social order, it sufficed. It became part of the untested general idea, the ideology which made it possible to stigmatize dissent as acts of individuals, of rogues and criminals and madmen.

The hypothesis presented here is that the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army. The ideology of the law was crucial in sustaining the hegemony of the English ruling class. This argument, if sound, helps us to explain their resistance to suggestions for drastic legal reform. It also casts some light on the membership of that ruling class, and the character of their society.

III

The long resistance to reform of the criminal law has perplexed later writers. The conservatives who opposed reform have been generally criticized, but historians have failed adequately to explain the growth in numbers of capital statutes and the simultaneous extension of the pardon. When the criminal law is seen not simply as a coercive instrument to punish crime, however, both problems seem largely resolved.

The post-revolution Parliaments passed more and more capital statutes in order to make every kind of theft, malicious damage or rebellion an act punishable by death. Although most executions took place under Tudor statutes rather than these fresh-minted ones, the new legislation gave the power to make terrible examples when necessary. Sometimes the new laws merely re-created the death penalty for offences which had been affected by the development of benefit of clergy; more often they added it to newly defined offences, including some not foreseen by the lawmakers of Elizabeth's time, such as the forging of banknotes. But if gentlemen in Parliament were willing to hang a proportion of offenders every year in order to stage the moral drama of the gallows, it is extremely doubtful that they ever believed that the capital statutes should be strictly enforced.\(^1\) The impact of sentencing and hanging could only be diminished if it became too common: 'It is certain,' wrote Burke, 'that a great havock among criminals hardens, rather than subdues, the minds of people inclined to the same crimes; and therefore fails of answering its purpose

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\(^1\) This is Paley's doctrine, embraced by every subsequent conservative apostle. Radinovich explicitly rejects it on the grounds that the divergences between the law and its administration was increasing (Radinovich, vol. 1, p. 164, n. 59). His argument ignores the probability that Parliament passed many laws in part because they knew they would not be rigorously enforced; that is, that they legislated on the basis of their experience. On the evidence for divergence, see above, p. 23, n. 1.

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of discretion, such as the pardon, which contributed so much to the maintenance of order and deference. Beccaria's thought, as Venturi has pointed out, was no mere mélange of humanitarianism and reason. His machine-like system of judgement and punishment would work only where differences of power between men did not exist, where the 'perhaps unnecessary right of property' had disappeared. His principal European opponents seized on this fact: his ideas, they claimed, spelt the end of all authority.¹

In England the opposition was muffled, since the rhetoric of Whiggism denied that arbitrary measures existed and claimed that the criminal law was already fixed and determinate. Most of the opponents of reform therefore argued only that it was impossible to create a schedule of crimes and punishments complete enough to do 'justice' to the subtle differences between cases. But there were hints even in England of the deeper fears for authority. In 1817 Christian, always a frank defender of the unreformed law, recalled Livy's description of the fixed laws enacted after the expulsion of the Roman kings:

The King was a man from whom you might obtain by petition, what was right, and even what was wrong: with him there was room for favour and for kindness: he had the power of showing his displeasure, and of granting a pardon; he knew how to discriminate between a friend and an enemy. The laws were a thing dear and inexorable, more favourable and advantageous to the weak than to the powerful: they admitted of no relaxation or indulgence, if you exceeded their limits.

'He knew how to discriminate between a friend and an enemy' — no criminal code could do that, in Christian's opinion. And had not the French Revolution shown that rigid laws could favour the poor rather than the property? With such reforms, the judge concluded, 'we should all be involved in republican gloom, melancholy, and sadness'.²

Throughout the period we have been considering, the importance of the law as an instrument of authority and a breeder of values remained paramount. The English ruling class entered the eighteenth century with some of its strongest ideological weapons greatly weakened. The Divine Right of Kings had been jettisoned in the interests of gentility power, but the monarchy lost as a consequence much of its potency as a source of authority, and so too did religion. At the same time control had flowed away from the executive in the extreme decentralization of government which characterized the century. With Stuarts plotting in Europe, Jacobitism suspected everywhere at home, and a lumpily unattractive German prince on the throne, English justice became a more important focus of beliefs about the nation and the social order. Perhaps some of the tension abated after the last Jacobite attempt in 1745, which may help to account for Blackstone's relatively favourable attitude to reform in mid-century. But within a few decades renewed assaults on the structure of authority - the riots of 1776 and 1780, Wilkes and the French Revolution - determined the English ruling class to repel any attacks on the mystery and majesty of the law.

