pandaemonium* of John Milton's *Paradise Lost.* The devils Moloch, Belial, and Mammon appear in turn and each represent a different aspect of the new British empire. Moloch, the warrior, appears first. Moloch is metaphorically responsible for the vast and violent extension of the British Empire in the seventeenth century, bringing warfare and destruction to "five continents and seven seas."[93] Belial, the intellectual, appears next. Belial is the counsellor lacking in principle; in Milton's words, Belial "could make the worse appear [t]he better reason."[94] Belial provides the intellectual foundation to the diabolical new order by proposing a new theory of political power based on capital punishment. Mammon, the acquisitive one, appears last. Mammon is concerned with profits and productivity and stands for the subversion and destruction of gnilds and other organizations protective of the working classes, their replacement by a new and centralized means of organizing labor, and the creation of an exposed and vulnerable working class.[95]

Let us focus on Belial. Belial stands particularly for two late seventeenth-century intellectuals, William Petty and John Locke who, according to Linebaugh, were the ones who spun the intellectual justifications for the new age. Of the two, Linebaugh sees Locke as the more important: "Petty was a rough intellectual tailor. 'Reason's garb' found a far more brilliant and fashionable tailor in John Locke."[96] Locke proposed a new understanding of political power centered on government's power to declare capital crimes:

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92 *See supra* note 7 and accompanying text.

93 THE LONDON HANGED, *supra* note 1, at 47.

94 *Id.* at 48 (quoting JOHN MILTON, PARADISE LOST II 109-17).

95 *Id.* at 60-61.

96 *Id.* at 49.

> Political power, then, I take to be a right of making laws with penalties of death, and, consequently, all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws . . . and all this only for the public good.[97]

This definition is crucially important to Linebaugh's understanding of "thanatocracy."[98] The fact that Elizabethan England witnessed a far higher execution rate than Hanoverian England is immaterial to Linebaugh's argument. What matters to Linebaugh is the new relationship struck between capital punishment and sovereignty: "[I]t is not the rate of hanging but the definition of sovereignty in terms of it and its exercise in close calibration with money that requires emphasis."[99]

Two objections may be made to this argnment. First, it misrepresents Locke's thinking on sovereignty. As Linebaugh himself concedes, the relationship between capital punishment and sovereignty is not well known.[100] This relative obscurity is the result of the relationship's unimportance to Locke's theory of government. The quotation Linebaugh relies upon is drawn from the opening paragraphs of Locke's *Second Treatise on Government,* in a section summarizing the main arguments of the *First Treatise.* Locke provides a fuller discussion of political power toward the close of the *Second Treatise.*[101] In that discussion, Locke proposes that political power arises from the consent of the governed, and that the chief purpose of political power is the preservation of the lives and property of society's members. Crimes may be punished consistent with this purpose, but the punishment must not be arbitrary. Locke does not specify the form of punishment, but he does refer to the need to "cut[ ] off those parts, and those parts only, which are so corrupt, that they threaten the sound and healthy."[102]

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97 *Id.* at 50 (quoting JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, ch. one).

98 Describing this passage from Locke, Linebaugh states: "The movement of ideas is from property to law, from law to death, and from death to the public good." THE LONDON HANGED, *supra* note 1, at 50.

99 *Id.*

100 *Id.* at 49.

101 The *First Treatise on Government* was composed in the mid- to late-1680s and had as its purpose the refutation of Robert Filmer's Scripture-based arguments in favor of absolute monarchy. Locke relies on Scripture heavily in his reply to Filmer and simply does not make capital punishment a central feature of his treatment of political power. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 136-263 (1988).

102 Locke asserts:

> *Political power* is that power which every man having in the state of nature has given up into the hands of the society and therein to the governors whom the society hath set over itself, with this express or tacit trust that it shall be employed for their good and the preservation of their property. Now this *power* which every man has *in the state of nature,* and which he parts with to the society in all such cases where the society can secure him, is to

Capital punishment simply does not occupy a central position in Locke's discussion of political power. If one assumes "cutting off parts" refers to the imposition of capital punishment,[103] one can easily substitute for this phrase an alternative expression such as "impose criminal sanctions according to the norm of law." Locke's "political power," accordingly, should be understood as the power of the community, exercised by the community's representatives, to protect life and property. Pursuant to this end, the community may, but need not, impose the death penalty on those threatening the health of the community.[104]

A second and more important objection goes to the enduring significance Linebaugh ascribes to Locke's theory of sovereignty. Linebaugh seems to assume that Locke's definitions of political power and sovereignty met with universal, or at least widespread assent in the eighteenth century.[105] This is not true. Locke was a polemicist and a partisan whose views remained controversial both in his own time and subsequently.[106] Other political theorists offered lively competition to any supposed Lockean hegemony. Perhaps the most important of these was Edmund Burke.

Edmund Burke was a lawyer and politician who was actively engaged in public affairs during much of the period in question. Burke was a reflective man who attempted to conform his public career to

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> use such means for the preserving of his own property as he thinks good and nature allows him, and to punish the breach of the law of nature in others so as according to the best of his reason, may most conduce to the preservation of himself and the rest of mankind. So that *the end and measure of this power*, when in every man's hands in the state of nature, being the preservation of all of his society—that is, all mankind in general—it can have no other *end or measure* when in the hands of the magistrate but to preserve the members of that society in their lives, liberties, and possessions; and so cannot be an absolute arbitrary power over their lives and fortunes, which are as much as possible to be preserved, but a *power to make laws*, and annex such *penalties* to them as may tend to the preservation of the whole, by cutting off those parts, and those only, which are so corrupt that they threaten the sound and healthy, without which no severity is lawful. And this *power has its original only from compact* and agreement and the mutual consent of those who make up the community.

Id. at 381-82.

A recent and comprehensive study of Locke's views on capital punishment has reached similar conclusions. *See* Brian Calvert, *Locke on Punishment and the Death Penalty*, 68 PHILOSOPHY 211 (1993). According to Calvert, Locke restricts "[e]xecution . . . to the most desperate cases, where no adequate security can be provided against someone who poses a constant threat." *Id.* at 229.

103 Such an assumption is not automatic given the new reliance placed on transportation beginning in the 1690s. *See* ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775, at 11-45 (1987).

104 *See supra* note 102.

105 *See* THE LONDON HANGED, *supra* note 1, at 50.

106 "The actual, historical Locke was a political partisan deeply involved in the struggles of his age." RUSSELL KIRK, THE CONSERVATIVE CONSTITUTION 66 (1990).

his own evolving and publicly expressed political philosophy.[107] He has been recognized by contemporary scholars as one of the founders of the philosophical movement known generally as "conservatism."[108]

Burke's philosophy stressed the organic continuity of society. Society is a partnership of the generations, extending over time, to include not only the present generation, but also the dead and unborn. Change in such a partnership should come slowly, and should remain faithful to society's traditional principles because "[h]istory is a proving ground, testing institutions through circumstance and so producing the wisdom of the ages."[109] As a result, Burke rejected Locke's contention that societies were formed through an exchange of consent by free actors exercising natural rights. Indeed, abstract natural rights meant very little to Burke, although Burke was quick to defend against the violation of political and legal rights belonging to particular groups of persons.[110]

Burke differed with Locke as well on the hierarchical nature of society. According to Burke, the Crown and the aristocracy occupied positions of leadership by virtue of the historical status of their offices, and they were expected to discharge their responsibilities with the solemnity and seriousness that came with their state in life. But persons of all stations were expected to lead lives of "accepting virtue" by acknowledging the circumstances of their lives and responding appropriately.[111]

What is important in this account of Burke's thought is what is not said. One would search in vain for any evidence that Burke saw capital punishment as essential to his definition of sovereignty. This is not to say that Burke was opposed to capital punishment; he could enthusiastically endorse its administration in the appropriate circumstances.[112] Rather, Burke's theory of political power, resting on his-

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107 For biographical detail on Edmund Burke, see generally CONOR CRUISE O'BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE (1992).

