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«Piecemeal, incremental, *ad hoc*»: 'Beccarian' experiments in law enforcement in late seventeenth- and early eighteenth-century England

Jeanne Clegg

Università Ca' Foscari di Venezia

Abstract. In the course of the late seventeenth and early eighteenth century a series of measures were introduced into the practice of law enforcement in England which, though «piecemeal, incremental, *ad hoc*» were, J.M. Beattie claims, driven by a common belief in the need for more effective ways of dealing with a perceived dramatic rise in urban property crime. These included preventative measures such as improvements in street lighting and gradual recognition of the need for professional policing, measures – such as statutory rewards to informers – designed to encourage prosecutions and raise conviction rates, and state-funded transportation, which provided a punishment more appropriate to petty crime than the death penalty. Though many of these measures, diverged sharply from Beccarian principles, Beattie is right in claiming that in general terms they «anticipated some of the arguments that would be made by the reformers of the late 18th century». If this has not been noticed previously it is because scholars have focused on the history of ideas at the expense of changes in practice the resulting from thousands of individual decisions by made by ordinary people, and even by apparently powerless.

Keywords. Beccaria, England, Prevention, Conviction, Judicial procedure, Punishment.

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WELCOMING BECCARIA.

From its first appearance Cesare Beccaria's treatise (or essay) *On Crimes and Punishments* aroused a degree of enthusiasm among British intellectuals which historians of ideas have not found easy to account for[1]. As Hugh Dunthorne puts it somewhat wryly, «the English have not often turned to foreign writers for advice about how to govern themselves»[2]. David Lieber-

[1] The title of the first English translation, *An Essay on Crimes and Punishments*, a title which includes a genre indicator suggesting an exploratory aspect not highlighted in the original; R. Loretelli, *Cesare Beccaria, in Inghilterra prima di Jeremy Bentham. La specificità inglese*, «Antigone», 3, 2014, p. 119.

[2] H. Dunthorne, *Beccaria and Britain*, in D. H. Howell and K.D. Morgan (eds.), *Protest and Police in Modern British Society*, University of Wales Press, Cardiff 1999, pp. 73-96: 75.

man has seen Beccaria as having been warmly received because he was «preaching to the converted»[3], indeed flattering in his admiration of liberties and institutions – such as jury trial and rejection of judicial torture and "cruel and unusual punishments" – sanctified in Whig tradition[4]. As Anthony Draper noted, Beccaria's fundamental contention that deterrence, rather than state retaliation, should be the goal of punishment had long been current in English penal theory[5]. On the other hand, Draper also pointed out, Beccaria's ideas were welcomed by English jurists not because they reflected the English *status quo*, but because they chimed with various current dissatisfactions with the practice of punishment, dissatisfactions that were to be expressed in the late 1760s and 1770s by William Blackstone, William Eden, and Jeremy Bentham. Looking back to earlier decades, Dunthorne sees Beccaria's proposals as having «harmonized with a debate on the reform of the country's criminal justice system that had been proceeding intermittently for a generation or more», citing Bernard de Mandeville's 1725 critique of public execution as ineffective as a deterrent, Samuel Johnson's denunciation of «confusion of remissness and severity» in the penal laws in the *Rambler* of 20 April 1751, and Oliver Goldsmith's insistence on the need for a «sense of distinction in the crime»[6].

Whether these scattered polemics add up to a «debate» is doubtful; and the decades preceding what is generally recognized as the penal reform movement produced no clear, systematic critique of the judicial system. What it did produce was a series of practical changes in methods of law enforcement which, though «piecemeal, incremental, *ad hoc*», were driven by a common belief in the need for more effective and less socially disruptive ways of dealing with a perceived dramatic rise in urban property crime of all kinds, from pickpocketing and shoplifting to burglary and highway robbery[7]. The object of my contribution is to call attention to these changes as charted by social historians of crime and justice in the period between the Restoration of the monarchy in 1660 and the middle of the eighteenth century. One of the most important of these, John Beattie, sees them as having

> *anticipated Beccaria's emphasis on the importance of preventing crime, and some of his attitudes towards punishment – in particular that moderate punishment, adjusted to fit the crime and administered quickly and with certainty, would provide more effective deterrence than occasional displays of extreme violence on the scaffold*[8].

Attentive not only to parliamentary legislation and decisions by central government, Beattie scrutinises also local government initiatives and court practice in metropolitan London, where the problem of urban crime was felt most strongly and where many of the measures intended to deal with it originated. In what follows I shall adopt his grouping of these measures under four heads:

> *measures to improve the prevention of crime; to encourage detection and the prosecution of offenders; to ensure the conviction of the guilty offenders; and to make punishments more effective*[9].

PREVENTING CRIME.

«It is better to prevent crimes than to punish them» is a constant refrain in *Dei Delitti e delle pene*[10]. Ch. XI, entitled «Della Tranquillità pubblica», lists several practical measures recommended as efficacious in preventing popular disturbances, the first of which are publicly financed street lighting and the placing of guards around the city. Together with restrictions on heated religious discourse and the giving of harangues promoting adherence to the public interest, these measures constituted in Beccaria's view one of the main branches of magisterial vigilance as understood in the French of the time as the *police*. How to «police the night streets» was an issue at the heart of early modern England's efforts to "keep the peace", namely contain immorality and disorder and thus prevent crime in urban contexts.

