The Bloody Code

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Abstract

This Article focuses on the bloody code in England during the second half of the eighteenth century and assesses the extent to which its effectiveness depended upon the discretion of judges, jurors and prosecutors to mitigate and to nullify the law. Discretion was far reaching in 1750, playing a role in pre-trial proceedings, the trial itself and post trial procedure. This Article will also discuss other discretionary bodies such as the Justices of the Peace and the Grand Jury as well as the impact of transportation and the introduction of defence counsel.

Discretion was so prominent that this paper questions whether the bloody code could have been effective at all in its absence. It will be argued that whilst discretion is undoubtedly the most prominent factor in the effectiveness of the system other factors did contribute. Namely, its strength as an ideology, the position of society at the time and how a strict application of the statutes saw the law mitigate itself. It concludes that whilst there is evidence to suggest that the system could have been effective in the absence of discretion it is doubtful that it would have remained for so long had discretion not played such a large role.

I. Introduction

John Beattie has described the 18th century criminal justice system in England as one which 'was shot through with discretionary powers. Indeed it could hardly have worked had it not been.'[1] The aim of this essay is to discuss the Bloody Code in the second half of the 18th century and assess the extent to which its effectiveness depended upon the discretion of judges, jurors and prosecutors to mitigate and to nullify the law. This will lead to an examination of further areas of discretion within the system such as Justices of the Peace, the Grand Jury and Parliament. The final part of this essay will address whether the system could have been

1 John Beattie, *Crime and the Courts in England 1600-1800* (Princeton University Press 1986) 404.

effective in the absence of discretion, before concluding with a brief discussion on the appeals for reform that were simultaneously developing and gaining strength by discrediting the Bloody Code.

When dealing with historical issues there is, of course, the danger of projecting our own understanding backwards about the 'nature and workings of law itself.'[2] This essay will attempt to be sensitive to this fact and seek to interpret legal issues as contemporary agents understood the law to be.[3]

II. The Bloody Code

Following the Glorious Revolution in 1688, the number of capital statutes in England and Wales grew from approximately 50 to 200 by 1820.[4] Almost all of these were for offences involving property. It was this vast number of offences, punishable by death, that led to the era being labelled as the Bloody Code by those who were arguing for reform.

Douglas Hay attributes the increase in capital statutes as a calculation by the ruling classes to manipulate the poor and maintain socio-political control: 'Again and again the voices of money and power declared the sacredness of property in terms hitherto reserved for human life.'[5] It has been estimated that approximately 35,000 people were condemned to death in England and Wales in 1770-1830 with about 7000 actually being killed.[6] The disparity

2 Stroud Francis Charles Milsom, *A Natural History of the Common Law* (Columbia University Press 2003).

3 Michael Lobban, 'Introduction' in Michael Lobban and Andrew Lewis (eds) *Law and History* (OUP 2003).

4 Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Volume I (Stephens & Sons 1948) 4.

5 Douglas Hay, 'Property, Authority & the Criminal Law,' in Hay, Langbein et al, *Albion's Fatal Tree: Crime & Society in 18th Century England* (Peregrine Books 1975) 19. The actual effects of the increase in capital statutes may have been less significant than Hay suggests. See discussion of Emsley's ideas.

6 Vic Gatrell, *The Hanging Tree, Execution & The English People*, (OUP 1994) 7.

between the numbers condemned and the numbers executed may, to some extent, have been a result of the discretion exercised by judges, jurors and prosecutors.

III. Discretion Exercised by Judges, Jurors and Prosecutors

Judges in the 18th century held extensive discretionary power and they exercised it to mitigate and to nullify the law. In the absence of defence counsel the judge would ensure fair play by questioning the witnesses and commenting on the evidence. Although there was no clearly developed law of evidence at this point, judges were beginning to examine evidence more closely. Judges would also recommend that the accused plead not guilty as this would at least let the jury hear certain mitigating factors, such as good character, which could mean the difference between life and death.