In doing so they apparently sacrificed some security of property. Romilly and the rest of the reformers were undoubtedly right that convictions in the courts were uncertain, and that the occasional terror of the gallows would always be less effective than sure detection of crime and moderate punishments. Yet the argument had little weight with the gentry and aristocracy. In the first place they had large numbers of personal servants to guard their plate and their wives. Their problem was not attack from without but disloyalty within their houses. No code of laws or police force would protect them there. Their own judgement of character and the fair treatment of servants within the family were the only real guarantees they could have. Nor did the technicalities of the law bother country gentlemen when they did come to try pilferers of their woods and gardens. For as MPs they passed a mass of legislation that allowed them, as JPs, to convict offenders without the trouble of legalistic indictments or tender-minded juries. In cases involving grain, wood, trees, garden produce, fruit, turnips, dogs, cattle, horses, the hedges of parks and game, summary proceedings usually yielded a speedy and simple conviction.³ The other crime from which the gentry commonly suffered was sabotage: arson, cattle-maiming, the destruction of trees. Although all these offences were punished by death, few offenders were ever caught. Here too gentlemen knew that a reform of the capital statutes would not increase the certainty of a conviction. Moreover, sabotage was primarily an attack on their authority rather than their property. Their greatest protection against such assaults was acquiescence in their right to rule: the belief in their neighbourhoods that they were kind and just landlords and magistrates. In one area alone were they exposed to the danger of great financial loss from theft. Their largest possession was land. The only way it could be taken from them illegally was by forgery - and it is significant that forgery


3. The growth of this body of legislation was remarked by lawyers, who sometimes argued that it threatened trial by jury; its expansion paralleled the growth in capital statutes.
was punished with unmitigated severity throughout the century, by death.  

Lower down the social scale, the property of men in trade and manufacturing and farming was much less secure. In the eighteenth century very few of the offences from which such men suffered were punishable on summary conviction. Instead, to recover embezzled banknotes or shoplifted calico or stolen sheep, it was necessary to go to the expense and trouble of a full criminal trial. Its outcome was always uncertain: the technicalities of indictment or the misplaced sympathies of juries allowed many thieves to escape. After the trial came the misplaced sympathies of petitioners for pardons. Martin Madan, anxious to see property secured by a more rigorous execution of the laws, argued that 'the outside influences of great supporters' had too great effect on the prerogative of mercy. The result was that the great indulged their humanity at the expense of lesser men's property.  

There was, therefore, a division of interest among propertied Englishmen about the purpose of the criminal law. The reformers' campaign spoke to humanitarians of all classes, men revolted by the public agonies of the condemned at the gallows. But their argument that capital punishment should be replaced by a more certain protection of property appealed mostly to that great body of 'middling men', almost half the nation, who earned from £25 to £150 a year at mid-century, and created more than half England's wealth. Although they could use the discretionary elements of the law to a limited degree, their property was the prey of thieves undeterred by terror. Their complaints did not impress a tiny but powerful ruling class, whose immense personal property in land was secure, who could afford to protect their other goods without public support, and who in any case were most concerned with the law as an instrument of authority.  

It is in such terms that we must work toward a definition of the ruling

1. Forfery is also punished capitably, and nobody complains that this punishment is too severe, because when contracts sustain action property can never be secure unless the forfery of false ones be restrained.' Adam Smith, Lectures on Justice, Policie, Revenue and Arms (1762), ed. Edwin Cannan, 1896, p. 150.
3. Derived from the estimates of Joseph Masse in 1760, the figures can be trusted only as general estimates (Peter Mathias, 'The Social Structure in the Eighteenth Century: A Calculation by Joseph Masse', Economic History Review, 2nd ser., 5, 1957, pp. 30-45). According to Masse, families with this range of income accounted for 48 per cent of the population and 57 per cent of the total of all families' 'annual income and expenses'. Above them, with incomes of more than £300, were the landed gentry, great merchants and aristocracy. The merchants, 1-6 per cent of the population, accounted for another 8-9 per cent of total income, and the landed classes (1-2 per cent of the population) over 14 per cent.

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class of eighteenth-century England. Far from being the property of Marxist or marxian historians, the term is a leitmotiv in studies of the period.  