In the pre-modern world it was generally assumed that, with few exceptions, innocent people would not be found on the city streets after dark: «that the night gave cover to the disorderly and the immoral, and to those bent on robbery or burglary or who in other ways threatened physical harm to people in the streets and in their houses»[11]. Until the late sixteenth century London relied for protection from such dangers on its 9 pm curfew, on the closing of the City gates, and on house-

[3] D. Lieberman, *The Province of Legislation Determined*, Cambridge University Press, Cambridge 2009, p. 207; quoted in A. J. Draper, *Cesare Beccaria's Influence on English Discussions of Punishment, 1764-1789*, «History of European Ideas», 26, 2000, pp. 177-199.
[4] Draper, *Cesare Beccaria's Influence*, cit., pp. 182-183.
[5] *Ibidem*, p. 184.
[6] Dunthorne, *Beccaria and Britain*, cit., pp. 76-77.
[7] J.M. Beattie, *Policing and Punishment in London, 1660-1750. Urban Crime and the Limits of Terror,* Oxford University Press, Oxford, 2001, p. 464.
[8] *Ibidem*, p. 463.
[9] *Ibidem.*
[10] C. Beccaria, *Dei delitti e delle pene*, Armando & Armando, Roma, 1998, cap. XLI.
[11] Beattie, *Policing and Punishment in London,* cit., p. 169.

holders fulfilling customary preventative policing duties: acting as unpaid night watchmen, and placing candles in tin lanterns with horn sides outside their houses during moonless, winter evening hours. By the mid-seventeenth century, however, the citizens of London were proving increasingly unwilling to patrol the night streets, preferring to pay fines out of which inadequate and unregulated substitutes were employed for scanty wages. Meanwhile the curfew collapsed under pressure from a swelling population and the sprouting of shops, eating-houses and commercial places of entertainment, while for the wider thoroughfares of the city as rebuilt after the Great Fire of 1666, candles provided grossly inadequate illumination[12].

Both issues were addressed by fits and starts and at local level. Street lighting was to be one of several public service provisions supported by taxes but carried out by private companies, yet special in that it was

> *thought of as a policing device in a new, more specific way and more modern way as a way of bringing the streets under surveillance and control. Effective lighting would help pedestrians to be on their guard and the night watch and constables to prevent crime and to be able to distinguish between those who had legitimate reasons to move around the city in the dead of night and those who did not*[13].

As with other aspects of policing, the modernisation of London's street lighting involved the replacement of customary participation by an obligation to pay for a service. From the 1660s and 70s groups of projectors were experimenting with various types of oil lamps, encouraging householders to pay them to take over the duty to place candles[14]. Later came tempting offers to the City Corporation, which was nearing bankruptcy, of large sums for monopoly privileges in providing a range of public services. In 1694 a first contract for oil lamps was awarded, and the following year a 21-year monopoly was sold to the Convex Light Company. At the same time an Act of the Common Council of aldermen and commoners which administered the City extended the obligation to place candles by two hours and imposed a hefty penalty on defaulters, thus virtually forcing householders into paying the Company's fees for installing and maintaining its lamps[15].

There was to be no going back on these measures, which met rising expectations of urban amenities on the part of the middling sort, and responded to fears of gangs of street robbers and burglars, whose activities were loudly publicised in the flourishing literature of crime of the 1720s. In 1735 a committee set up by Common Council expressly to deal with lighting moved that «the better to prevent Robberies and other inconveniences» street lamps be lit from sunset to sunrise every night of the year, and petitioned parliament for powers to defray expenses. This was rapidly followed by a Lighting Act which set up a rating scheme based on values of houses, instituted all-night, year-long street lighting, regulated the types of lamps to be set, maximum distances between them, set limits on charges, and authorised wards to arrange contracts with companies as they saw fit. By the mid seventeen thirties, the City of London was probably «the best lit urban area in Europe»[16].

Professionalization of surveillance proceeded more erratically and less deliberately. In 1661, 1662 and again in 1663 Common Council recognised the need for «better ordering and strengthening» the night watch, but could only reiterate the obligation of all London householders to fill the customary quota of watchmen for each ward. The *de facto* transition to a paid night watch was not, however, conceptualised until the 1690s, when alarm over the perceived crime wave, and complaints about corruption, lax time-keeping, feeble and unsuitably-armed watchmen came to a head. In 1705 the Council passed an act which called for watchmen to be «able-bodied», thus implicitly recognising their employee status, but failed to confront the question of how they were to be paid[17]. It was not until 1737 that wards were authorised to levy rates to pay watchmen's wages, which were made uniform across London. In other respects the watch and its financing was still organised locally however, so that rich, inner city wards continued to be better policed than the large, poor and crowded outskirts. Nevertheless, the 1737 Act, and similar ones passed for Westminster parishes, Beattie comments, «marked a significant moment [...] it translated the obligation to serve in person into an obligation, easily enforced, to pay in support of a service provided by waged officials»[18].