It was however in the post-trial procedures that the judge could exercise the most discretion. If the judge was unsure on a point of law he could reserve a case and suspend his verdict until he had gained the opinion of others. Should the point be found to be in favour of the accused then he would be pardoned at the next assizes. Following a capital conviction the judge would also reprieve some of the convicted or grant a conditional pardon. If the judge refused to grant a reprieve then the accused could petition to the King for mercy.[7]

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7 Peter King, *Crime, Justice & Discretion in England* 1740-1820 (OUP 2000) 113. King has researched the frequency with which a particular factor was used in petitions for pardon in an attempt to determine what feature was the most successful in obtaining one. King criticised Hay for using only a small number of quotations from judge's reports to highlight the fact that he believed respectability was the most important factor in receiving a pardon. King therefore undertook a study of all factors mentioned between 1784-1787. The results in order of importance were: Good character, youth, circumstances of the crime, poverty of the culprit and finally respectability of the culprit. Beattie provides figures for the number of royal pardons for property offences in London in 1600-1800: 1139 people were sentenced, 703 of whom were pardoned. This is a pardon rate of 61.7%.

Juries were viewed by some as independent bodies who were the 'bulwark of English liberty.'[8] Langbein explains that 'whereas Hay has exaggerated the extent of prosecutorial discretion, he has underestimated the importance of jury discretion.'[9] Juries had great discretional ability. They could mitigate the law by finding the accused guilty of a lesser charge or by acquitting them. It is thought that jurors found not guilty verdicts or verdicts of 'not found' in favour of nearly 40% of the accused.[10] They could also find special verdicts where they 'decided the facts but left the court to determine whether those facts gave rise to criminal liability.'[11] Partial verdicts were an element of jury discretion that Blackstone called 'pious perjury.'[12] There are many of examples of verdicts where goods were valued at thirty-nine shillings,[13] in order to avoid the capital sanction given for thefts of goods over forty shillings. Beattie explained that the 'scale of undervaluation was frequently staggering.'[14] This is presumably because the jury 'thought about their verdicts at least to some extent in light of the punishment that would follow.'[15]

The prosecutors of crimes also played a large role in mitigating and nullifying the law. People from almost every class in the 18th century took others to court.[16] This, argues King, 'put a tremendous breadth of discretionary power in

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8 John Hawles, *The Englishman's Right: A Dialogue Between a Barrister at Law and a Juryman* (1686). This text focuses in detail on jury independence.

9 John Langbein, 'Albion's Fatal Flaws,' *Past & Present* 98 (1983) 105.

10 King (n 7) 359.

11 John Langbein, *From Altercation to Adversary Trial* (OUP 2003) 329.

12 William Blackstone, *Commentaries on the Laws of England* (Cavendish Publishing 2001) 239.

13 Case of Alexander Duglass (1750) (theft from a specified place under 40s) Goods valued at 39s. As a result the punishment was transportation. Reference number: t17501017-9 <www.oldbaileyonline.org/static/crime.jsp> Accessed 11 November 2012.

14 Beattie (n 1) 424.

15 ibid 419.

16 King (n 7) 357.

the hands of the non-elite groups.' As a result a large majority of cases were settled within the community, before the issue could ever reach the courts.

Whilst developments to facilitate prosecution were improving – such as a growing rewards system, networks of thief-takers and help with prosecution expenses – there was also plenty of room for discretion in prosecutorial procedure. Prosecutors could decide 'what type of charge they wanted to bring without the interference of professional bureaucratically organized police forces.'[17] They could also weaken their evidence or downgrade their charge, which effectively gave them 'the equivalent to the jurors' partial verdict option.'[18] Some prosecutors chose not to turn up, 'contenting themselves with the fact the accused had often spent a considerable time in gaol awaiting trial.'[19]

IV. Other Discretionary Bodies

It was not solely the judges, jurors and prosecutors who exercised discretion. There were plenty of participants in the criminal justice system who utilised this concept prior to the trial. Indeed, 'evidence suggests that the major participants in these earlier stages exercised wide and often almost untrammelled discretion.'[20]

The Justices of the Peace were a body in which discretion could be found at work. They tended to be people who were of some social standing and played a role in local governance. For minor offences, the Justice of the Peace could try the accused themselves but for more serious ones they would bind it over for trial by judge and jury. This was a procedure that was undoubtedly influenced by

17 ibid 356.

18 ibid 357.

19 ibid 356. According to Emsley in the Surrey assizes between 1771-1800 thirty-six men and women committed for trail in property cases were discharged due to a lack of prosecutor.

20 ibid 355.

discretion, not least because it often took place in an informal setting such as a local inn.

