

*Dedicated to the memory of my dead grandmother Klara
Kreutzberg, as well as to the memory of my deceased
parents Gertrud and Engelbert Eder. They all died all too
soon and left me very lonely.*

*“At the Instigation of the Devil“: Capital Punishment
and the Assize in the Early Modern England, 1670-1730*

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***Chapter I:
Introduction***

I.1. Problems and arguments: The present state of research on capital punishment

Although emotionally one of the most polarizing aspects of English legal history, the topic of capital punishment, surprisingly, has as yet not received the kind of careful attention it deserves. Quite to the contrary, its study has up to now suffered from regional and periodical limitations as well as from ideological bias.

If studied in its own right, as in Peter Linebaugh's *The London Hanged: Crime and Civil Society in the Eighteenth Century* or Brian Henry's *The Dublin Hanged: Crime, Law Enforcement, and Punishment in Late-Eighteenth-Century Dublin*, its treatment has been largely limited to an eighteenth century urban background. Admittedly, this has not always proved a disadvantage, as the primary sources for large urban centres in general, and capitals in particular, are often much more fuller than those surviving for smaller communities. Linebaugh, for example, has not only been able to draw on the official legal records of the city of London, but also on the so called records of the *Ordinary of Newgate*. These last mentioned records contain the verbatim transcripts of the interviews conducted by the churchmen at London's most important prison, Newgate, with the capitally convicted prior to their execution. Naturally, such a rich source offers ample insight into the life of the convicted and their motives for committing crime, although, of course, many such convicts might have been tempted to present their deeds in an excessively favourable light. Last Dying Speeches, too, which were the speeches capitally convicted persons delivered to the execution audience immediately before their death, are much more extant for the large metropolises than for more rural areas. The same holds true for transcripts of court proceedings, which -due to improved shorthand techniques- increasingly appear from roughly 1740/1750 onwards for trials in metropolitan areas. Nevertheless, limiting oneself to the large metropolises undoubtedly raises for a period in which 70-80 per cent of all English still lived in the countryside the issue of representativeness. A point Linebaugh himself concedes in another publication. Moreover, the unilateral emphasis on the eighteenth century, or, to be more precise, on the period after the passage of the so called *transportation act* of 1718 with its far reaching consequences.

for the administration of capital punishment, might somewhat distort the picture.¹

Apart from their focus on the metropolises and their eighteenth century bias, Linebaugh's and Henry's publications also suffer from a certain ideological predeterminism. Everybody reading the introduction and prefaces to his book, will easily recognize, that particularly Linebaugh considers the purpose of his work more to be a tool for the present day fight against the death penalty than as an unbiased piece of historical writing.

Consequently, he paints eighteenth century authorities' administration of the death penalty in rather bleak colours, in order to discredit present day administration of the death penalty with reference to its allegedly dirty early modern roots. What emerges, is the picture of an pretendedly evil Stuart king failing to prevent plague and London fire (as if anybody would be able to prevent natural catastrophies of that kind) and of capital punishment as an mere instrument for controlling the impoverished eighteenth century proletariat.² To be sure, it is of course possible to be divided on the issue of the death penalty, but whatever attitudes one holds towards this sort of punishment, fairness and historical truth should not suffer, if it comes to discussing this form of penalty.

Studies approaching capital punishment within the general framework of crime and punishment have not always fared that much better. Most of them are studies of one single british county, and most of these studied counties are areas closely situated to the centre London, and therefore somewhat under the spell of the capital. Whether such one-county studies of areas under the influence of London provide a representative picture of capital punishment in early Modern England as a whole, must appear somewhat doubtful. Like Linebaugh's and Henry's studies on capital punishment, they are furthermore, for the most part, very much limited to the eighteenth and early nineteen centuries.³

Even the few studies who have a broader regional and/or periodical focus, as, for example, those penned by Sharpe, Beattie, Walker or Morgan and Rushton, to a certain degree, fail to overcome these shortcomings. James Sharpe in his *Crime in Seventeenth Century England: A County Study* admittedly treats the seventeenth century, too, but once again his approach is limited to one county, Essex, and

once again this county is regionally closely situated to London. John Beattie's

Policing and Punishment in London 1660-1750 treats capital punishment in the context of general crime in seventeenth and eighteenth centuries' London. Although inclusive of the seventeenth century, too, the scope of his book is once again limited to London and is furthermore selective in the sense, that it evaluates only every third year of his chosen period. It, furthermore, leaves out violent crime as, for example, homicide, robbery, high treason or rape completely. His earlier book *Crime and the Courts in England, 1660-1800* has -despite its title- a clear eighteenth century focus. Moreover, with Surrey as its main object of study, the closeness to London is once again evident.

