Part I

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Introduction

Rooted in customary landholding practices and the unwritten constitution, the law played a central role in early-modern English society. It was given still greater prominence as a result of the civil war and the revolution of 1688. In the eighteenth century, Douglas Hay and E.P. Thompson have argued, the governing class was deprived of the full powers of the traditional bulwarks of social order – a strong monarchy and the church – and became dependent on the law as the primary instrument of its rule. Backed by a combination of the terror of threatened punishments, the mercy of pardons and partial verdicts, and the idea of equal treatment before the law, the ideology of the rule of law secured the consent of the governed. Evidence of the pervasiveness of legal ideas comes most strikingly from rioters and others who challenged government policies, who often expressed their grievances in terms of the need for enforcement of specific laws. If even the challengers to authority worked (at least partly) within the law, it appears that the law played a major role in limiting conflict and maintaining social stability in preindustrial England.

This argument is based primarily on evidence from the criminal law, and most historians working on the subject accept that the criminal justice system played an important role in maintaining social order. Recent debate has instead focused on how it functioned to achieve this end. Hay’s assertion that the flexibility of the law allowed it to be used to discipline the lower classes through a mixture of ceremony, terror, and mercy dispensed by the ruling class has been countered with evidence that jury verdicts, sentencing decisions, and pardons were based upon “good-faith considerations of factors with which


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ethical decision-makers ought to have been concerned." Many historians now describe the law as a "multiple-use right" which accommodated complaints from, and depended upon the participation of, members of all social classes, with the exception of the poor. Peter King has argued that quarter sessions prosecutions were dominated by a "broad group of farmers, tradesmen, and artisans ... using that court both to protect their property and to resolve the various types of dispute from which an assault case arose." Similarly, Cynthia Herrup asserts that "the obligation to participate in prosecutions went deep into the ranks of propertied society, assuring not only the involvement of a fair number of persons but also their interest in upholding deference to the law." As Hay has recently conceded, both points of view have merit: the law served many purposes, both "as a generator of social symbols [and] a service institution for the prosecution of crime"; both as "promoting specific class interests ... [and] used by all social classes ..."

Hay's critics have usefully broadened the scope of criminal justice history to include careful analysis of the process and results of formal prosecutions, but many fundamental questions concerning the social significance of the law in preindustrial England remain unanswered. We still know remarkably little about popular attitudes towards, and experiences of, the judicial system. This is a notoriously difficult subject, but one that is crucial for our understanding of the social impact of the law, for assertions about the accessibility of the law or the manipulation of justice for the purposes of "terror" or "mercy" mean little unless we can detect the impact of prosecutions and judicial decisions on the people they affected. Recent work has tended to focus on the attitudes of the protagonists in judicial decisions (jurers and judges), as opposed to the attitudes of the people who used the law as prosecutors and experienced the law as defendants (though the former have received some attention). Our ignorance of this subject is greatest for the poorest sections of society, a substantial proportion of the population. How far down the social scale was the law truly accessible? How did those people with restricted access view the legal system? We also need to consider the consequences of the fact that popular consent to laws could be selective, in the sense that laws which

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conflicted with traditional customs and popular values often received no allegiance.7

More importantly, historians have yet to test Hay and Thompson’s assertions that the criminal law was the most important institution for maintaining social stability in post-revolutionary England. Perhaps because historians of the criminal law have been unwilling to question a raison d’être, John Langbein’s irreverent remark that the criminal justice system was no more important than a service industry such as refuse collection has not been taken seriously.8 But if we are to understand the nature of social stability in preindustrial England it is clear that we need to assess the impact of the law and other sources of order more comprehensively. By focusing on the prosecution of felons, historians have largely failed to assess the social importance of several other facets of the legal system, including misdemeanor prosecutions, civil cases, and suits prosecuted in the church courts.9 More generally, social historians need to examine the role of other institutions, such as the family, the church, schools, and poor relief, in maintaining social order.10

This book takes a step towards a wider understanding of the social significance of the law by analyzing the prosecution of misdemeanors, an aspect of the law which had a broad social impact in terms of the numbers and status of people involved, the wide range of offences prosecuted, and the substantial degree of discretion and flexibility involved in the judicial process. Misdemeanor prosecutions can shed considerable light on popular experiences of, and attitudes towards, the law in the seventeenth and eighteenth centuries.