The Grand Jury's role was to consider if the indictment, drawn up by a clerk was a true bill and could be sent to trial or 'ignoramus,'[21] which meant that there was no case to be brought. They 'applied the law with discretion [when] deciding whether or not the prisoner should be sent to trial.'[22] Their decisions were influenced by many factors including the type of charge, who the accused was, the apparent state of crime and the need at that moment for examples to be made in order to deter potential offenders.[23]

We can question whether Parliament intended its statutes to be strictly enforced or whether it intended them to be applied with discretion. Radzinowicz argued that Parliament did intend for their legislation to be enforced and that judges 'increasingly vitiated that intention by extending pardons freely.'[24] Hay has strongly disagreed by saying that 'a conflict of such magnitude between Parliament and the judiciary would have disrupted 18th century politics and nothing of the sort happened.'[25] Paley, on the other hand, thought that 'the laws were never meant to be carried into indiscriminate execution...the legislature when it [established] its last and highest sanctions, [trusted] the benignity of the crown to relax their severity, as often as circumstances [appeared] to palliate the offence.'[26]

The introduction of transportation and varying lengths of imprisonment provided judges and juries with greater discretion when sentencing. In the 50 years after

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21 John Baker, 'Criminal Courts & Procedure at Common Law 1550-1800' in James Cockburn (ed) *Crime in England 1550-1800* (Princeton University Press 1977) 18.

22 Beattie (n 1) 403.

23 ibid.

24 Hay (n 5) 23.

25 ibid.

26 William Paley, *Principles of moral and Political Philosophy,* (West and Richardson 1785).

1718, 30,000 were transported to North America. This provided an alternative which could leave death as an 'awful example to be visited upon by the worst few.'[27]

The introduction of defence counsel in the later part of the 18th century also allowed for further discretion within the system, though not perhaps in an obvious sense. The purpose of defence counsel was to simply cross-examine witnesses. What ensued however was a manipulation of 'cross-examination for the purpose of making a [defensive] argument.'[28] Langbein argues that the growing aversion to capital punishment was what contributed to contemporaries tolerating 'the truth impairing attributes of adversary procedure.'[29] Most trials in the 18th century were still lawyer-free however and, as a result, the accused still had to rely on the discretion of the judge and jury. The discretion of the lawyers in formulating arguments under the guise of cross-examination did, however, help a lucky few.

V. An Effective System in the Absence of Discretion?

It is clear from the above argument that judges, jurors and prosecutors, along with other pre-trial bodies, acted with great discretion. Could the Bloody Code still be an effective system in the absence of such discretion? It can be argued that the system did not solely depend on these discretionary bodies to mitigate and to nullify the law:

> One of the key errors of many historians has been to take the 18th century Bloody Code at a face value based on modern perceptions of the

27 William Cornish, *Law & Society* (Sweet & Maxwell 1989) 694.

28 Langbein (n 11) 299. Langbein gives the example of the case of Gabriel Beaugrand and Louis Brunet OSB 1743 #256-7. The case involved murder by stabbing. The defence counsel, banned from arguing that the victim died accidentally from his own weapon, instead formed a question during cross examination: 'If a man had a sharp knife in his pocked might it not run into his body by accident?'

29 ibid 254. Langbein argues that this was a grave mistake and had the judges recognised the effect on the legal system they would never have allowed defence counsel in.

> law, thus they have assumed that the increase in capital statutes during the 18th century was a meaningful one...In reality the new capital legislation defined offences in a very narrow way and often made reference to a specific institution or piece of property only; as a consequence the number of prosecutions likely to follow the passing of a capital statute was tiny.[30]

Indeed, the law was, to a certain extent, mitigating itself by being so specific.

There were also limitations on who could exercise discretion; age and gender were the most obvious. Women were 'completely excluded from serving as judges, magistrates and jurors, and were much less likely to play a role as prosecutors, character witnesses or petitioners for pardon.'[31] In homicide cases too the presence of a coroner largely eliminated the room for discretion.[32] These facts do not detract from the wide discretion already exercised in the criminal justice system, but they do show that the role of discretion was marginally restricted.

It could also be argued that the Bloody Code was effective in the absence of discretion because of the position of society at the time. Mid-18th century England witnessed a dramatic transformation in society and economy due to the Industrial Revolution, and the population grew from 7 million in 1770 to nearly 14 million by 1830. The fear of disorder and social unrest was therefore running throughout this period – people only needed to look to France to see what could happen.[33] Perhaps the system was viewed as 'the price the English cheerfully paid for the liberty and prosperity.'[34]

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30 Clive Emsley, *Crime & Society in England 1750-1900* (Longman 2005) 263.