It was to take much longer for the gradual, *de facto* transformation of the ancient and customary office of constable to be officially recognised. Traditionally an unpaid, community duty to which local householders were called in rotation, the office had always been a complex one, involving what, in a classic essay, Joan Kent described as a «dual allegiance»:

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[12] *Ibidem*, p. 172.
[13] *Ibidem*, p. 224.
[14] *Ibidem*, pp. 210-213.
[15] *Ibidem*, p. 215.
[16] E.S. De Beer, 'Early History,' 323, quoted in Beattie, *Policing and Punishment in London*, cit., p. 223.
[17] *Ibidem,* p. 186.
[18] *Ibidem*, p. 197.

On the one hand, the constable was the lowest officer in a hierarchy of authority that stretched from the monarchy to the village [...] On the other hand, the constable also had to represent the village's interests to his superiors[19].

With the expanding scope of criminal, social and economic legislation under the Tudors and Stuarts, constables' duties were extended enormously. By the late seventeenth century they were responsible for a vast range of tasks, from reporting newcomers, vagrants, unlicensed beggars, runaway servants, labourers refusing to work, gamblers, drunks, blasphemers, lewd persons, nightwalkers, singers of seditious ballads and people committing victimless offences and misdemeanours of many kinds[20]. In Europe's fastest-growing city, the burden of crowd and traffic control grew heavier, as did – under pressure from the turn-of-the-century Reformation of Manners movement – expectations of what constables should do to enforce the vice laws[21].

All this the men chosen to serve their year as constable were meant to reconcile with earning a living by other means. It is no wonder that, of those who could afford it, many chose to pay the fine for avoiding their turn, or finance men poorer than themselves to stand in for them[22]. During the seventeenth century the practice of paying substitutes grew steadily, especially in the richer wards. By the 1720s over 100 out of 360 London constables were deputies, and by the 1750s some 90% of men elected were buying their way out of office. Many hired men served repeatedly, sometimes taking on other paid posts such as that of beadle, and/or acting as or in association with entrepreneurial thief takers. By the end of the eighteenth century amateur community representatives had in practice been completely replaced by a body of paid professionals, a transformation signalling a «sea-change in thinking about policing issues»[23]. As we shall now see, this shift in recruiting methods was associated with a change in the nature of law enforcement: the emergence of detection as a function of professional policing.

PROSECUTION PROCEDURES.

Although both watchmen and constables were sometimes called upon to help search or collect evidence for use in court, the detecting, arrest and prosecution of offenders remained throughout the eighteenth century the responsibility of private citizens. It was usually victims of crimes - if anyone – who noticed a loss, suspected someone and, perhaps aided by neighbours, servants, passers-by or a patrolling watchman, grabbed him or her and "carried" – perhaps with the help of a constable fetched for the purpose – the supposed offender before a magistrate. It would then be up to the apprehender to organise witnesses and other evidence to set first before a grand jury and, if accepted by that body, a petty jury in a court of assize.

Prosecution was thus an expensive and time-consuming business, and only very partially compensated after 1714, when governments began paying the costs of bringing cases in which they had an interest [24]. Private citizens would in any case risk loss of earnings, damage to reputation and, with hanging the only penalty for an ever-growing number of offences, in theory responsibility for the death of a man, woman or even a child found guilty of stealing something as small as a handkerchief. The size of the "dark figure" of unprosecuted crime is impossible to calculate, but historians agree that it was probably huge[25]. Many victims certainly preferred to settle informally with the thief, perhaps compounding for the return of their goods, and/or resorting to traditional forms of shaming punishment, such as beating or dowsing under a water-pump.

Beccaria explicitly condemned private "forgiving" of offenders (Ch. XXIX), and as a contractualist could never have condoned the survival of such informal, amateur methods of administering justice. But neither would he have approved many of the measures instituted by turn-of-the-century parliaments in their efforts to encourage prosecutions. Chapter XXXXVI of the *Essay* denounces the offering of rewards for the capture of offenders as confessions of weakness on the part of the state, expedients which might temporarily shore up a crumbling edifice but in the long run undermine morality and virtue, trust in social relations, the happiness and peace of the whole nation. In England there had long been a tradition of offering *ad hoc* rewards for convicting felons and religious dissenters, but after the Glorious Revolution rewards became «a fundamental aspect of public policy»[26]. The 1692 Act instituting a £40 reward for convicting a highway robber was quickly followed by similar measures against counterfeiters and coiners, then

[19] *The English Village Constable, 1580-1642: The Nature and Dilemmas of the Office, «Journal of British Studies»*, 20, 1981, pp. 29-49: 30-31.
[20] R.B. Shoemaker, *Prosecution and Punishment. Petty Crime and the Law in London and Rural Middlesex, c. 1660-1725*, Cambridge University Press, Cambridge 1981, p. 217.
[21] *Ibidem*, pp. 124, 155.
[22] *Policing and Punishment in London*, cit., p. 134.
[23] *Ibidem*, p. 157.
[24] *Ibidem*, pp. 384-387.
[25] P. King, *Crime, Justice and Discretion in England 1740-1820*, Oxford University Press, Oxford 2000, p. 11.
[26] J.M. Beattie, *Crime and the Courts in England, 1660-1800*, Oxford University Press, Oxford 1986, p. 51.

shoplifters, burglars, housebreakers and horse thieves. During the robber gang scares of the early 1720s all the streets of London and Westminster, including lanes and courts, were re-categorised as highways, and an astronomical £100 temporarily added to the standard £40.

