

Introduction to Douglas Hay – David Volk – Jan 25th/09

In “Property, Authority, and the Criminal Law” Douglas Hay examines the ostensibly severe criminal law system that existed in England following the Glorious Revolution in 1688 and which prevailed until the early part of the 19th century. The ostensible severity of the criminal law system lay in the fact that during this period the amount of offences for which capital punishment was the legislated punishment increased dramatically from 50-200 (p. 18). Hay’s work is one of social history inquiring beyond the merely legal implications of the criminal law system and looking instead to distil a cogent explanation for the system’s continued existence during the period. In conducting the inquiry, Hay critiques what he sees as the over-simplified analyses of other scholars who argue that the ‘system of terror’ was ineffective and who suggest that the system was simply a product of the political dominance of conservative interests resisting reform (p. 23).

Hay’s expostulation of his theory begins with his noting that “wealth does not exist outside a social context ... and the connections between property, power and authority are close and crucial” (p. 25). Key facts which defined the period were the non-existence of a domestic police force; an unquestioned deification of property and the consequent belief that property interests must be protected at all costs (p. 18-22); and a continued concentration of political power within the propertied class, which only comprised 3% of the total population (p. 61). Such facts however, are not contested by the historians Hay critiques, rather, Hay’s critique lies in how these historians have viewed the criminal law system in relation to property. In the eyes of these other historians, the ‘irrational’ criminal law system of seventeenth century England was an inadequate system for the protection of property given the ostensible failings of the system to consistently protect property.

Hay’s response is to look beyond imagined legal efficiencies and posit the criminal law system as the prime ingredient in the construction and maintenance of a political ideology which sustained the continued dominance of the propertied class over all other class interests. This continued dominance required that the ‘opinion’ of the ruling class prevail over the ‘physical strength’ of the lower classes; with law acting as “one of the chief ideological instruments” (p. 26) for effecting this dominance. To explore the idea of law as ideology, Hay identifies three aspects which distinguish law as ideology: *majesty*, *justice* and *mercy*. In analyzing these three concepts, Hay credibly demonstrates how the ostensible failings of the criminal law system were merely symptoms of the system’s evident functionality as a means by which the dominant ideology of class was consistently reinforced.

Majesty

Citing historical material, Hay notes that the twice-yearly visits of high-court judges to country parishes were one of the premiere social events during the period and as such they were widely attended (p. 27). Possessed of a high degree of credibility and prestige, justices took full advantage of the opportunity to maximize it as *spectacle*; communicating in turn the ethos of paternalism and a morality of lawfulness to the crowds (p. 28-29). Hay notes that the authority of the high court justices even outweighed that of the clergy, which comparatively, was accorded far less deference amongst the populace (p. 30). Nonetheless, the spectacle of the assize traded on the imagery of religion, with the justice emulating the role of the priest, reliving with each visit a ritualistic delivery of justice and righteous vengeance.

Justice

The justice of the criminal law lay in a firm adherence to the particular version of the rule of law which prevailed during the period; a version that focused upon decentralization of royal power through a

strengthened recognition of individual rights as against the power of the Crown. In the criminal law realm, Hay notes that the rule of law led to a strict observance of the rules of evidence and procedure, such that mere technical errors by prosecutors led to cases being thrown out (p. 32-33). In this way, the populace actively observed an even-handed application of the law by justices, who in their extreme formalism appeared to often side with the populace. Furthermore, adherence to the notion of “equality before the law” led to the occasional conviction of higher-class individuals, providing enduring symbols of the law’s *supposed* equal application (p. 33-34). Hay also notes that use of the system was not entirely restricted along class lines, with members of the lower classes being entitled to bring prosecutions, further adding to the balanced appearance of the system. Hay notes however, that even these prosecutions were not permitted on the traditional natural law justification of poverty, rather these prosecutions acted as public advertisements that the protection of property was so significant that the protection of the law would be extended to protect even the meagre possessions of the poor.

Mercy

Of the three aspects offered for justifying the criminal law system, mercy above all, was the primary vehicle by which the criminal law system as ideological propaganda was transmitted. Hay begins by rationalizing the peculiar practice of prosecutions being only privately initiated, arguing that the practice gave the property class a consistent opportunity to wield the threat of criminal sanction as a device to inure loyalty from parishioners (p. 40-42). Similarly, the ability of character witnesses to exonerate an accused also gave the property class an opportunity to visibly horse-trade their influence in exchange for parishioner loyalty (p. 42-43). Most significant to the system however, was the extensive practice of granting pardons to the convicted. The pardon system permitted justices to evaluate factors extant to the criminal process, in particular the *respectability* of those seeking the pardon could be weighed (p. 44-45). Vertical loyalties in the class system were thus reinforced through persons seeking the influence of respectable members of the higher-classes whose credibility was significant enough to gain a pardon. Thus the pardon was a vehicle which encouraged those caught in the criminal law’s net to rely on the political system’s network of patronage connections and thereby reinforce vertical loyalties (p. 45-48).

While these three aspects of the system provided the mechanisms for transmitting the ideology of patronage, Hay notes that the effective delivery of this system required *delicacy and circumspection*. In other words, given the non-existence of a police force or standing army, the authorities were required to be sensitive to the dormant and sometimes explosive power of the populace to revolt. The effect of this *delicacy* was a significant curbing of the criminal law power such as strategically minimizing application of the death sentence (p. 49-50), or a climactic, staged use of the pardon to avoid the creation of martyrs whilst still transmitting the ideological effect of the trial (p. 52).

In the concluding portion of the essay Hay takes care to differentiate his theory of the criminal law system as ideology from other explanatory attempts. For instance, Hay rejects any notion that the working of the criminal law system was the work of a cunning puppet-master (p. 53). In addition, Hay rejects the efforts of those historians who examine the period through a simplified, contemporary moral vision which seeks to pass judgment on the efficacy of the system (p. 54-55). Finally, Hay explores reasons for the system’s slow reform. According to Hay, the longevity of the system paralleled the longevity of the concentration of wealth in the propertied classes since the continued existence of the propertied class’ political existence required the maintenance of personal relationships between parishioners and landlords. Consequently, a rationalist criminal law system was avoided since such a system would have severed the connections of patronage necessary for the system’s existence. Ironically then, Hay appears to suggest that, even more important than the protection of property interests was the protection of political authority, since the former could not exist without the latter.