108 Burke's "conservatism" was firmly rooted in the dominant English legal philosophy of the seventeenth and eighteenth centuries, "historical jurisprudence." *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994). On Burke's conservatism generally, see BRUCE P. FROHNEN, VIRTUE AND THE PROMISE OF CONSERVATISM: THE LEGACY OF BURKE AND TOCQUEVILLE (1992); KIRK, *supra* note 106; J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT 202-32 (1971).

109 FROHNEN, *supra* note 108, at 51.

110 NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 77-118 (Jeremy Waldron ed., 1987).

111 FROHNEN, *supra* note 108, at 65-71.

112 Thomas W. Laqueur, *Crowds, Carnival, and the State in English Executions*, *in* THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOR OF LAWRENCE STONE 305, 331-32 (A.L. Beier et al. eds., 1989).

tory, circumstance, hierarchy, and virtue, leaves no room for claims that capital punishment was somehow essential to sovereignty.

Eighteenth-century political theory thus cannot be characterized as a "thanatocracy." John Locke, upon whom Linebaugh relies to assert the existence of a "thanatocracy," is at best ambignous on the essential relationship between the power to create capital crimes and political power more generally. But the eighteenth century was not dominated by John Locke. Rival thinkers, including Edmund Burke discussed above, also developed political theories that asserted no essential relationship between capital punishment and sovereignty.

2. *Tyburn, Theater, and Thanatocracy*

On the level of political theory, therefore, Linebaugh's claim is unproven. But Linebaugh's "thanatocracy" has a second element that must also be confronted, namely, the assertion that the "drama" of execution had the effect of consolidating the power of the ruling classes.[113] Thus, one might claim that even if eighteenth-century political theorists did not articulate the intellectual foundations of "thanatocracy," such a "thanatocracy" might still exist in practice, since ruling-class power was thereby enhanced. The evidence, however, fails to bear out this claim.

This drama had, according to Linebaugh, three acts: the trial, the procession to the gallows, and the actual hanging. Each act, Linebaugh contends, served the purposes of the ruling class. The Old Bailey, where the criminal trials of London took place, was a "theatre" whose "costuming, make-up, and staging"[114] gave the bench the advantage over the defendant. The Old Bailey itself consisted of three "spaces." The first space, the actual courtroom, was where the trial was played out. But the other two spaces were important as well: the second space held the prisoners waiting to have their cases called, while the third space "was filled with people who, in being excluded from an official role in the proceedings, acted as spectators to the drama of oyer and terminer, but who nevertheless produced a counter 'hearing and determining' of their own."[115] It was by controlling the events that took place in each of these "spaces" that the ruling class (the "bench") controlled the first act of the drama of Tyburn.

The second act, the procession from Newgate prison, where the condemned were led to the gallows, was similarly dominated by the ruling class. In fact, Linebaugh describes the procession to Tyburn as not only a drama, but as a "cultural battle."[116] Although condemned

113 THE LONDON HANGED, *supra* note 1, at xvii-xviii.
114 *Id.* at 83.
115 *Id.* at 86.
116 *Id.* at 215.

prisoners used the parade to Tyburn as a last opportunity to drink and revel (gin and ale were frequently consumed in large quantities along the route), religious leaders like John Wesley used the parade as a means of stressing the importance of sobriety and spiritual submission.[117] A contest was thus played out between "antinomianism" and the "work ethic," but the outcome was foreordained, since prisoners nearly invariably arrived at the gallows.

And it was at the gallows that the final and most compelling act in the drama took place: the actual execution of the condemned. The execution ritual would begin with sermons preaching the awfulness of God's justice and the promise of his mercy. The condemned was then afforded the opportunity to speak his final words to the assembled crowd.[118] The condemned would then be hanged. A struggle sometimes then ensued over possession of the dead body. Judges were empowered to deny burial to particularly heinous criminals and instead to have their bodies turned over to the London medical schools for anatomization.[119] But where the crowd disapproved of a particular hanging, as in the legendary case of Jack Sheppard,[120] the crowd would express its outrage by trying to seize the body.[121] Sometimes, as in the case of Sheppard, the crowd might even succeed in preventing anatomization.

This ritual was meant to consolidate the power of the ruling class and so perpetuate the thanatocracy.[122] In making this claim for the "theater" of ruling-class justice, Linebaugh both depends on and builds upon a foundation laid by Douglas Hay.[123] Hay has argued that the "theater" of capital punishment served "hegemonic" and "legitimating" functions.[124] English criminal law in the eighteenth century, Hay contends, was extremely ritualistic and formalistic. The English gentry, which by and large controlled the judiciary, made scrupulous observance of procedure a prerequisite and frequently acquitted defendants for breaches of procedure. But, Hay continues, this preoccu-

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117 *Id.* at 214-15. It is a mistake to see, as Linebaugh does, the rise of Methodism narrowly as part of the "class struggle" of eighteenth-century London. Methodism originated from the desire of some to "reform" the eighteenth-century English church. Its ascetic practices were designed to achieve salvation, not develop "work-discipline." *See* ELIE HALEVY, THE BIRTH OF METHODISM IN ENGLAND (1971); HENRY D. RACK, REASONABLE ENTHUSIAST: JOHN WESLEY AND THE RISE OF METHODISM 1-42 (2d ed. 1992).

118 *See* Laqueur, *supra* note 112, at 319-21.

119 *See* Peter Linebaugh, *The Tyburn Riot Against the Surgeons, in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (Douglas Hay et al. eds., 1975) [hereinafter ALBION'S FATAL TREE].

120 THE LONDON HANGED, *supra* note 1, at 39.

121 *Id.* (citing Linebaugh, *supra* note 119).

122 *Id.* at xix-xxi.

123 Linebaugh makes his reliance on Hay explicit at *id.* at xx.

124 *See generally* Douglas Hay, *Power, Authority and the Criminal Law,* in ALBION'S FATAL TREE, *supra* note 119, at 17-63.

pation with "procedural justice" was only for show. The ruling class had in fact developed an ideology built around the "rule of law," and the excessive use of formality, acted out in the theater of the courtroom and gallows, was necessary to plant this ideology firmly in the hearts and minds of English men and women. In this way, the ideology of the rule of law became "legitimated."[125]

Several replies to this argument are possible. One might assert that the doctrine of hegemony and "legitimacy," upon which both Hay and Linebaugh rely, commits the logical fallacy of assuming what it is attempting to prove.[126] One might also contend that the evidence of actual English criminal trials of the eighteenth century, far from demonstrating the law to have been a tool of ruling-class power, actually demonstrates that most judgments were arrived at after good-faith consideration of evidence and law.[127] But the most centrally damaging objection to Linebaugh's claims is the argument advanced recently by Thomas Laqueur that the whole process of public executions could not have possibly functioned as a theater of state power.[128] According to Laqueur there was simply too much "slippage" in the English execution ritual for it to be an effective device for consolidating power. As Laqueur puts it:

> The hangings and beheadings of seventeenth-, eighteenth- and nineteenth-century England were unpromising vehicles for the cer-

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125 *Id.* at 32-34, 55-56 (discussing hegemony, legitimation and law).