8 Langbein, “Alison’s fatal flaws,” p. 120. For a satirical response to this argument, see Peter Linebaugh, “(Marxist) social history and (conservative) legal history: a reply to Professors Langbein,” New York University Law Review 60 (1985), pp. 238–42. Peter King’s recent article on gleaning, however, outlines some of the limitations of the powers of the “formal law,” with respect to attempts to impose new definitions of property on the rural poor (King, “Gleaners, farmers and the failure of legal sanctions”).
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1.1 Misdemeanors and Society in Preindustrial England

The impact of misdemeanor prosecutions was felt in all corners of society. Perhaps nine times as many defendants were involved in misdemeanor prosecutions as in felony cases,\(^{11}\) and they came from a wider range of social classes than other types of litigation. While the civil law increasingly arbitrated the financial disputes of the propertyed\(^{12}\) and the law of felonies was mainly used to prosecute thieves, who were disproportionately from the lower classes, defendants accused of misdemeanors came in significant numbers from all social classes. Misdemeanors, moreover, included a far more diverse collection of offenses than felonies. The preindustrial definition of crime was far broader than our own, including offenses we would label as sins, torts, or breaches of administrative regulations. While a narrow range of theft offenses dominate the records of prosecuted felonies, misdemeanors include, in addition to property offenses (theft, fraud, trespass), significant numbers of vice offenses (keeping a disorderly or unlicensed alehouse, prostitution, gambling), regulatory offenses (neglect of office, failure to repair the highway, selling goods underweight), poor law offenses (idleness, vagrancy, bastardy) and offenses against the peace (riot, assault, defamation). A study of the prosecution of misdemeanors illustrates the variety of social contexts from which people brought their grievances before the courts.

In contrast to felonies, a distinctive aspect of misdemeanor prosecutions is the large number of victimless offenses, offenses which directly harmed no one individual but indirectly could be said to harm the whole community. These include regulatory offenses, poor law offenses, and vice, and they were typically prosecuted by parish officials or informers. Private citizens were unlikely to assume the public burden of prosecuting victimless offenses unless they were motivated by financial gain (part of the fine if the defendant was convicted) or religious zeal. As unpaid, part-time officials, parish officials often shared this reluctance to prosecute, but they were occasionally stimulated into apprehending or reporting the names of large numbers of offenders by pressure from neighbors, justices of the peace or the central government. Consequently, the patterns of prosecutions for victimless offenses, which fluctuate even more erratically than those for felonies or offenses against the peace, were shaped by a combination of the attitudes of local and national governors and broader social and cultural changes.\(^{13}\)

Discretion and flexibility were the hallmarks of the early modern criminal

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\(^{11}\) See below, Table 3.3. This calculation does not include summary convictions by fine for vice.


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justice system, and, as patterns of prosecutions of victimless offences suggest, misdemeanor prosecutions provide abundant opportunities for observing discretion and flexibility in action. In contrast, plaintiffs and justices of the peace exercised considerably less flexibility in the prosecution of felonies. Justices were legally required to refer felony accusations to the quarter sessions or assizes courts, and victims could not legally conclude informal settlements with felons. Although recent research suggests that some cases were nonetheless settled informally, justices of the peace were under some pressure to refer felony accusations to the courts.14 Felonies were often very serious crimes, and both community pressure and legal requirements encouraged formal prosecution by indictment.

Misdemeanors, on the other hand, were often rather trivial offences, and it is likely that a much smaller proportion of misdemeanors was prosecuted in comparison to felonies. While it is possible to argue that changes in prosecutions for theft (most thefts were felonies) reflect changes in the actual incidence of theft as inferred from economic conditions, it is impossible even to estimate the relationship between the number of prosecutions for most misdemeanor offences and the number of crimes which actually occurred.15 For example, two of the most commonly prosecuted misdemeanors were assault and prostitution. In law, an assault could involve as little as a threatening gesture or placing a hand on another in anger.16 Historians will obviously never know how many assaults took place; only a tiny proportion of such acts can ever have been prosecuted. Prostitution, like many other victimless offences, was even more erratically prosecuted. Because so many misdemeanors were not prosecuted, prosecution statistics are far more revealing of attitudes concerning the merits of resorting to the law than they are of changes in the actual incidence of crime.