Garthine Walker: *Crime, Gender and Social Order in Early modern England* focuses on Chester in the sixteenth and seventeenth centuries. This focus on the sixteenth and seventeenth centuries is valuable, but the question must once again remain, whether the 20000-30000 souls' Palatinate of Chester at the border to Wales really provides much representativeness for England as a whole.

Gwenda Morgan and Peter Rushton have dealt with crime in the area of the Northern Circuit and with transportation in the areas of the Western Circuit, the Northern Circuit, and some other areas of England. They can therefore very well claim to have transcended the one county barrier. However, they, too, largely limit their studies to the post-1718 period, which is the period after the passage of the *transportation act* of 1718.⁴

Against this background of somewhat fragmentary present day research, it appears desirable to compose a study that puts the research on capital punishment on a broader regional and periodical footing. In doing so, we will have to strike a compromise: Due to loss of archival material, it certainly will not be possible to write a history of capital punishment for the whole of seventeenth and eighteenth centuries' England. Instead, it will be necessary to choose an area large and representative enough to reach valid conclusions for the whole nation. In my opinion, the so called Western Circuit as one of the largest and one of the most far stretching of all English Assize circuits qualifies best for such an undertaking.

1.2 The legal and socio-economic patterns of the Western Circuit

Legal Patterns

As far as the more serious crimes are concerned, the legal map of early Modern England was divided up into six Assize Circuits, three Palatinate jurisdictions and the Old Bailey for London and Middlesex. The latter was, strictly speaking, not called an Assize but nevertheless functioned as one. The six Assize Circuits were the Midland Circuit, the Oxford Circuit, the Western Circuit, the Northern Circuit, the Norfolk Circuit, and the Home Circuit. The three Palatinate Jurisdictions comprised Chester, Lancashire and Durham.

Apart from the Northern Circuit, which only had one yearly Assize, and the Old Bailey featuring eight annual sessions, each of these jurisdictions witnessed two annual sessions, a Winter Assize and a Summer Assize. These Assizes were chaired by judges from the central Courts at Westminster, who for that purpose travelled around the country twice a year. When arrived at an Assize-town, the Assize-judge worked together with two kinds of juries, the so called grand jury and the petit or trial jury. The grand jury determined whether there was enough evidence to justify further legal proceedings against the accused or not. If the grand jury had doubts about the validity of the evidence, it could pronounce either a „non true bill“-ruling or an ignoramus ruling („we do not know“). In these cases of grand-jury doubts, the accused was in general immediately released. If, on the contrary, it found the evidence convincing, it pronounced a so called „true bill“-ruling, and the accused was handed over to the trial jury. The trial jury could then by an unanimous vote, and only by an unanimous one, fully or partially convict the offender.⁵

Socio-economic Patterns

Within this framework of higher jurisdiction, the Western Circuit was one of the most populated ones. Its six counties Hampshire, Wiltshire, Dorsetshire, Cornwall, Devonshire and Somersetshire comprised during the period 1670-1730 about 1,2 million people on average. It was probably also the one with the greatest regional variation, as it stretched from Hampshire in the middle of England to Cornwall in

the Western outskirts. Moreover, with about 70-80 percent of its population living in the countryside, it reflected the overall demographic patterns of early Modern England fairly well.⁶

Economically, too, the area showed a great deal of variation. While the mines of Cornwall were famous for their copper and tin, the textile industry, whose products were to be exported via Exeter to southern Europe, featured prominently in Devonshire. Portsmouth in Hampshire was the most important site for ship construction, and also served as port of transshipment for exports of textiles to France and Southern Europe. Bristol, although strictly speaking not belonging to one of these six counties, performed a similar function for textile exports to the West Indies and North America.⁷

Historically speaking, the area had by no means been a quiet one. Beginning with the so called *Cornish Rising* in the fifteenth century, over the *Western Uproar* and the *Western Rising* in the sixteenth and seventeenth centuries to the so called *Monmouth rebellion* of 1685, popular unrest had manifested itself many times in violent defiance to the central authority in London. This somewhat elaborate tendency towards rebellion and the ready access to the sea via ports like Plymouth, Portsmouth or Bristol might very well have favoured this area's early adoption of transportation, as the penal measure of banishing convicts to other parts of the world was called.⁸