126 John Langbein has replied to this method of historical argumentation:

> A staple of Marxist argumentation for dealing with contrary evidence is what I call the legitimation trick. Evidence that cuts against the thesis is dismissed as part of a sub-plot to make the conspiracy more palatable to its victims, to legitimate it. The Hay essay [*Power, Authority, and the Criminal Law*] contains some splendid examples. Hay notices the pervasive legalism of English criminal procedure, including the "extreme solicitude of judges for the rights of the accused . . . a sharp distinction from the usual practice of continental benches." Hay also mentions the tradition of strict construction against penal statutes and the recurrent quashing of strong prosecution cases for technical flaws. But Hay undertakes to reconcile this attention to safeguard with his thesis by arguing: "When the ruling class acquitted men on technicalities they helped instill a belief in the disembodied justice of the law in the minds of all who watched. In short, its very inefficiency, its absurd formalism, was part of its strength as ideology."
>
> Now the question that comes to mind is, simply, how does one test that proposition? A revealing manner, I think, is to hypothesize the exact opposite facts. Suppose that the rulers of eighteenth-century England had been operating banana-republic courts, coercing confessions or lynching paupers without trial. Obviously, the ruling-class conspiracy would be equally well evidenced. I have to ask, therefore, what kind of thesis it is that can be satisfied by any state of the evidence, and my answer is that it is not a thesis about the evidence, which means that it is not a thesis about history as I understand the discipline.

See John H. Langbein, *Albion's Fatal Flaws*, 98 PAST AND PRESENT 96, 114 (1983).

127 *See infra* notes 159-85 and accompanying text.

128 *See* Laqueur, *supra* note 112, at 309.

> emonial display of power, if by this is meant the sovereign power of the state. They were more risible than solemn as they lurched chaotically between death and laughter. As often as not, executions were, and were known to be, utter disasters as "imposing demonstrations" of authority, religious or secular. They were held in unprepossessing locations, with little attention to dramatic detail and many opportunities for generic slippage. Executions were the most aleatory of occasions and those responsible did very little to make them otherwise, to insure the triumph of a prescribed interpretation. The state seemed to show a perverse lack of interest in the solemnity of hangings and in making its presence decently manifest. On the contrary, it perpetrated the shabbiest of rituals with the minimum of authorial control. Considerable evidence suggests too that those who watched the deaths of criminals and traitors understood the bodies of the condemned in very different ways from what the state might have intended. The script, the staging and the public's response were thus all wrong if the point of executions was to put on "an imposing demonstration of the state's might and authority played out at the grass roots level." Some, or indeed even the majority, might have skirted dramatic disaster, but any such success was due more to accident than to authorial competence.
>
> Tyburn itself, where the great proportion of London executions took place, was the unlikeliest of venues for displaying the power of the state. The gallows from which a world power launched its criminals into eternity was just outside a barnyard . . . .[129]

Laqueur musters a wealth of evidence to support this thesis: Foreign visitors to England frequently remarked on the lack of solemnity that attended English executions;[130] the condemned frequently refused to

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129 *Id.* at 309-11 (citations omitted). Some eighteenth-century writers shared Laqueur's estimation of the English execution ritual. Henry Fielding, the dramatist who assisted in the development of the Bow Street magistracy, a precursor to the formation of a professional police force, argued that capital punishment was ineffective in England precisely because the necessary dramatic elements were lacking. The procession to Tyburn was not a fear-inspiring exercise of state power; rather the condemned's "Procession to *Tyburn*, and his last Moments there, are all triumphant; attended with the Compassion of the meek and tender-hearted, and with the Applause, Admiration, and Envy of all the bold and hardened." HENRY FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS AND OTHER WRITINGS 167 (Malvin R. Zirker ed., 1988). Fielding went on to argue that private executions would be more effective than public ones because private executions could promote the dread needed to deter the commission of capital crimes. *Id.* at 169-71. *Cf.* Gayle R. Swanson, *Henry Fielding and 'A Certain Wooden Edifice' Called the Gallows, in* EXECUTIONS AND THE BRITISH EXPERIENCE FROM THE 17TH TO THE 20TH CENTURY: A COLLECTION OF ESSAYS 45, 52-54 (William B. Thesing ed., 1990) (exploring Fielding's arguments that the death penalty, as administered, failed as a deterrent).

130 *See* Laqueur, *supra* note 112, at 313-14.

play their "part;"[131] and the crowd, far from being awestruck at the spectacle, tended to treat it as a sort of light entertainment.[132]

One can thus conclude that Linebaugh has failed to prove the existence of a "thanatocracy" at the heart of the eighteenth-century English practice of capital punishment. English political theory did not make capital punishment central to its definition of sovereignty. The "drama" of public execution did not serve to consolidate the power of the ruling class. Tyburnography, with its rich and detailed portrayal of the London hanged, is ultimately betrayed by a theoretical framework that does not work.

II

MARXIST HISTORIOGRAPHY AND EIGHTEENTH-CENTURY ENGLISH CRIMINAL LAW

Peter Linebaugh's treatment of "Tyburnography" and "thanatocracy" is thus distorted by his use of a Marxist framework. While the laboring classes of eighteenth-century London were certainly treated harshly, and capital punishment clearly served as a means of keeping order among the working class, it is wrong to use Marxist categories to explain these actions. Similarly, it is a mistake to argue that eighteenth-century political thought constituted a thanatocracy. This sort of reductionism does a disservice to the diversity and complexity of political opinions that prevailed in eighteenth-century Britain.

But Linebaugh's reliance on Marxist analysis results in more than simple distortions of the historical record. Important aspects of the story of eighteenth-century capital punishment are thereby omitted or obscured. In this section of the review, three themes that are minimized by Linebaugh's Marxist framework will be briefly discussed, in order to suggest avenues of further research into the issue of capital punishment in eighteenth-century London. These are: (1) the relationship of religious belief to capital punishment; (2) the growth of transportation as an alternative to capital punishment; and (3) the independence and integrity of those who had a role to play in the criminal-justice system.

A. Religion and Capital Punishment

A large anomaly exists in the evidence Linebaugh adduces for "Tyburnography": His chief source, the Ordinary of Newgate's *Account*, is an explicitly religious document, yet Linebaugh fails to ex-

131 *Id.* at 317-20.

132 *Id.* at 323-24. Laqueur would prefer to see the execution ritual as a "carnival of spirited death and mockery" that reinforced traditional conceptions of English community. *Id.* at 354.

amine the religious background that informed the drafting of that document. Even a brief consideration of the religious beliefs that helped to shape eighteenth-century thought on capital punishment indicates that religion, not class warfare, provides a potentially more fruitful resource for explaining the proliferation and operation of the death penalty.[133]

The Ordinary of Newgate, also known as the "Bishop of the Cells," has been described as "lending religious sanction to the gallows."[134] The chaplain to the condemned of Newgate Prison and invariably a member of the Anglican Church, the Ordinary was charged with the spiritual welfare of those about to be put to death. He would preach to the condemned, lead them in liturgy, and attempt to extract from them signs of repentance.[135]

In fact, the Ordinary was part of what might more broadly be called a theology of capital punishment. Randall McGowen, in particular, has argned that capital punishment in Hanoverian England was surrounded by a whole set of theological beliefs. He reached this conclusion through a study of the sermons preached at the assizes where capital sentences were imposed. Several recurrent themes are prominent in this sermon literature. First, God was seen as the ultimate source of governmental power; the administration of human justice was "part of God's wider and ultimately beneficial arrangement of the world."[136] Second, recourse to religion allowed judges and magistrates to reconcile two sometimes conflicting impulses: "Justice and Mercy."[137] As McGowen puts it: "The ministers [who preached the assize sermons] encouraged the magistrates to use their judgment in finding the balance between the two."[138] Finally, death and hell were

133 Randall McGowen has recently studied the contents of sermons preached at the assizes empowered to impose the death sentence. McGowen has found that: "The sermons remind us that what was a ceremony of state was still very much a religious ceremony as well. . . . The sermons evoked emotions, proposed images, and offered scriptural authority to justify the justice that was to follow. They sought to instruct; they also endowed justice with a sacramental aura." Randall McGowen, *'He Beareth Not the Sword in Vain': Religion and the Criminal Law in Eighteenth-Century England*, 21 EIGHTEENTH-CENTURY STUDIES 192, 193 (1987-1988) [hereinafter McGowen, *'He Beareth Not the Sword in Vain'*]. *Cf.* Randall McGowen, *The Changing Face of God's Justice*, *in* 9 CRIMINAL JUSTICE HISTORY 63, 64 (Louis A. Knafla et al. eds., 1988) [hereinafter McGowen, *The Changing Face*] (asserting that "religious principles had an important and independent role to play in influencing legal history," including the history of capital punishment in England).