Beattie finds it likely that the policy of massive rewards «had the effect they were meant to have and encouraged victims to give chase and to get others to join them in tracking down a robber or burglar»[27]. In the long run, however, Robert Shoemaker sees the rewards policy as having brought about «a significant transfer of responsibility from those on the streets being expected to help out of a sense of duty to giving those with information an *incentive* to come forward»[28]. A secondary effect – and again one that Beccaria could not have approved – was to stimulate the growth of thief-taking as a trade. Though not new to the English scene, thief-takers show a «marked increase» in the course of the eighteenth century. «Without their knowledge of criminal networks», Shoemaker admits, «far fewer major criminals would have been apprehended»[29], but by the mid century associations with "blood money" and scandals involving "thief-making", malicious prosecution and extortion had caused the government to abandon the massive rewards policy. Nevertheless when, in the mid 1750s, Henry and John Fielding began organising a regular, paid force of detectives, it was from among thief-catchers as well as ex-constables that they recruited a body known at the time as «Fielding's traps», but later as «Bow Street Runners». If the old appellative witnesses to the survival of past practices, the one more familiar to us reflects the transformation of private, unregulated expedients into state-regulated strategies. In this and other areas of justice administration, such as the collecting of data and development of techniques of cross examination, these extraordinarily energetic magistrates worked to coalesce «a series of single small-scale adjustments to necessity and barely perceptible shifts in attitude [...] into an articulated programme [by which they] sought to transform Londoners' immediate response to crime from one of self-help to one of relying on the police»[30].

Two of a growing breed of «trading justices»[31], the Fieldings were also anomalous in that the elder was legally trained and, as court justices, both were paid by the state. In 1718 William Nelson was one of many who complained about corruption and laziness among J.P.s, and but was well ahead of his time in proposing that half of those appointed be stipendiary, and be subject to strict discipline[32]: no such appointments were made until 1792. As with constables, and unlike the salaried officials of continental Europe, the Justices of the Peace of early modern England were «unpaid men of fortune who administered the communities in which they resided»[33]. Created in the fourteenth century «to hear and determine felonies and trespasses done against the peace», by late Tudor times they were responsible for many aspects of local government and trade regulation, as well as for conducting pre-trial examinations of men and women accused of felonies, taking bonds guaranteeing appearance in court and good behaviour, and committing suspects to prison to await trial. By the late seventeenth century they also exercised jurisdiction over the entire range of misdemeanours, a huge category which included certain kinds of theft, vice, regulatory and poor law offences, as well as breaking the peace[34].

In a period when financial and commercial affairs were demanding more time from merchants and bankers, the kinds of men who traditionally served as City aldermen and magistrates, the burdens of judicial office were also being complicated by innovations in the penal code and in the procedures intended to encourage prosecutions. With extension of the death penalty, the introduction of massive rewards and of pardons for accomplices on the one hand, and the 'lawyerization' of the trial bringing closer scrutiny of evidence on the other, the magisterial decision-making process was becoming ever more «complex, perhaps more difficult, or uncomfortable». The J.P.'s preliminary hearing in particular a «far more complex procedure [...] [with] a more uncertain outcome»[35]. These and other reasons have been offered for the «flight from office»[36] which affected London's magistracy even more adversely than it did other community officers. By the turn of the century the judicial business of London and Middlesex «was concentrated in the hands of a few very active justices»[37], and by the late 1720s, in those of just two: Sir William Billers and Sir Richard Brocas. When these men died, in 1734 and 1737 respectively, a rota system was hurriedly set up. With a regular timetable involving all the aldermen who were J.P.s, an attendant attorney and clerk, and a formal, public location in the Matted Gallery of the Guildhall, the City thus gave birth to the first regular magistrates'

[27] *Ibidem*, p. 55.
[28] R.B. Shoemaker, *The London Mob: Violence and Disorder in Eighteenth-Century England*, Humbledon Continuum, London 2004, p. 36
[29] *Ibidem*, p. 39.
[30] *Ibidem*, p. 41.
[31] . Landau, Law, *Crime and English Society, 1660-1830*, Cambridge University Press, Cambridge 2002, ch. 3.
[32] *Office and Authority of a Justice of the Peace*, London, 1721[7].
[33] N. Landau *The Justices of the Peace, 1679-1760*, University of California Press, Berkeley 1984, p. 1.
[34] Shoemaker, *Prosecution and Punishment*, cit., p. 6.
[35] Beattie, *Policing and Punishment in London*, cit., pp. 106-107.
[36] *Ibidem*, p. 147.
[37] Shoemaker, *Prosecution and Punishment*, cit., p. 236.

court, one which «did not depend entirely on the whim of a magistrate, but had a permanent life and a public character»[38]. Once again, necessity brought changes, changes soon to be developed by the Fieldings, who not only restructured their Bow Street offices into a space resembling a courtroom but also, by extending their functions in investigating and organising prosecutions, «created a new kind of urban magistracy»[39].

