Criminalisation and the eighteenth-century's 'Bloody Code'

Lizzie Seal explores the link between poverty and criminalisation in the eighteenth century.

The 'Bloody Code' refers to the large number of capital offences that were created in England and Wales in the eighteenth century during the 'old regime'. This is the period after the Glorious Revolution of 1688, when the power and authority of parliament overtook that of the monarchy and constitutional government developed. There was no professional police force in the eighteenth century, and historians have argued that the Bloody Code of capital offences was a means of keeping order through the fearsome suppression of the population (Hay, 1975; Linebaugh, 1991).

The majority of capital offences were property crimes, arguably entailing large-scale criminalisation of the labouring poor. Capital statutes often protected specific, limited property interests, such as an act passed in 1753 that prescribed hanging for stealing shipwrecked goods, brought on behalf of 'Merchants, Traders and Insurers of the City of London' (Hay, 1975). During the eighteenth century, the system of capitalist wage labour was established. This change meant that members of the labouring poor often had to steal in order to stay alive. Therefore, it was not necessarily possible to distinguish between the 'criminal' population and the poor, as being poor meant being criminal (Linebaugh, 1991).

Abstracting labour as wages led to the criminalisation of ordinary, day to day practices carried out by working men, such as customary appropriation. This refers to the perquisites that labouring jobs had traditionally entailed, such as keeping extras, leftovers and off-cuts of materials. Under a system of criminal law derived from capitalism, customary appropriation became theft and was subject to punishment by execution, whereas it had previously been an accepted part of craftsmen's trades (Linebaugh, 1991). The criminalisation of the labouring classes throughout the eighteenth and nineteenth centuries benefited the ruling and owning classes.

By way of contrast, the law was far slower to penalise those who perpetrated abuses in the commercial world. Balance sheets and profit and loss accounts did not need to be published until the twentieth century, a lack of scrutiny which made it relatively easy to disguise fraud and embezzlement (Emsley, 2005). The Bloody Code's focus was on types of theft. In addition to the lack of criminalisation of practices in the commercial world, crimes of violence against the person were not punished more harshly or systematically than property crimes, and this was not an area of expanding legislation in the eighteenth century.

The eighteenth century criminal law can be perceived as having an ideological function. It was administered by the ruling class and its subjects were largely from the labouring poor. Analysis of the records of those who were executed on the gallows at Tyburn in London reveal that in addition to being from the lowest class, the hanged were often recent arrivals to London. There is also an over-representation of people who were not English, with Irish forming the largest non-English group (Linebaugh, 1991).

In a famous essay, Hay (1975) contends that in the eighteenth century the criminal law operated as an instrument of terror to subjugate and maintain order among the population. It threatened death for relatively trivial offences, but as they related to property, they damaged capitalist interests. The criminal law's ideological power was manifested in three ways: majesty, justice and mercy. The majesty of the law was enacted through the emotional climax of proclaiming the death sentence on the errant prisoner. The law claimed to extend protection to all by outlawing theft. Therefore, justice was presented as something available to ordinary people, although they were not usually its beneficiaries, especially as men were not eligible to appear on a jury unless they owned property.

The final ideological function of the criminal law, and the one which enabled its survival, was mercy. Pardons were frequent, and half of those sentenced to death did not go to the gallows. Hanging was used selectively, but the law was presented as impartial. This paradox allowed the perpetuation of a system of law that was controlled by the three per cent of the population which comprised the aristocracy and gentry, to the detriment of the majority (Hay, 1975).

This picture of criminalisation under the Bloody Code requires some modification. It presents a unified ruling class always able to serve its own interests, and a similarly homogenous labouring class always and inevitably oppressed by the criminal law. Although many new capital offences were created during the eighteenth century, this needs to be contextualised within a period in which large amounts of legislation of all kinds were passed. This was due to the ascendance of parliament, which began to meet annually.

As mentioned above, much of the legislation related to property crime was incredibly specific. This meant that it did not end up applying to many people. During the eighteenth century, the majority of the hanged were prosecuted under Tudor and Stuart legislation rather than the

statutes of the Bloody Code. Although property crimes accounted for the majority of the hanged, those convicted of crimes against the person were the least likely to escape execution through reprieve (Emsley, 2005). The flood of legislation related to property crimes also needs to be understood within the context of a time which preceded the nineteenth century innovation of legislating for types of crime. In the eighteenth century, the various statutes were not necessarily conceptualised as relating to a particular classification of crime as they are now.

There is also little to support the contention that the workplace crimes created by the Bloody Code were a protest against wage discipline, or that the practices they criminalised were regarded as simply part of day to day life by ordinary people (Emsley, 2005). It is, of course, difficult to recover the views and opinions of people who did not leave their own written records. However, accounts of crowd activity at executions suggest that feelings towards condemned prisoners varied from support for the prisoner to support for their punishment (Gatrell, 1994).

The eighteenth century criminal justice system was more complex and diverse than purely being an instrument of the ruling class. The system was largely administered by people from the middle-class, itself a diverse category. They were far more privileged than the labouring poor but were not part of the ruling elite. Ordinarily, the criminal law was a means of controlling the working class, but sometimes working class people were able to use the law in order to resolve disputes (King, 2000).

Justice in the eighteenth century was often discretionary. Offenders could escape prosecution through informal practices such as compounding, paying off the victim in exchange for the charge being dropped. Unofficial practices such as compounding were illegal and so were not recorded, but demonstrate that 'justice' was not the sole province of the law. Popular justice was also meted out, apart from the strictures of the criminal justice system (King, 2000).

However, this modified picture of criminalisation under the Bloody Code does not alter the fundamental argument. The makers and administrators of the criminal law were usually not the ones who were penalised by it. People from the working class were less able to evade criminalisation and therefore punishment. The most marginalised were the ones most likely to experience the criminal law's harshest punishments. Not only that, but also the criminal law was largely in the interests of those with property, even if there were occasions when it could be utilised by those without it.

The Bloody Code persisted into the nineteenth century but fell away after the 1832 Reform Act, which changed the British electoral system. The Act opened parliament to independent MPs who advocated repealing the Bloody Code, which happened during the 1830s. Penitentiaries and prisons began to gain importance as suitable means of punishing offenders. Professional police forces were also established at around this time. By the nineteenth century, the criminal law was overloaded and in danger of collapsing under the weight of the high number of capital statutes. A boom in prosecutions in the early nineteenth century meant that pardons had to be used with increased frequency, casting doubt on the legitimacy of the criminal justice system and its ability to function effectively (Gatrell, 1994).

Immediate parallels between criminalisation under the Bloody Code and criminalisation in England and Wales today may seem few. The death penalty and other corporal punishments have been abolished.

However, those on the receiving end of official punishments are disproportionately drawn from the most marginalised sections of society. Although there are laws in place criminalising white collar and corporate crime, they are easier to evade than laws which govern the behaviour of working class people. Arguably, the criminal justice system remains a means of controlling people who are disadvantaged, even if this is not its only role. Crimes against the person are punished more systematically than they were in the eighteenth century. However, the contemporary criminal justice system is more adept at prosecuting crimes against private property than, for example, rape and sexual assault, perhaps demonstrating the Bloody Code's legacy. ◾

> Under a system of criminal law derived from capitalism, customary appropriation became theft and was subject to punishment by execution, whereas it had previously been an accepted part of craftsmen's trades.

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