134 *See* HARRY POTTER, HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND 18 (1993). While Potter's book is largely focused on nineteenth- and twentieth-century movements to abolish the death penalty, its opening chapters are nevertheless useful for setting the religious context within which eighteenth-century capital punishment was carried out.

135 *See* Linebaugh, *supra* note 2, at 250-52.

136 *See* McGowen, *'He Beareth Not the Sword in Vain'*, *supra* note 133, at 196.

137 *Id.* at 199.

138 *Id.* at 200.

crucial to the whole didactic purpose of the sermon: through concentration on the torments of hell that awaited malefactors, others might be led to salvation.[139]

An awareness of the theology of capital punishment might account for a number of anomalies in the history of executions in England. Perhaps the most serious anomaly is that at the same time one sees a huge increase in the number of capital offenses (from around fifty in 1688 to perhaps over 200 by the year 1800), the execution rate actually decreased.[140] Linebaugh dismisses this anomaly as unimportant to his concerns, preferring to try to fit it within the framework of his "thanatocracy."[141]

A knowledge of theological developments, however, permits one to explain this anomaly. English law had been generally transformed as a result of the English Revolution.[142] Theologically, the revolutionaries, many of whom were Puritan, introduced a new concept of sin into England. Roman Catholic theology had traditionally divided all sin into two large categories, mortal and venial. Mortal sin was sin that was intrinsically deadly. One would, at least so far as the external forum was concerned, be understood as automatically condemned to hell for committing a single mortal sin. One would not, however, be condemned to hell for committing a venial sin. Rather, one would be required to make satisfaction in purgatory. Robert Bellarmine, for instance, explained venial sins by stating that they "deserved temporal punishment only." Further, although a mortal sin directly violated the law of God, a venial sin, in contrast, constituted a lesser offense occurring "outside the law" (*praeter legem*).[143]

Puritan theology (and Anglican theology under the influence of Puritanism) challenged this distinction. Anglican and Puritan theologians stressed the intrinsic deadliness of all, even the slightest, sins. All sinful action could lead to hell.[144] Such a theology, however,

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139 *Id.* at 201-02.

140 *See* 1 RADZINOWICZ, *supra* note 78, at 3-5.

141 *See supra* text accompanying note 99.

142 *See* Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 598-613 (1984). Berman has persuasively argued that English law was fundamentally transformed by the "Puritan Revolution" of the mid-seventeenth century: "I propose a different view [from that commonly held by historians of English law], namely that in the late seventeenth and early eighteenth centuries there were fundamental changes in the English legal system as a whole, including not only its constitutional aspects but also its criminal and civil aspects . . . ." *Id.* at 599. The following argument is indebted to Berman's insights into the fundamental transformation worked by the Puritans on English law.

143 *See* H. R. MCADOO, THE STRUCTURE OF CAROLINE MORAL THEOLOGY 98-99 (1949).

144 *See* THOMAS WOOD, ENGLISH CASUISTICAL DIVINITY DURING THE SEVENTEENTH CENTURY WITH SPECIAL REFERENCE TO JEREMY TAYLOR 120-26 (1952).

might lead to despair.[145] To prevent despair, some theologians distinguished between "sins of willfulness" and "sins of infirmity." Sins of willfulness were committed in full knowledge that what one was doing was wrong, while sins of infirmity were committed because of some intrinsic weakness on the part of the individual.[146] Other theologians, meanwhile, stressed that while all sin was deadly, one might be saved through appropriate repentance.[147]

At the risk of speculating somewhat, it is possible to see these distinctions in moral theology reflected in eighteenth-century criminal law. A vast range of wrongful conduct comes to be seen as "deadly" in a quite literal sense: capital punishment is the prescribed means of dealing with an expanding array of transgressors. But at the same time, the weakness of individual defendants and the defendant's repentance are taken into consideration when imposing sentence.[148] These sentencing practices likely represent a transfer of beliefs from the theological realm to the legal, and is in keeping with Harold Berman's observation that "virtually every law-making regime in the history of mankind has wanted its laws not only to advance its interests but also to reflect its ideas of rightness and of justice."[149] One should not be surprised, accordingly, to see deadly sin (now understood to encompass a great many types of wrongdoing) punished capitally.

B. Capital Punishment and Transportation

To understand the role capital punishment played in eighteenth-century London, one must also understand the functions filled by benefit of clergy and transportation. Benefit of clergy was a legal device that had its origin in the conflicts between "Church" and "State" of the twelfth and thirteenth centuries.[150] As a means of ensuring the clergy's right to be tried by ecclesiastical courts, English law provided that anyone capable of reciting the 51st Psalm (the "neck verse") could not be sentenced to death in the royal courts.[151] The presumption was that only clergymen could read. By the closing years of the seventeenth century, however, this device had become a well-worn legal fiction. It could be asserted by a defendant not actually in orders

145 *See generally* C. FitzSimons Allison, *The Pastoral Cruelty of Jeremy Taylor's Theology*, 15 THE MODERN CHURCHMAN 123, 128-29 (1972) (arguing that if a sinful person with low self-esteem is unable to redeem himself, secularism would be a more attractive alternative).

146 *See* MCADOO, *supra* note 143, at 114-18; WOOD, *supra* note 144, at 123.

147 *See* MCADOO, *supra* note 143, at 120-37. A helpful recent overview of some of the issues implicated in Caroline moral theology is found at JOHN SPURR, THE RESTORATION CHURCH OF ENGLAND, 1646-1689, at 279-375 (1991).

148 *See* Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 3, at 47-55.

149 *See* Berman, *supra* note 142, at 571.

150 *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 255-69 (1983).

151 THE LONDON HANGED, *supra* note 1, at 53.

only once;[152] it was available to women, who, theologically, could not be ordained, and so were unable to join the ranks of the clergy;[153] and, finally, it was unavailable to those convicted of many of the newer statutory offenses.[154]

A strange tension accordingly existed in the criminal law of the time. On the one hand, there was a growing number of criminal statutes the violation of which was punished capitally; but on the other hand, a guilty party might be released with no more punishment than branding on the thumb (done to prove that someone had already had his or her "clergy") if he or she succeeded in reciting the 51st Psalm.

Judges had long manipulated benefit of clergy as a means of preventing unacceptably large numbers of persons from being hanged.[155] This manipulation, however, had its drawbacks, since it resulted in the freeing of prisoners who were deserving of at least some punishment. Judges began to remedy this situation beginning in the 1660s. One finds in the records instances in which judges denied benefit of clergy to parties who, although unable to read, might nevertheless have been "clergied" under the older, more liberal approach. But instead of being hanged, these individuals were offered the possibility of a royal pardon conditioned on accepting transportation to the American or Caribbean colonies.[156]

With the enactment of the Transportation Act of 1718, transportation was officially established as an alternative to capital punishment. In London, transportation immediately proved to be a popular alternative and in fact, far more felons were transported than were hanged in London for most of the period Linebaugh has considered. Roger Ekirch has established that in the period 1718-1769, 69.5% of convicted felons were transported to America, while only 15.5% were hanged (the remainder were given lesser punishments).[157]

One must always be wary of criticizing an author for not writing a different book. But certainly an account of the London hanged would be enriched by an examination of (or at least a comparison with) the London transported.[158] Who was transported? Why? How did the transported differ from the hanged? Can a comparison reveal

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152 *See* JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 142 (1986).