If in this respect judicial practice was by the third decade of the new century being rationalised, in other ways it remained almost unregulated. The J.P.s before whom plaintiffs accused their suspects enjoyed a degree of freedom in decision-making quite incompatible with Beccaria's utopian prohibition of interpretation. In some cases decisions were taken in "Sessions", i.e. by at least two magistrates acting together, but many – a proportion that increased in the course of the eighteenth century – were dealt with by individual justices and by most in the privacy of their own homes. In no case were their rulings subject to state regulation, and very rarely to disciplinary measures: «[n]either central government nor parliament told them what to do, supervised them or even ensured that they acted at all»[40]. Especially in dealing with the petty offenses which constituted the majority of those brought before them, justices could choose whether to mediate a dispute, bind over the defendant to appear at the next Sessions, or – in certain cases – issue a summary conviction on the spot and sentence the offenders to pay a fine, to be whipped, or to be committed to a house of correction[41]. Shoemaker's study of the conduct of seventy-one justices active in Middlesex around the turn of the seventeenth-eighteenth centuries reveals

> *dramatic differences in judicial behaviour [...] fundamentally different conceptions of the nature of justice and the purpose of prosecutions and punishments. Consequently, people's expectations of the criminal justice system varied considerably depending on the identity of the justice who handled the case*[42].

At the opposite pole in this respect to the uniform and automatic decision-making process augured by Beccaria, the English judicial system was «shot through with discretionary powers»; as we shall now see, this applies not only to the apprehending of suspects and preliminary hearings, but to «every stage of the trial and [...] administration of punishment»[43].

In one important respect J.P.s had little room for manoeuvre. Bail statutes still in force from the time of Mary Tudor stipulated that a magistrate before whom a man or woman was accused of a felony must merely record the prosecution testimony and commit the suspect to prison to await examination of the bill of indictment by a Grand Jury of seventeen, usually wealthy men of some social standing. If the bill was found "true", the accused would then go to trial before a Petty Jury of twelve, in London for the most part artisans and shopkeepers, many with previous court experience. Despite the fact that they heard only prosecutors' versions of events, Grand Juries threw out «significant numbers» of property charges, perhaps because they took into account a broad range of factors: not only the nature of the offence and the characters of offender and prosecutor, but also economic conditions of the time and the «general aim of preserving order and harmony»[44]. During the late seventeenth century London Petty Juries were «notably lenient», acquitting on average 45% of those brought before them; acquittal rates were subsequently to drop off, but still remained as high as 30%[45]. In addition juries exercised «massive discretionary powers», resorting in over 15% of cases to "partial verdicts", i.e. convictions for less serious offenses than those on indictments[46]. Even then, those found guilty could and often were reprieved by the judge, or could have a petition of mercy presented to the monarch; in the late seventeenth century 40% of those condemned received pardons.

By such means early modern jury and court practice worked to mitigate the effects of the harsh penal legislation passed during the Tudor «assault on crime», allowing large numbers of men and women found guilty to go free. As we have seen, during the second phase of the making of the "Bloody Code" several of the more innovative measures passed by parliaments between 1690 and 1713 were designed to encourage prosecutions, while others were meant to ensure higher rates of conviction. We know very little about how juries reached their verdicts. Drawn from the neighbourhood in which the crime had been committed, jurors were originally meant to rely on their prior knowledge or inform themselves of the facts of a case. By the sixteenth century, however, population growth and mobility were rendering these expectations vain, and juries were relying largely on accounts and character testimony provided in court by witnesses. But convincing evidence from victims, especially eye-witness testimony, was not always forth-

[38] Beattie, *Policing and Punishment in London*, cit., p. 94.
[39] *Ibidem*, p. 418.
[40] Landau, *Introduction*, *The Justices of the Peace, 1679-1760*, cit.
[41] Shoemaker, *Prosecution and Punishment*, cit., p. 23.
[42] *Ibidem*, p. 233.
[43] Beattie, *Crime and the Courts in England*, cit., p. 406.
[44] *Ibidem*, pp. 401-405.
[45] Beattie, *Policing and Punishment in London*, cit., pp. 284-285.
[46] *Ibidem*, pp. 277-286.

coming[47], a problem to which late seventeenth and early eighteenth century governments responded by extending to criminals themselves offers virtually impossible to refuse. The 1692 Act «for encourageing the apprehending of Highway Men», for example, established

> *That if any person or persons being out of Prison shall discover Two or more person or persons [who already hath or hereafter shall commit any Robbery so as two or more of the person or persons discovered shall be convicted of such Robbery any such discoverer shall himself have and is hereby entituled to the gracious pardon of Their Majesties Their Heires and Successors for all Robberies which he or they shall [have] committed at any time or times before such discovery*[48].

A statute of 1695 offered identical terms to «discoverers» of coiners and clippers, as did the 1699 «Shoplifting Act» to discoverers of a motley assortment of thieves. By means of this legislation, «both the authorities and private prosecutors actively sought the cooperation of accomplices as the most likely means of apprehending and convicting offenders»[49], a means which and in certain cases offered the courts their only hope of a guilty verdict:

> *The fundamental fact was that in the absence of regular police and detective forces, immunity from prosecution (along with the offer of rewards) gave the authorities their only means of securing evidence, especially against members of gangs*[50].