Not only did victims and officials exercise greater discretion in choosing whether to prosecute misdemeanors, but they possessed greater flexibility in choosing a method of prosecution. While the indictment was the only legally recognized method of prosecuting felonies, misdemeanors could be (and were frequently) prosecuted using less formal procedures: plaintiffs could choose from informal mediation by a justice of the peace, binding over by recognizance, and summary conviction (with punishment by either fine or commitment to a house of correction).17 These alternative procedures, which are only

15 See below, section 3.3.
17 In this study, I use the term “prosecute” to refer to all accusations reported by plaintiffs to a justice of the peace or to the grand jury at quarter sessions, whether the plaintiff sought informal mediation or a formal conviction.
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now beginning to attract the attention of historians, were used far more often than indictments for prosecuting misdemeanors. Since each procedure involved different facets of the law and resulted in contrasting social costs and consequences, the choice of a procedure was important, and it allowed plentiful opportunities for social considerations to influence legal strategies. By examining these choices from the plaintiffs’ point of view, this study seeks to illuminate people’s motivations for bringing accusations and disputes before the courts. And by ascertaining the impact of prosecutions and punishments on defendants, the experiences and attitudes of those on the receiving end of the judicial system will be examined.

1.2 THE CONTEXTS: CITY AND COUNTRY IN MIDDLESEX, 1660–1725

How the judicial system was used in different social contexts reveals much about the social significance of the law. This study is based on records of the activities of justices of the peace in Middlesex, a county of contrasting environments. With its areas of relative social stability and instability, Middlesex offers the possibility of testing the hypothesis that the law contributed to social order in preindustrial England. Although geographically the county was still predominantly rural after the Restoration, about four-fifths of its population lived in the London metropolis. Surrounding the City of London to the west, north, and east, the population of urban Middlesex far exceeded that of the City of London. Rural Middlesex, with its market gardens and busy roads which supplied London with food and visitors, was undoubtedly less pastoral than most English counties, but its small villages and agricultural character


19 In addition to providing evidence of prosecutorial attitudes and the flexibility of the law, these procedures merit closer investigation because they left more useful records than the indictments usually studied by historians of crime. While indictments reduce “complex human conflicts” to “the archaic language and fossilized categories of the criminal law” (Douglas Hay, “War, death and theft in the eighteenth century: the record of the English courts,” Past and Present 95 (1982), p. 118), the language describing offences on recognizances and house of correction calendars, and in justices’ notebooks, is more discursive and less constrained by legal categories. See below, section 3.2.

20 Roger Finlay and Beatrice Shearer, “Population growth and suburban expansion,” in London 1500–1700, ed. A. L. Beier and Roger Finlay (1986) Table 2, p. 42 (calculation based on the estimates from 1660, 1680 and 1700.)

21 See below, section 1.3.
nevertheless contrasted sharply with the densely populated metropolis.\textsuperscript{22} Within rural Middlesex, the rapidly growing parishes in the environs of the metropolis, whose proximity to the city generated both significant economic opportunities and social disruptions, should be distinguished from both the market gardening areas which extended along the rivers and the arable farming parishes in the northern and western regions of the county.\textsuperscript{23} Within urban Middlesex, the population was socially segregated to a far greater extent than in the City.\textsuperscript{24} While artisans and the laboring poor were concentrated in parishes east and north of the City of London, the gentry and nobility (along with the servants and tradesmen who catered to their needs) were concentrated in the west end.\textsuperscript{25} By identifying the different prosecutorial strategies that emerged in these contrasting settings, some of the perceived advantages, and the probable social significance, of resorting to the law will be revealed.