153 *Id.*

154 *Id.* at 143.

155 *See* Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 3, at 38-41.

156 *See* BEATTIE, *supra* note 152, at 472-73.

157 *See* EKIRCH, *supra* note 103, at 21. *See also* PETER W. COLDHAM, EMIGRANTS IN CHAINS, 1607-1776 (1992); ABBOT E. SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776 (1947).

158 Transportation receives only glancing treatment in THE LONDON HANGED. See, for instance, Linebaugh's brief discussion of James White who was sentenced to be transported to the American colonies, in THE LONDON HANGED, *supra* note 1, at 153-54; *see also supra* text accompanying notes 58-59.

anything about the deeper role of criminal law in English society? These are important questions that go largely unasked and unanswered.

C. The Integrity and Independence of the Criminal Process

Finally, Linebaugh's Marxist framework caricatures the criminal process. At least four groups of individuals had significant roles to play in the eighteenth-century criminal prosecution: (1) judges; (2) juries; (3) prosecutors (distinct from counsel); and (4) counsel. All four groups have their integrity and independence either implicitly or explicitly impugned in an account that sees them more as unwitting class warriors than as conscientious participants in a process that might involve the taking of human life. Each group of actors will be briefly considered.

1. *Judges*

Judges come in for only brief mention in *The London Hanged.* We learn that the judges who presided at the Old Bailey session of January 1715 "were not as bad as some who had recently served the regime."[159] We further learn that judges tended to dominate jurors,[160] and, we learn in particular that Lord Mansfield, respected for his contributions to commercial law, "was both feared and hated in eighteenth-century London."[161] Linebaugh premises his brief treatment of judges on his belief that they were knowledgeable participants in the class struggle.

But this is not a fair portrayal of the English judiciary. A bold standard of integrity was set for modern English judiciary by the seventeenth-century judge Sir Matthew Hale (1609-1676). Hale was a man with well-developed notions of justice and a deep commitment to the law.[162] First appointed to the bench in 1653, Hale took especially seriously his responsibility in capital cases. His sense of responsibility comes through with particular clarity in a diary he kept while on circuit, which has only recently been edited and published.[163] Among the admonitions Hale felt it necessary to keep in mind when judging capital cases were the following:

> That he [the judge] avoid all precipitancy and haste in examining, censuring, judging, [that he] pause and consider, turn every stone,

159 THE LONDON HANGED, *supra* note 1, at 77.

160 *Id.* at 83-84.

161 *Id.* at 360.

162 *See generally* EDMUND HEWARD, MATTHEW HALE (1972).

163 This diary has been edited and published in Maija Jansson, *Matthew Hale on Judges and Judging*, 9 J. LEGAL HIST. 201 (1988). I am grateful to Harold J. Berman for this reference.

> weigh every question, every answer, every circumstance, follow the wise direction of Moses in a case of importance to inquire, ask, diligently inquire, behold if it be true and the thing be certain; all the senses, all the methods of disquisition are little enough in cases of great moment or difficulty, especially where a man can err but once.... If upon the best inquisition a man can make, the scales are very near even or if it stands near a measuring case the sentence or direction of absolution is fitter to be given than the sentence of condemnation *tutius probate in mise[re]cordia quam in severitate* [since it is proven to be safer to err on the side of sympathy than severity] especially where the sentence is *ultimum supplicium* [capital], for though to condemn the innocent and to acquit the guilty are both abomination unto to God, yet that is where a sufficient evidence of guilt appears, but *in obscuris et in evidentibus praesumitur pro innocentia* [innocence is presumed where the evidence is obscure] and I had rather through ignorance of the truth of the fact or the unevidence of it acquit ten guilty persons than condemn one innocent.[164]

Doubtless, few eighteenth-century judges could live up to the standard set by their predecessor Matthew Hale. Even so, the evidence indicates that judges tried, for the most part, to conduct trials in a fair-minded way, careful to take into account the defendant's disadvantageous position.[165] Thus, the evidence does not support Linebaugh's premise that a large number of judges used their office as a means of advancing the interests of a particular class.

2. *Juries*

As in the case of judges, Linebaugh tells his readers relatively little about juries. We are told that jurors had relatively little independence *vis à vis* the bench;[166] and that many, perhaps most, jurors came from the class of small property owners, a group particularly vulnerable to the economic manipulations of the well-to-do.[167] Linebaugh broadly suggests that individual jurors, and even entire panels, were usually corrupt.[168] Despite their economic vulnerability and

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164 *Id.* at 207-08 (citations omitted). Elsewhere in this diary Hale wrote:

> Yet even in relation to those offenses that require the severest animadversion and punishment I shall exercise it still with a compassionate heart even to those very malefactors that shall suffer under the severest sentence: that while I exercise my office as a judge in punishment of the offense, yet I may not forget that common humanity that is fit to be shown to the offenders and, therefore, ever to avoid insolence, passion, intemperance, or unevenness and unequality of mind or deportment in what I do herein.

Id. at 209.

165 See, for instance, Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 3, at 31-55.

166 THE LONDON HANGED, *supra* note 1, at 83-84.

167 *Id.* at 78-79.

168 *Id.* at 83-84. Linebaugh makes much of "ancient jurymen" or "standing jurors" who served regularly on jury panels, sometimes for years on end. Linebaugh suggests that long

their frequent corruption, however, Linebaugh indicates that juries quite often acquitted defendants or engaged in "pious perjury," by reducing capital offenses to non-capital offenses, typically by down-valuing the items allegedly stolen.[169] Linebaugh ignores the apparent anomaly of a dependent and sycophantic jury system routinely acquitting or reducing charges.[170]

Several important studies of eighteenth-century jury practice are now available.[171] These studies suggest a more nuanced picture than Linebaugh provides his readers. In the early period of Linebaugh's account (roughly up to 1735), jurors were under the substantial control of the judge, who might comment on the evidence and even in rare instances overrule a verdict of acquittal.[172] After 1735, as an adversary process became more evident in the courts, judges were less inclined to dominate proceedings than before, but could still exercise substantial control in given cases.[173]

While juries did not then enjoy the independence they have acquired in the last two centuries, their integrity was not thereby necessarily compromised. Substantial evidence has established that juries, for the most part, operated in a "principled"[174] fashion in arriving at verdicts. Recent studies suggest that the portrait Linebaugh sketches—of jurors who might, for instance, sentence defendants to hang simply because they have grown hungry and irritable[175]—is in substantial measure a caricature. Jurors were aware of the power over life and death that they held and were generally unwilling to abuse it.[176]

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service resulted in corruption in the sense that veteran jurors convicted more readily than inexperienced ones. *Id.* at 84. In reviewing the pattern of convictions in Essex, however, Peter King has reached the opposite conclusion: "One theory sometimes advanced by modern commentators—that older and more experienced jurors are much less likely to acquit than young and inexperienced ones—receives no support from the Essex verdict patterns of the late eighteenth century." Peter J. R. King, *"Illiterate Plebeians, Easily Misled": Jury Composition, Experience, and Behavior in Essex, 1735-1815*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL IN ENGLAND, 1200-1800, at 254, 289-90 (J. S. Cockburn & Thomas A. Green eds., 1988) (citations omitted).

169 THE LONDON HANGED, *supra* note 1, at 83-85.

170 *Id.*

171 *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL JURY, 1200-1800 (1985); TWELVE GOOD MEN AND TRUE, *supra* note 168; Peter King, *Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800*, 27 THE HIST. J. 25 (1984); Langbein, *The Criminal Trial Before the Lawyers*, *supra* note 3.

172 *See* Langbein, *The Criminal Trial Before the Lawyers*, *supra* note 3, at 284-300.