31 King (n 7) 357.

32 Langbein (n 9) 103.

33 The French revolution, 1789.

34 Gatrell (n 6) 8.

It is possible to suggest that the Bloody Code was effective due to a combination of discretion and strict application of the law. If we believe Hay, the Bloody Code was effective due to its strength as an ideology. With no police force, physical force lay with the people and the ruling class used ideology to maintain authority. Hay talks of the characteristics of the criminal justice system as being majesty, justice and mercy. Majesty was seen in the twice-yearly visits of the High Court judges. Their visits 'had considerable psychic force...[and were an] elaborate manifestation of state power.'[35] Justice was seen to be shown 'when the ruling class acquitted men on technicalities...In short, its absurd formalism was part of its strength as ideology.'[36] Mercy was demonstrated through the act of pardoning. Considering this combination of technical acquittals and merciful pardons, it is unsurprising that it led to a system of justice which – when presented in this sense – resisted reform for so long.

VI. Reform

It is interesting to note that both those arguing for reform and those loyal to the existing system 'shared a common description of the current process of law...They argued that judicial discretion was the operative principle of the system, where they differed so sharply was over the value to be attached to discretion.'[37] To its defenders 'the exercise of some degree of personal judgement in awarding punishment was necessary and desirable.' However, 'the Whig reformers challenged the uncertainty in operation of the law by this discretion and suggested that personal whim

35 Hay (n 5) 27.

36 ibid 33. There are numerous cases where men have been acquitted due to technical faults on the indictment or where the indictment does not match up to the evidence presented. As to the numbers of people who were acquitted in this way Beattie explains that these acquittals based on technicalities were often marked as 'not guilty' and as a result 'it is possible that a larger proportion than [we] realize of the not guilty verdicts were arrived at by these means.' 412.

37 Randall McGowen, 'The Image of Justice & Reform of the Criminal Law in early 19th century England, 32 *Buffalo L Rev*, 89 (1983) 110.

played too large a role in determining punishment.'[38] What had been created and sustained was effectively a 'lottery of justice.'[39]

Samuel Romilly was one of the first to propose to Parliament a mitigation of the law, in the early 19th century. He argued that 'the psychology of [reform] was sounder, [as] it represented the clear association of act and punishment.'[40] The subsequent Reform Act 1832 'gave new energy to independent abolitionist MPs,' to continue to push for reform of the criminal justice system.[41] The speed at which reform eventually ensued is indicative of the failings of the Bloody Code and the idea that the 'capital law had come to look randomly cruel and terminally silly.'[42]

VII. Conclusion

It is clear that 'the great age of discretion was not necessarily the golden age of legitimation within the history of the English criminal law.'[43] The system contained a 'complex multidimensional set of decision-making processes,'[44] and at each stage it was clear that there was a 'continuous winnowing of the capital cohort, with the goal of leaving only the worst few for execution.'[45] The argument in this essay has been that the effectiveness of the Bloody Code relied on the discretion, not just of judges, jurors and prosecutors but also of other pre-trial bodies to mitigate and to nullify the law. Whilst there is evidence to suggest that the system could have been effective in the absence of discretion due to its strength as an ideology, the position of society at

38 ibid 91.
39 ibid 100.
40 ibid 118.
41 Gatrell (n 6) 22.
42 ibid.
43 King (n 7) 372.
44 ibid 356.
45 Langbein (n 11) 334.

the time and the fact that the law mitigated itself to some extent, it is doubtful that it would have remained for so long had discretion not played such a large role. It can be argued that the Bloody Code was not an effective system and this can be evidenced by the speed at which reform finally took hold. This essay has not addressed this point in detail. What this essay has attempted to show is that the Bloody Code, taken for what it actually was and not what it proposed to be – a system that contained a large amount of discretion and merciful pardoning instead of a strict application of the capital statutes – was an effective system in that it functioned in this way for so long. The system would undoubtedly have collapsed sooner had it not been for the discretion of judges, jurors and prosecutors, combined with other pre-trial bodies that acted with the knowledge that 'too much truth brought too much death.'[46]

46 ibid 334.

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