According to Beccaria, in a perfect legal system pardons had no place, for mercy should be a characteristic of the legislator, while the executor should be inexorable (ch. XVLVI). Ch. XXXVII of the *Essay* further argues that to offer impunity to those willing to implicate confederates is particularly odious in that it authorizes treachery and cowardice of the most contagious kind, and exposes the weakness of a legal system reduced to begging help from those who offend it. In effect, and as with the rewards policy, in mid eighteenth-century England accomplice pardoning proved open to abuse, leading to false accusations by men and women in danger of their lives, and extortion of payment in exchange for silence. Like other forms of evidence, such as hearsay and confession, accomplice evidence came increasingly under scrutiny in the course of the eighteenth century, especially as solicitors became more active in pre-trial hearings and barristers in court[51]. Yet the practice of pardoning accomplices seems to have persisted, may have become more common, and was eventually to lead to the development of the modern crown witness system[52].

Two other innovations, apparently favourable to defendants, were in Beattie's view intended to encourage prosecutors and ensure higher rates of conviction. Until the end of the seventeenth century, and in order to save them from committing perjury and thus jeopardising their souls, neither defendants nor defence witnesses were required to give evidence under oath[53]. This changed in 1702, when a statute aimed at punishing accessories and receivers, who were increasingly suspected of giving false evidence in support of the thieves who supplied them, were required to 'take an oath to depose the truth the whole truth, and nothing but the truth in such a manner as the witness for the Queen are by law obliged to do; and if convicted of any wilful perjury' to suffer the consequences.

The other apparent concession to defendants, in fact designed to ensure more guilty verdicts, concerns the extension to women of the possibility of pleading benefit of clergy. This device had been introduced in the Middle Ages to save men in holy orders, but during the early modern period broadened to allow any man who could read a verse from the fifty-first Psalm (popularly known as the "neck verse") off on pain of branding. From 1623 women too became eligible for benefit of clergy in some cases, and were exempted form the literacy test. During the last decades of the seventeenth century, however, women were being increasingly held responsible for property crime, and so more frequently facing the prospect of a death sentence[54]. When, in 1691, benefit of clergy was allowed to women on the same footing as men, the gender imbalance was corrected, but at the same time potential prosecutors and juries were relieved of the responsibility of sending large numbers of women to the gallows. The measure may, Beattie suggests, have contributed to the conspicuous rise in prosecutions of women during the 1690s and 1700s, and very probably

[47] Crimes defined as private (pocket picking, shop lifting) were by definition carried out without the victim's knowledge; others, such as street robbery and burglary, carried fears of retaliation.

[48] Ch. VIII Rot. Parl. pt. 3. no. 3. William and Mary, 1692: An Act for encourageing the apprehending of Highway Men [Ch. VIII Rot. Parl. pt. 3. nu. 3.], accessed at https://www.british-history.ac.uk/statutes-realm/vol6/pp390-391

[49] Beattie, *Crime and the Courts in England*, cit., p. 366.

[50] *Ibidem*, p. 369.

[51] Officially excluded by law until well into the 19th century, solicitors and lawyers seem to have begun appearing for the defence – often without their presence being noted in official records – from the 1730s, perhaps the 1720s.

[52] J.H. Langbein, *The Origins of the Adversary Criminal Trial,* Oxford University Press, Oxford 2005, pp. 158-165.

[53] Beattie, *Policing and Punishment in London*, cit., p. 319.

[54] Beattie, *Crime and the Courts in England*, cit., pp. 141-143.

to the fall in acquittals from one third to 14%[55]. As we shall now see, it was not only with respect to women that early modern governments sought to tighten the practical operation of the law by offering alternatives to the drastic forms of punishment laid down in the penal code.

EFFECTIVE PUNISHMENTS.

The innovation in the justice system most pertinent to Beccaria's thinking regards the proportionality of punishment to the crime, discussed in Chapter VI of the treatise. This notion seems in have circulated in early modern England for many years before being put partially into practice in the second decade of the eighteenth century, though in a form that would not, as we shall see, have satisfied Beccaria. With only whipping, branding and the pillory available as punishments for less serious offenses, and death for most felonies, «the criminal law provided the narrowest of penal options»[56]. As a series of Tudor statutes excluded benefit of clergy from a long series of offences from petty treason to pickpocketing, capital punishment became the only penalty for a huge range of crimes, and under Elizabeth large numbers of those convicted, even of non-violent thefts, were sentenced to death[57]. During the final decades of the seventeenth century more potential victims of the gallows were saved by jury manipulation of verdicts and the exercise of judicial discretion, for example in applying the literacy test for benefit of clergy less strictly. This tendency declined in the 1590s but accelerated once more in the second quarter of the seventeenth century, when more convicted offenders were let off with a branded thumb, a whipping or, in a few cases, pardoned on condition of accepting transportation to the new American colonies[58]. Overall, Ian Archer argues, the criminal law was becoming «a more subtle and flexible instrument in discrimination between degrees of seriousness in crime»[59].

This trend, according to Beattie, «must have derived from shared views about the best way to manage capital punishment, and from a growing conviction that there was a need for alternative sanctions», and it was these assumptions, he supposes, that provided

> *the seed-bed for the radical ideas that came to be expressed in the remarkable outburst of writing and speculation about the criminal law that followed the breakdown of authority after 1642 and accompanied the experiments in governance in the 1650s*[60].