173 *Id.* at 307-14.

174 Concerning Essex, King has stated: "Although it is difficult to uncover the underlying criteria that influenced these highly selective processes [of convicting or acquitting], it is evident that these were principled decisions." King, *supra* note 168, at 255 (citations omitted).

175 THE LONDON HANGED, *supra* note 1, at 83.

176 *See* Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 3, at 52-55.

3. *Prosecutors*

In the days before professional police, London (like the rest of England) relied upon a baffling series of *ad hoc* measures to bring miscreants to justice. Undergirding most schemes, however, was the basic premise that the victims of crime would privately bring criminal prosecutions.

Linebaugh attacks the legitimacy of this premise, arguing that the reward system, which Parliament began to construct beginning in the 1690s as a means of inducing private individuals to bring criminal complaints, was irredeemably corrupt.[177]

Linebaugh substantially hits the mark with this charge. The reward system encouraged the creation of networks of "thief-takers," who were supposed to serve the court as professional informants. Often, however, these "informants" functioned instead as "set-up" artists who specialized in entrapping inexperienced or even totally innocent parties.[178]

But other groups were also interested in law enforcement. The eighteenth century saw the growth of a nearly unique type of organization, the private prosecution association. Originating in all likelihood in the late seventeenth-century Societies for the Reformation of Manners,[179] private prosecution associations performed both investigative and prosecutorial functions. Many associations set their fee schedules on a sliding scale to allow those to join who otherwise might not have been able to afford membership.[180]

Alternatively, individuals, acting alone, might also bring criminal charges. Where individuals did bring charges, the threat of a substantial fine compelled their appearance in court. Irrespective of whether charges were brought by a prosecution association or a private party, the entire system of private prosecution was designed in part to discourage "self-serving" prosecutions.[181]

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177 THE LONDON HANGED, *supra* note 1, at 27-28, 52-54.

178 Commencing in the 1690s, Parliament created a scheme of statutory rewards for the apprehension and conviction of felons that had the effect of inducing groups to organize to profit from the rewards. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 572-80 (1990).

179 *See* T. C. Curtis & W. A. Speck, *The Societies for the Reformation of Manners: A Case Study in the Theory and Practice of Moral Reform*, 3 LIT. & HIST. 45 (1976); *see also* J. H. OVERTON, LIFE IN THE ENGLISH CHURCH, 1660-1714, at 213-16 (1885).

180 *See, e.g.*, Peter J. R. King, *Prosecution Associations and Their Impact in Eighteenth-Century Essex*, *in* POLICING AND PROSECUTION IN BRITAIN 1750-1850, at 171, 179 (Douglas Hay & Francis Snyder eds., 1989).

181 *See* Langbein, *supra* note 126, at 102.

4. *Counsel*

Linebaugh has virtually nothing to say about the role of counsel in criminal trials. Yet, according to Stephan Landsman, the very period he is documenting gave rise to the adversarial process. Counsel began to take an active role in defending those accused of felonies and began to practice some of those trial techniques we in the late twentieth century take very much for granted—such as conducting cross-examination and objecting to violations of the rules of evidence.[182]

Counsel was hardly available to all those accused of serious wrongdoing, but the evidence nevertheless suggests large numbers of defendants took advantage of lawyers' services, especially from mid-century onward. Where counsel was not present, the court took on some of the burden of assisting the accused with defense. The emergence of counsel served as an important quality control on the integrity of the eighteenth century criminal trial. Counsel increasingly tested the veracity of witnesses;[183] courts sharpened and enforced rules of evidence;[184] and the participants in the process found themselves challenged in new ways to render verdicts faithful to both evidence and law.[185] In these circumstances, it is difficult to imagine a thoroughly corrupt judicial system operating on behalf of the class interests of the elite.

III

MARXIST HISTORIOGRAPHY AND THE RULE OF LAW

As suggested above, Marxist legal scholars differ over whether it is possible or useful to speak of "the rule of law."[186] Linebaugh himself believes that one can avoid this "antinomy" by focusing on the persons who were actually hanged at Tyburn.[187] Nevertheless, Linebaugh seems to operate under the presumption that law in eighteenth-century England was mere "superstructure," and that lawyers and judges were engaged in class oppression rather than in the search for justice.[188]

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182 *See generally* Landsman, *supra* note 178 (discussing the prominent role played by counsel in the new English adversarial system of the eighteenth century).

183 *Id.* at 535-37, 539-43, 548-57.

184 *Id.* at 564-72.

185 Landsman states: "The adversary method was created by judges and lawyers who sought . . . to build a more equitable court system. They were concerned not only that there be appropriate adjudications, but 'that the Publick may be satisfied, that no unfair Practices have been made use of.' " *Id.* at 603 (footnotes omitted).

186 *See supra* note 12 and accompanying text.

187 *See supra* note 13 and accompanying text.

188 *See supra* notes 159-85 and accompanying text.

Testing the proposition that eighteenth-century lawyers and judges were primarily engaged "in the search for justice" is beyond the scope of this review. I will, however, briefly discuss a related issue: the nature of the disagreement between Marxist legal scholars (and critical legal scholars more generally) on the one hand, and (how to put it?) "orthodox," "mainstream," "establishment" scholars on the other hand regarding the rule of law. Such an inquiry might at least yield criteria by which to judge the adequacy of eighteenth-century jurists' concern for justice.

A significant part of contemporary critical legal scholarship has for its purpose the exposition of what might be called the "false neutrality" of the law. This endeavor may be roughly sketched in a few broad strokes. The consensus jurisprudence of the post-World War II era believed that law was a "neutral" enterprise.[189] This jurisprudence stressed procedure and the "institutional settlement" of legal controversies, and placed confidence in widespread political agreement as a means of transcending debates over the substantive content of law.[190]

This trust in process, however, was misplaced. In truth, the law contained implicit value judgments and political stances that were (improperly) obscured by the predisposition to claim the neutral highground.[191] One purpose of the critical movement was to expose this false neutrality through devices such as "trashing."[192]

On this view, the concept of the rule of law is itself simply another "false neutrality." These critics propose that the concept originated in seventeenth- and eighteenth-century England as a device for controlling the great mass of people without recourse to a police force or standing army.[193] It proved so successful as a means of social control that even opponents of the "ruling classes" came to frame their complaints in the language of the law.

This is essentially the position that Linebaugh takes, though he does not make it consistently clear that he is doing so. Using "neutrality" as a sort of straw figure, Linebaugh challenges the legitimacy of English law; he hopes to discredit that law by proving that it was the

189 *See* Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561 (1988) (situating the emergence of process-oriented jurisprudence in the culture of the 1950s). *Cf.* Earl M. Maltz, *Critical Theory, Neutral Principles, and the Future of Legal Scholarship*, 43 FLA. L. REV. 445 (1991) (defending legal scholarship against infusions of political ideology).

190 *See* Peller, *supra* note 189.

191 *Id.* at 566-72. *Cf.* Mark G. Kelman, *Emerging Centrist Liberalism*, 43 FLA. L. REV. 417, 420-21 (1991) (examining the core beliefs and influences affecting post-war process scholars).

192 *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

193 *See* Douglas Hay, *supra* note 124, at 26-56. It is a mistake to see the rule of law as originating in seventeenth- and eighteenth-century England. For its eleventh- and twelfth-century origins, see Berman, *supra* note 150, at 292-94.

product of a "thanatocracy" out to protect its interest in property.[194] According to Linebaugh, judges like Lord Mansfield and a host of less eminent figures were merely agents of class oppression acting under cover of "ideology" and not the "neutral" decision-makers they should have been.[195]

Some scholars have responded to works such as Linebaugh's by reasserting the need to maintain the old consensus.[196] Many scholars, however, have attempted to move beyond this argument by asserting the need to examine more closely the issue of the goods toward which the law is oriented. John Finnis is one such thinker.[197] At the risk of oversimplication, I will attempt a thumbnail sketch of Finnis's scholarship.