How did approaches to the law differ between urban and rural Middlesex? Conventional wisdom suggests that crime was far less of a problem in rural England than in urban areas. John Beattie has suggested that crime occurred more frequently in London both because “targets and temptations were more abundant there” and, “above all, [because] poverty pressed with particular urgency in London . . . “\textsuperscript{26} It has also been suggested that there was less respect for judicial institutions in urban areas. According to Douglas Hay, social conditions in London undermined the ideological and social impact of the law: “resistance to the law, disrespect for its majesty, scorn for its justice were greater [in London]. Equally, judicial mercy in London was more often a bureaucratic lottery than a convincing expression of paternalism.”\textsuperscript{27} There are several grounds for questioning this model of the contrasting nature of crime and judicial authority in urban and rural areas. First, because of considerably shorter distances and more frequent meetings of the court, justices of the peace and the courts in London were more available than their rural counterparts. Higher prosecution rates in the metropolis may have been caused not (or not only) by higher urban crime rates but by the fact that plaintiffs were more willing to prosecute because the courts, prisons, and houses of correction were


\textsuperscript{27} Hay, “Property, authority,” p. 55.
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more accessible. Second, because personal relationships with other figures of authority such as resident gentry and the clergy may have been harder to establish in the city, justices of the peace may have played a greater role in mediating disputes than they did in the countryside. In the large suburban parishes, only a small fraction of the residents can have attended church. In many parishes there were few resident gentry, and in all the suburban parishes the large number of immigrants and the poor threatened to overwhelm informal methods of exercising authority. As exemplified in the phenomenon of “trading justices,” urban justices of the peace clearly did establish rapport with local inhabitants. Because of the larger number of cases coming before the courts, and the fact that the informal institutions of social control were weaker, the influence of the judicial system may have been greater in urban areas.

When thinking about crime and justice in London historians have relied on the commonly held, but unproven, idea that London life was, in contrast to rural life, essentially anonymous. Due to high levels of mortality and immigration, it is suggested, individuals had fewer family and community ties and their social contacts were more likely to be casual, transitory experiences. These assertions, however, are based on weak theoretical models and insufficient research. The idealization of rural society as close-knit and unchanging, in contrast to the anonymity and mobility of urban areas, is based largely on nineteenth-century sociological models. In contrast, a late-sixteenth-century author took pride in what he perceived to be the virtues of urban life, arguing that when men are congregated into cities, they “are withdrawn from barbarous ferocious and force to a certain mildness of manners and to humanity and justice.”

The social history of preindustrial London has yet to be written. Recent research on sixteenth- and seventeenth-century London has, however, pointed to stable social relations and the existence of community ties. Jeremy Boulton has described early seventeenth-century Southwark as a set of “neighborhoods” where “local ties were the biggest single source of financial, emotional and

28 This is suggested by Landau (Justices of the Peace, p. 201).
30 Landau, Justices of the Peace, p. 190, and below, section 8.4.
social support” for householders. Even in the face of a disruptive force like the plague, Londoners displayed “social solidarity and collective defiance.” Other historians have noted that London possessed institutions unique to urban areas – the Lord Mayor and aldermen, apprenticeship, the guilds, the ward system of local government – which effectively cemented social bonds, relieved economic distress, resolved conflicts, and maintained public order.

Much of this evidence, however, is derived from the late sixteenth and early seventeenth centuries and from parishes within the City of London, when and where the institutions encouraging social stability were strongest. In many respects, the middle decades of the seventeenth century constitute a turning point in the history of London; the demographic and socioeconomic changes London experienced during the second half of the century threatened to undermine whatever stability the metropolis had earlier possessed. After 1650, two of the institutions which historians believe contributed to social order in the City of London, the wardman system of local government and the guilds, declined. Moreover, by 1640 the population of the rapidly growing suburbs had exceeded that of the City of London; shortly thereafter, according to one estimate, the population of the City actually began to decline while the metropolis as a whole continued to grow. After mid-century, it was the suburbs which absorbed the thousands of immigrants who arrived from the country each year; between 1660 and 1700 the population of the suburbs north of the river increased by 76% to about 310,000, more than three times the population of the City. The suburbs were not governed by the ward system, nor had the guilds ever had much impact outside the City. Not enough is known about the extent of social instability in the suburban parishes, but it is clear that after the Restoration (if not before) population growth, poverty, and weak local government all presented potentially serious obstacles to the maintenance of order. Historians have been able to identify only a small proportion of the approximately 8,000 immigrants who moved to

34 Boulton, Neighbourhood and Society, p. 291.
38 Finlay and Shearer, “Population growth,” pp. 42, 45.