During these revolutionary times law reform became «an issue of urgent concern», especially among radical groups but also within the Rump Parliament, which appointed Matthew Hale to lead a committee to recommend ways of restructuring the criminal law. Leveller Gerard Winstanley was the perhaps the only critic to support total abolition of capital punishment, but many of the leading pamphleteers took the view

> *that punishment ought to be proportional to the offence [...]. There was general agreement, for example, that minor thefts should not be punishable by hanging, and some writers would have removed capital punishment from all property crimes*[61].

These proposals drew on various types of biblical, ethical and pragmatic argument: the Law of Moses offered no justification for killing a thief, the prospect of executing an offender discouraged prosecutors, encouraged juries to acquit and judges to pardon, and even led robbers to kill their victims in order to silence potential witnesses.

With the Restoration, public speculation on such matters closed down:

> *to all outward appearance, little was to change for the next thirty years. The courts continued to administer a criminal law that provided the narrowest of penal options and that continued to rely on the discretionary manipulation of sentences to construct a more flexible outcome*[62].

Yet, as Beattie underlines, in this period Old Bailey acquittal rates for property offences reached very high levels (48% for women and 42% for men), while almost 30% of defendants received partial verdicts. This pattern of jury behaviour may have been in part due to conflict between City and Crown, but also expressed dissatisfaction with the punishments available to the courts, a dissatisfaction perhaps influenced by the radical debates of the 1650s. In addition, a high proportion of those sentenced to death were reprieved and then pardoned, often unconditionally: between the 1660s and the 1680s the rate of free pardoning rose from 13% to 40%[63]. In

[55] Beattie, *Policing and Punishment in London*, cit., p. 318.
[56] *Ibidem*, p. 283.
[57] *Ibidem*, p. 278.
[58] *Ibidem*, p. 279.
[59] I. Archer, *The Pursuit of Stability. Social Relations in Elizabethan England*, Cambridge University Press, Cambridge 1991, p. 248; Beattie, *Policing and Punishment in London*, cit., p. 280.
[60] *Policing and Punishment in London*, cit., p. 280.
[61] *Ibidem*.
[62] *Ibidem*, p. 282.
[63] *Ibidem*, p. 295.

the 1690s rising prosecution rates (especially of women) and the effects of the Bloody Code led to such dire overcrowding of the notoriously unhealthy London gaols that inmates were simply set free, taking the total enjoying impunity between 1680 and 1714 to 60% of those convicted. Of the few who did go to the gallows, many were pitied and celebrated by the crowds whom public executions were meant to terrify and deter; it became a point of pride, especially among highwaymen, to put on a brave show at the gallows and "die game". As Mandeville and others were to complain, the traditional four-hour hanging-day processions from Newgate to Tyburn were also occasions for disorder and disruption and provided excellent pick-pocketing opportunities.

Dissatisfaction with the death penalty as the only punishment for property crime does not, of course, imply satisfaction with the impunity enjoyed by the convicted. The anonymous author of *Hanging not punishment enough* thought that even more severe punishments should be adopted for certain types of crimes, and Mandeville that hanging should take place far from public view, a proposal that was to be reiterated by Henry Fielding on the grounds that what is unseen is more terrifying than what is done in plain sight. But for non-violent thefts, most writers – and probably most juries – took the view that more moderate punishments would be more appropriate, more productive of convictions, and hence more effective as deterrents.

But what were the alternatives? Whipping was seen only appropriate for the least serious offences, and as traditionally performed in the street on half-naked convicts, usually women, was by the eighteenth century becoming in any case less acceptable to a polite and commercial people[64]. During wartime the option of enlisting in the armed forces offered a solution which was evidently temporary and applied only to able-bodied men[65]. Restitution of two to four times the value of goods stolen had been proposed during the 1650s, but was clearly only applicable to those in a position to pay. The most popular and frequently proposed alternative to hanging involved the equivalent of slavery as recommended by Beccaria in Chapter XXVIII of his treatise: hard labour in a house of correction or workhouse, or in the colonies. Since the creation of Bridewell in the sixteenth century houses of correction had been favoured as punitive and reformative contexts for minor offenders,[66] and during the late seventeenth century London magistrates made increasing use of their summary powers to commit defendants to them directly[67]. But as in the case of the street watch, the financial burden of running these institutions fell on local communities, which understandably objected to having convicts dumped on them without compensation [68]. The Hard Labour Act of 1706-7 authorising judges to sentence clergied offenders to long periods of hard labour in houses of correction made «an important gesture towards filling crucial gap in the penal structure. It pushed out the boundaries of the possible and acceptable forms of punishment», but failed in practice due to lack of financial provision[69].