Parly this is due to the testimony of the sources: gentry and aristocracy claimed the title with complete assurance. Its historical usage, however, remains imprecise. Usually it has been defined in terms of income or status: the rents of the great landed estate, or the exact meaning contemporary gave to the word 'gentleman'. Class, however, is a social relationship, not simply an aggregate of individuals. As a relationship based upon differences of power and wealth, it must be sought in the life of the institutions that men create and within which they meet. The law defined and maintained the bounds of power and wealth, and when we ask who controlled the criminal law, we see a familiar constellation: monarchy, aristocracy, gentry and, to a lesser extent, the great merchants. In numbers they were no more than 3 per cent of the population. But their discretionary use of the law maintained their rule and moulded social consciousness. An operational definition of the ruling class — asking who controlled a critical institution like the law, and how they manipulated it — is a more useful approach than drawing horizontal lines in Blackstone's list of forty status levels. For it is necessary to define in detail what it means to rule.  

Many historians, confronted with the hegemony of the eighteenth-century ruling class, have described it in terms of absolute control and paternal benevolence. Max Beloff argued that after the Restoration they enjoyed an unparalleled sense of security which explained 'the leniency with which isolated disturbances were on the whole treated, when compared with the ferocity shown by the same class towards their social inferiors in the times of the Tudors and early Stuarts'.  

It seems more likely that the relative insecurity of England's governors, their crucial

1. Max Beloff, Public Order and Popular Disturbance 1660-1714, 1938, p. 154, discussed the 'social thinking' of the Restoration ruling class; David Mathew in The Social Structure in Caroline England, Oxford, 1948, p. 8, asserted that 'within the general social structure the diverse elements were being moulded which would in time form themselves into a ruling class'; W. R. Brock wrote that country life taught 'a code of behaviour and first lessons in public life' to the eighteenth-century ruling class (New Cambridge Modern History, vol. VII, 1957, p. 243); Esther Moir referred to the landowners as 'the backbone of the traditional ruling class' in The Justice of the Peace, Harmondsworth, 1962. Lately a certain embarrassment occasionally has attached to the term. Peter Laslett, in The World We Have Lost, 1965, dismissed the idea that the governors of eighteenth-century England constituted the only class, but avoided invoking the evocative words: England had one class, but they were a 'ruling segment'. Harold Perkin, however, with a similar interpretation of the dynamics of the society, redrafted the term: The Origins of Modern English Society, 1969, p. 56.
Albion’s Fatal Tree
dependence on the deference of the governed, compelled them to moderate that ferocity. More recent writing has stressed the importance of patronage; Harold Perkin has argued that this was the central bond of eighteenth-century society. Patronage created vertical chains of loyalty; it was, in fact, ‘the module of which the social structure was built’. Powerful men bound less powerful ones to them through paternalism, controlling the income, even the ‘life-chances’ of the dependent client or tenant or labourer. Such ties, repeated endlessly, formed a ‘mesh of vertical loyalties’. Social control in the eighteenth century seems a gentle yoke from this perspective: a spontaneous, uncalculated and peaceful relationship of gratitude and gifts. The system is ultimately a self-adjusting one of shared moral values, values which are not contrived but autonomous. At one point the author concedes that insubordination was ‘ruthlessly suppressed’. But mostly social solidarity grew quietly: ‘those who lived within its embrace...[called it] friendship.’ Coercion was an exceptional act, to handle exceptional deviance.

Yet it is difficult to understand how those loyalties endured when patronage was uneven, interrupted, often capricious. Many contemporaries testified to the fickleness of wealth: disappointed office-seekers, unemployed labourers or weavers, paupers dumped over parish boundaries. Riot was a commonplace; so too were hangings. Benevolence, in short, was not a simple positive act: it contained within it the ever-present threat of malice. In economic relations a landlord keeping his rents low was benevolent because he could, with impunity, raise them. A justice giving charity to a wandering beggar was benevolent because he could whip him instead. Benevolence, all patronage, was given meaning by its contingency. It was the obverse of coercion, terror’s conspiracy of silence. When patronage failed, force could be invoked; but when coercion inflamed men’s minds, at the crucial moment mercy could calm them.

A ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not grow simply in complex societies: they are twisted, invoked and often consciously created. Eighteenth-century England was not a free market of patronage relations. It was a society with a bloody penal code, an astute ruling class.

1. Perkin, op. cit., pp. 32–49, a sustained historical use of the idea of ‘social control’ currently orthodox in the sociological literature. The origins of the concept lie at least as far back as Durkheim’s ‘social conscience’, and it has a marked ideological history of its own. Its increasingly common usage in historical writing, often with little critical examination, therefore bears watching. Its assumption of the relative autonomy of normative sanctions seems dubious, particularly in descriptions of the power of the state.