Finnis's jurisprudence is grounded on analytical and Aristotelian premises and is rooted in what he takes to be "the basic forms of the human good."[198] Finnis takes as essential to human existence the goods of life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. Finnis's theory of justice builds from these basic goods a theory of the common good. The common good consists, for Finnis, in "the flourishing of all members of the community."[199] While Finnis recognizes a basic right to private property, he argues that the possession of property should be subordinated to the common good. Owners of private property, for instance, are under a duty to put their property to productive use, and to avoid "speculative acquisition . . . uncorrelated with any economically productive development or use."[200]

This theory of justice suggests that law, at least in part, arises as a means of "bring[ing] definition, specificity, clarity, and thus predictability into human interactions."[201] The "rule of law" is, in a sense, an

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194 THE LONDON HANGED, *supra* note 1, at 50-54.

195 *Id.* at 357-60 (discussing Lord Mansfield); *see also supra* notes 159-61 and accompanying text.

196 *See, e.g.*, WALTER BERNS, IN DEFENSE OF LIBERAL DEMOCRACY 37-46 (1984).

197 *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) [hereinafter NATURAL LAW AND NATURAL RIGHTS]. Finnis did not write this book with the critical legal studies movement in mind. He has, however, written a profound response to the critical movement. *See* John Finnis, *On "The Critical Legal Studies Movement"*, 30 AM. J. JURIS. 21 (1985). It must also be noted that Finnis has integrated important insights of Lon Fuller and the "legal process" movement of 1950s jurisprudence into his theory of law. *See* NATURAL LAW AND NATURAL RIGHTS, *supra*, at 273-76.

198 *See* NATURAL LAW AND NATURAL RIGHTS, *supra* note 197, at 86-89. Finnis has further developed his argument about the basic forms of human goods in MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 40-44 (1991). *Cf.* Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURISP. 99 (1987) (developing the philosophical foundations of the basic human goods).

199 NATURAL LAW AND NATURAL RIGHTS, *supra* note 197, at 174.

200 *Id.* at 172.

201 *Id.* at 268.

elaboration of these requirements. Finnis proposes a detailed set of guidelines for testing a community's adherence to the rule of law.[202] An unjust law, then, is a law that violates the common good, for any one of a number of reasons Finnis specifies at length.[203]

But John Finnis represents only one of a number of approaches to jurisprudence. One alternative approach is the "integrative jurisprudence" of Harold Berman. Berman's jurisprudence is especially sensitive to the historical character of law. Harold Berman has identified three factors as essential to an "integrative jurisprudence."[204] One must consider basic moral principles (*i.e.*, is it right to execute certain classes of convicted criminals?). But one must also acknowledge that moral principles do not exist in a timeless present or in a realm divorced from practical judgments and political debate about what is most useful for society. Accordingly, reflection about whether the common good is served by capital punishment must also consider two further factors: historical experience (*i.e.*, in light of our experience, is it fitting to execute certain classes of criminals?) and politics or utility (*i.e.*, does it serve society's interests to execute certain classes of criminals?). This sort of analysis seems to be at the heart of the "evolving standard of decency" test used by the Supreme Court in death penalty cases.[205]

With this as prologue, I will return to the issue of the "false neutrality" of law. The law embodies a host of particular assumptions about the proper uses and distribution of property, the proper ways to treat criminals, and the like. The quest to unmask "false neutrality"

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202 *Id.* at 270-76.

203 *Id.* at 351-68.

204 These three factors are drawn from Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 782 (1988).

205 *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (citations omitted) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). *Cf.* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citing *Trop* for the above proposition in affirming the imposition of capital punishment).

LaFave and Scott, in their hornbook on criminal law, quite unreflectively analyze *Gregg v. Georgia* in an "integrative" fashion:

> As for the question of whether the death penalty is inherently cruel, so as to constitute a per se violation of the Eighth Amendment, the Supreme Court answered in the negative in *Gregg v. Georgia.* In reaching this conclusion, the Court emphasized three factors: (i) that the "imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and England"; (ii) that it was "now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction"; and (iii) that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."

WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 178 (2d ed. 1986).

I hope to return to the historical and jurisprudential commitments embodied in the "evolving standards of decency" test in a future article.

might help to stimulate thought about these first principles, but such a quest has very definite limits. Linebaugh has demonstrated that the supposedly neutral, legal decision-makers of eighteenth-century English criminal law had some very definite preconceptions about the value of property and the need to protect it. But is the appropriate means of analysis the sledgehammer of Marxist thought, or a searching study of the demands of morality, history, and politics in the face of concrete circumstances?

If one selects the Marxist approach, one is ultimately forced to call into question the legitimacy of the legal system one is studying. This is what Linebaugh has done. But if one takes as one's starting-point an integrative analysis, or an analysis of the demands of the common good, one is led to a much more promising set of questions: Is a particular legal institution, like capital punishment, just? Does its continued usage conform to the experiences of a particular community? Does it represent sound public policy?

Establishing some criteria by which to judge the judges and jurors of eighteenth-century England can also be instructive. These criteria should be shaped by reflection on the common good as understood by eighteenth-century men and women. Did judges or jurors exalt private or personal advantage over broader conceptions of the public welfare? Did they decide cases, especially capital cases, on whim or caprice? Or did they engage in searching analyses of law and facts, trying to arrive at the legally correct outcome? These are the criteria by which to judge the conduct of the relevant "decision-makers" of eighteenth-century English law. Proof that these decision-makers acted in conformity with these criteria would fill a book at least as large as Linebaugh's. Nevertheless, the evidence adduced in the body of this review suggests many, if not most, "decision-makers" behaved in a "principled" fashion, considering cases in accord with the rules. To be sure, when viewed retrospectively, a system that imposed capital punishment for minor infractions against property seems like a most barbaric regime. In fact, many eighteenth-century writers would have agreed with this assessment.[206] But can the entire system be delegitimated as existing for and perpetuating the advantage of a few? The case remains unproven.

IV

CONCLUDING OBSERVATIONS: TYBURNOGRAPHY TODAY

Linebaugh's findings, and this review's criticisms, can be reduced to a number of brief propositions. Capital punishment was a routine

206 *See generally* McGowen, *The Changing Face*, *supra* note 133 (reviewing religiously-based arguments against the death penalty).

feature of eighteenth-century London life, even if most convicted felons were transported rather than hanged. The London hanged were drawn, nearly exclusively, from the city's working classes. Large portions of working class London were economically pressed for much of the eighteenth century, as wages paid in cash eventually substituted for customary rights and privileges. Furthermore, many members of the working class belonged to "oppositional cultures," resistant to those who made or enforced the law. But while some of those hanged had merely acted out of economic necessity or opposition to the prevailing order, the British government was not a "thanatocracy." Public executions were of doubtful efficacy. The proliferation of capital offenses was not matched with an increase in the rate of executions. Evidence shows that judges, jurors, and other "decision-makers" acted with integrity when considering whether to impose a death sentence. Religious conceptions of sin, responsibility, and reformability were never far removed from such deliberations, and probably shaped the outcome of many cases. Political thinkers, Locke and Burke among them, accepted the death penalty as appropriate in some circumstances, but did not make it an integral part of their thought.