A sentence of several years' hard labour in the American or West Indian colonies had for a time seemed to offer the solution. During the 1650s transportation had been the favoured condition for pardoning, and throughout the 1660s merchants with trans-Atlantic interests seem to have been eager to take the condemned[70]. Efforts were also made in parliament to allow judges to assign directly it as a punishment for certain offenses, and although these bills failed, courts found «back-door» ways of extorting convicts' agreement to be transported[71]. By the 1670s, however, several colonies were establishing slave economies, and merchants became increasingly reluctant to take any but able-bodied and skilled young men; as a result, as we have seen, the gaols filled to bursting and the pardon rate rocketed. During the 1690s and 1700s war, and optimistic expectations of newly established houses of correction in London offered some respite, but with the coming of peace in 1713, the prospect of thousands of demobilised soldiers and sailors swarming the streets, and the contested accession of the first Hanoverian monarch in 1715, fears of crime and disorder once again intensified. It was this combination of factors that seems to have galvanised the new Whig ministry into seeking more lasting solutions:

> *A century after the first convicts were sent to America, and at a point when it seemed unlikely ever to a workable element on English penal practice, the punishment of transportation to the American colonies was suddenly put on a new footing and the administration of the criminal law was entirely transformed as consequence*[72].

The Transportation Acts of 1718 and 1720, which authorised courts to sentence those found guilty directly to transportation and provided for payment of the costs of carrying them was followed by a drop in the percent-

[64] *Ibidem*, pp. 304-305.
[65] *Ibidem*, pp. 366-367.
[66] *Ibidem*, p. 281.
[67] *Ibidem*, p. 309.
[68] *Ibidem*, p. 367.
[69] *Ibidem*, pp. 335-336.
[70] *Ibidem*, p. 290.
[71] *Ibidem*, pp. 291-293.
[72] *Ibidem*, p. 369.

age of men and women sentenced to death for property offences from just over 9% to 5.6%. For the thirty years that followed, until the War of Independence, transportation was to be the most common punishment assigned for property crimes, accounting for nearly 80% of sentences for such offenses.

But did transportation work? And was transportation seen by its "beneficiaries" as the kind of "moderate" punishment enjoined in *Dei Delitti e delle pene*? For Beccaria, to commit a convict to slavery to be performed in obscurity or at a distance, whether in a prison context or in a nation other than the one offended by the crime, rendered that slavery useless (Ch. XXIX): the penalty must be performed publicly and at the scene of the crime if it was to act as an effective deterrent. In practice, moreover, the introduction of systematic transportation led to a reduction in relative but not absolute numbers of men and women executed; many of those sent to labour abroad would earlier have been acquitted, received partial verdicts or free pardons, or never have reached the courtroom at all. There were frequent mutinies on transport ships, and many risked the gallows by returning before their time was up; one suspects that the plantations did not offer the rosy opportunity to reform and make a new life pictured by Defoe in *Moll Flanders* and *Colonel Jack*. In 1790s, by which time Tasmania had taken the place of America as the destination for transports, a group of women condemned for pocket-picking repeatedly told the judge that they preferred to be hanged in England than be eaten by the savages and wild beasts rumoured to roam the antipodes; eventually, in order to avoid a mass hanging, they were discharged. Within years transportation had been discarded as the standard punishment for property crime, and penitential solutions first experimented in the late 1770s being brought in its place[73].

IN CONCLUSION.

As we have seen, the practical changes effected in English policing and punishment between the Restoration and the mid-eighteenth century often diverged sharply from the proposals that were to be put forward by Beccaria in the 1760s and elaborated by Blackstone, Eden and Bentham. The deep reasons for these divergences need investigating more thoroughly, but the fact of their existence does not invalidate the argument that early eighteenth-century efforts to make judicial processes more effective in dealing with urban crime were 'Beccarian' in tendency:

> *Piecemeal though these responses were, they anticipated some of the arguments that would be made by the reformers of the late 18th century. Moderate punishments would encourage victims to prosecute, and potential offenders would learn that if they committed a crime they would be caught, if caught convicted, and if convicted punished*[74].

If scholars intent on tracing Beccaria's importance for English judicial thinking have failed to notice the ways in which late eighteenth century reformers' arguments were "anticipated", it is surely because they have – understandably – focused on the history of ideas as expressed in print by men educated enough to engage in theoretical debate. But as historians who study social processes "from below" contend, we need to pay as much attention to practice as to ideas if we are to understand how change takes place, and in this respect the actions of ordinary people may be as influential as the treatises of intellectuals. The transformation of English law and English legal institutions traced by Beattie and other social historians of recent years grew largely out of thousands of individual decisions by the merchants, financiers and lawyers who initiated private members' bills in parliament and acted as magistrates and aldermen, the shop-keepers, artisans and craftsmen who prosecuted (or decided not to prosecute), manipulated jury verdicts, served as constables or hired deputies in their place. Recent research by Tim Hitchcock and Robert Shoemaker has broadened and deepened the picture still further, investigating the agency exercised with respect to the penal system by the poor and criminal, the «apparently powerless Londoners who unintentionally helped to shape the changing character of the institutions and policies with which they were forced to engage»[75]. Even more «piecemeal and *ad hoc*» than the measures outlined above, their tactics may have determined changes even more significant.

[73] T. Hitchcock and R.B. Shoemaker, *Tales from the Hanging Court*, Bloomsbury Academic, London 2010, ch. 5.

[74] Beattie, *Policing and Punishment in London*, cit., p. 475.

[75] T. Hitchcock and R. B. Shoemaker, *London Lives: Poverty, Crime and the Making of a Modern City, 1690-1800*, Cambridge University Press, Cambridge 2015, p. 22.