What larger lessons can be drawn from these findings? The most obvious lesson has to do with the relationship of American law to its English roots. Like its mother country, the American colonies imposed capital punishment for a variety of offenses. The colonies did not have a uniform criminal law, and the English common-law of crimes was adopted selectively by the various jurisdictions.[207] Nevertheless, execution for crimes against property and commerce was commonplace, as it was for religious and sexual offenses.[208] Over the course of the late seventeenth and early-to-mid eighteenth centuries, the types of capital crimes "on the books" expanded steadily. In New York, for example, the death penalty was imposed for various types of counterfeiting in a succession of statutes enacted between 1709 and 1766.[209]

In the early decades of the nineteenth century, the states of the new United States steadily restricted the types of crimes for which capital punishment might be imposed.[210] The United States Constitution and Bill of Rights, however, were framed by men who understood the death penalty to be a routine feature of criminal law. The Fifth Amendment is testimony to this assumption when it states that no person may "be deprived of life . . . without due process of law."[211] Ac-

207 *See* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 4-5 (1991).

208 *See* NEGLEY K. TEETERS, HANG BY THE NECK 7-19 (1967).

209 *See* PHILIP E. MACKEY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861, at 15-16 (1982).

210 *See* PATERNOSTER, *supra* note 207, at 6-7.

211 U.S. CONST. amend. V.

cordingly, those who would argue against the death penalty on constitutional grounds must surmount an obstacle posed by the very language of the document.[212] In this way, the presumptions of the eighteenth century remain vital today.

American constitutional law thus continues to be influenced by some of the beliefs Linebaugh has chronicled. Similarly, the "demographics" of today's death penalty bear a striking resemblance to the demographics of the London hanged. A study of those executed in the United States between 1977 and 1990 has shown that the executed filled "low-skilled positions such as cement finisher, poultry company worker, handyman, laborer, sawmill worker, migrant worker, and tirecapper."[213] A few of those executed had "some training in blue collar posts,"[214] while only two "had quasi-professional backgrounds."[215] Additionally, 39.2% of those executed were African-American, a disproportionately large figure.[216]

Unlike the London hanged, however, the American executed have been put to death almost entirely for homicide.[217] Furthermore, many of those executed had lengthy criminal records.[218] As several commentators have put it, these "are not the type of people the public is likely to mourn over."[219]

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212 Three United States Supreme Court Justices, however, have proposed theories of constitutional interpretation that avoid this issue. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986); Jeffrey J. Pokorak, *"Death Stands Condemned:" Justice Brennan and the Death Penalty*, 27 CAL. W. L. REV. 239 (1991); Jordan Steiker, *The Long Road Up From Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993).

Retired Justice Harry Blackmun has now joined retired Justice Brennan and the late Justice Marshall in concluding that the death penalty is unconstitutional. *See* Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting). *Cf.* Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES, Feb. 23, 1994, at A1 (providing further detail regarding Justice Blackmun's dissent); and David von Drehle, *When Harry Met Scalia: Why the Death Penalty is Dying*, THE WASH. POST, March 6, 1994, at C3 (comparing and contrasting Justice Blackmun's and Justice Scalia's respective approaches to death penalty cases).

213 *See* John H. Culver, *Capital Punishment, 1977-1990: Characteristics of the 143 Executed*, 76 SOC. & SOC. RES. 59, 60 (1992).

214 *Id.*

215 *Id.*

216 *Id.* at 59.

217 Culver states:

> The 143 individuals executed over the past fourteen years were convicted of killing, or being involved in the murders of, 146 adults and 40 adolescents and children under the age of 18. Further, those executed had previously been convicted of killing, confessed to killing, or were suspected of killing an additional 146 adults and five others under the age of 18. If one accepts as valid the self-reported figures of several of the multiple murderers, those executed in this 14-year period were collectively responsible for 337 homicides.

Id. at 60.

218 *Id.* at 61.

219 *Id.* (quoting Robert W. Jolly, Jr. & Edward Sagarin, *The First Eight After Furman: Who Was Executed With the Return of the Death Penalty?*, 30 CRIME & DELINQ. 610, 622 (1984)).

In addition to poverty and a lack of job skills, the American condemned have quite typically been raised in what can only be described as dysfunctional settings. Unemployed parents, parents who abused drugs or alcohol, parents who separated or divorced, and parents who beat or otherwise mistreated their children, are all common denominators of most held on death rows.[220] It is well-established that such backgrounds can give rise to a host of psychological disturbances.[221] The Supreme Court, however, has given only limited recognition to family history and psychological disturbance as mitigating factors to consider when sentencing a defendant in a capital case.[222]

It is difficult to assert class oppression where the American executed are concerned. Most poor people and most unskilled and semiskilled workers never commit crimes of violence. Most persons who are raised in troubled families live productive and useful lives themselves. Nevertheless, one senses that in some fashion the nexus of economic deprivation and family dysfunction and violence "hardn'd the minds" of many of the executed and made them "hate and defy almost all mankind." A good many James Appletons have surely been executed over the years.[223]

One must ask whether the common good is served by executing such men and women. The affirmative case is clearest where a convicted murderer (or other felon) serving a life-without-parole sentence has killed in prison. Such a murder could be committed with relative impunity, since no other meaningful sanction is available. To safeguard the lives of staff and inmates, the offender should be put to death.[224]

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220 Family dysfunction and its traumatic impact on personality development is a recurrent theme among those interviewed by Doug Magee. *See* SLOW COMING DARK: INTERVIEWS ON DEATH ROW (Doug Magee ed., 1980).

221 *See generally* ADRIAN RAINE, THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER (1993) (exploring the relationship of crime and psychological disorder); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d rev. ed. 1987) (documenting the generally accepted psychopathologies).

222 *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence where the court refused to consider defendant's upbringing and emotional disturbance as mitigating factors). *Cf.* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 839-41 (1992) (attempting to provide greater and more defensible content to the Supreme Court's requirement of "individualized sentencing").

223 *See, e.g.*, John T. Noonan, Jr., *Horses of the Night:* Harris v. Vasquez, 45 STAN. L. REV. 1011, 1011-14 (1993) (discussing the case of Robert Alton Harris).

224 This has long been an issue in New York. *See* Note, *Death After Life: The Future of New York's Mandatory Death Penalty for Murders Committed by Life-Term Prisoners*, 13 FORDHAM URB. L.J. 597 (1985) (arguing there should not and cannot be a mandatory death penalty for life-term prisoners who murder in New York). *Cf.* W.E. Cooper & John King-Farlow, *A Case for Capital Punishment*, 20 J. SOC. PHIL. 64 (Winter 1989) (arguing capital punishment is morally justified by the protection it extends to the innocent).

Yet it is difficult to imagine other circumstances where the death sentence might be justified. The point has been put well by Watt Espy, a leading historian of the death penalty:

> [The death penalty] is not a deterrent to crime nor does it restore life to the victim. It is demoralizing to the population in general in that it shows a lack of regard for the sanctity of human life by the State itself. Finally the possibility of error exists and . . . nothing can be more terrible or more reprehensible than for the state to unjustly take the life of one of its own citizens.[225]

225 M. Watt Espy, *The Historical Perspective, in* SLOW COMING DARK: INTERVIEWS ON DEATH ROW, *supra* note 220, at 174. Hugo Adam Bedau has similarly made an eloquent case against continuance of the death penalty:

> [T]he current system of capital punishment entrenches our national obsession with killing people. It teaches the lesson that some may kill others willfully, deliberately, and with premeditation as long as they are the right people doing it for the right reasons in the right manner. The fact that such killings are not necessary, that there is a well-established alternative method of punishment—long-term imprisonment—now used throughout Europe and in many American jurisdictions for over a century, does not matter. Defenders of the death penalty insist that the killings they favor are justified, desirable, legal, authorized—and therefore *are* "necessary." Besides, we are told, those who are condemned to die by the death penalty are less than human. Their conduct and their histories prove that they are not like us, and they have done unspeakable things for which there is no forgiveness or repentance; they deserve our righteous indignation. Any refusal on our part to put them to death is proof of our own failure of nerve. Thus do we extend the reign of Thanatos, the god of death.

See Hugo A. Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 768 (1991).