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# The Beggar's Opera and its Criminal Law Context

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## THE BEGGAR'S OPERA AND ITS CRIMINAL LAW CONTEXT

### INTRODUCTION

The Beggar's Opera is a scholar's playground. Aside from the political satire that forms the play's core, writers have commented on subjects as diverse as its attack on London's Italian opera vogue,<sup>1</sup> its role as a "satiric meditation on Western heroic ideals,"<sup>2</sup> its status as a precursor of the Singspiel,<sup>3</sup> its theatrical nature,<sup>4</sup> and even its possible interpretation as a metaphor of the "Christian myth."<sup>5</sup> But for all the study the play's background has received, its foreground – the simple, cynical story of love and betrayal in London's criminal underworld – has drawn little interest.<sup>6</sup>

In part, this might be because Gay located the play in a criminal milieu to symbolize the "criminal" behavior of the politicians and courtiers he was satirizing, and it is the satire, not the symbol, that most analysts find interesting. It can also be difficult to learn much about a society's reaction to crime and criminals from a piece of theater: one might learn something about Britain's attitude to crime and policing in the 1960s from a close study of the B.B.C.'s "Dixon of Dock Green,"<sup>7</sup> but without placing it in context, one would not learn much.

Indeed, Ian Bell has cautioned against the dangers of reading too much historical significance into literary works, noting that "[i]t seems that when faced with the blowsy charms of literature, dignified historians go all to pieces, and start behaving like Professor Unrat in *The Blue Angel*." and that "there are certainly some pretty feeble books . . . written as though the literary text was a direct and uncontroversial source of reliable information. Similarly, there are plenty of examples of historians being bamboozled by

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<sup>1</sup> William Eben Schultz, *Gay's Beggar's Opera: Its Content, History and Influence* New York: Russell and Russell 1923, pp. 133-153.

<sup>2</sup> Dianne Dugaw, *Deep Play – John Gay and the Invention of Modernity* Newark: University of Delaware Press 2001, pp. 166-185.

<sup>3</sup> John Fuller, "Introduction," *John Gay Dramatic Works Volume I* Ed. John Fuller. Oxford: Clarendon Press 1983.

<sup>4</sup> William Empson, *The Beggar's Opera: Mock-Pastoral as the Cult of Independence in Twentieth Century Interpretations of The Beggar's Opera* Ed. Yvonne Noble. Englewood Cliffs: Prentice-Hall 1975, ("*Noble*") pp. 15-41.

<sup>5</sup> Harold Gene Moss, *The Beggar's Opera as Christian Satire* in *Noble*, pp. 55-65.

<sup>6</sup> Although there has been little scholarly interest in this aspect of the play, it is interesting to reflect that *The Beggar's Opera* is just as much the progenitor of literary and theatrical works that reflect a view of the urban criminal world as it is the precursor to *singspiel*, operetta, and the musical. There is much of Peachum in Fagan, Don Corleone, and Tony Soprano.

<sup>7</sup> A beloved, by some, British television program running from the 1950s until the 1970s that presented a warm, rosy, picture of London's Metropolitan police force. The principal character – George Dixon played by Jack Warner with avuncular sincerity – was the epitome of the almost mythical "bobby on the beat" who was able to resolve almost all situations with a kindly word and the occasional clip on the ear for young offenders.

‘imaginative’ writing, blithely lifting citations from plays and novels to illustrate the issues they are researching.”<sup>8</sup>

Bell’s cautionary note is particularly appropriate when considering *The Beggar’s Opera*, a play where nothing is what it seems and where nothing is meant to be taken literally. But this does not mean that the play has nothing to tell us about its ostensible subject – criminals in early eighteenth century London. Indeed, the process of testing the veracity of the world Gay creates for his fictional characters tells us a great deal about the real-life world inhabited by the play’s original 1728 audience.

So my goal here is to avoid the trap of interpreting *The Beggar’s Opera* as presenting historical truth by approaching it from the opposite direction. Rather than using the play as evidence of criminal life and activity in 1728 London, the year in which the play was first performed, I intend to look at how crime and criminals are portrayed and see how closely the picture matches the historical record.

This narrow approach has its limitations. Since the play is set in London, I will only look at criminal life in that city, and nothing I say here will apply to the broader question of criminality in England in 1728.<sup>9</sup> Moreover, since the play’s characters are involved only in certain crimes, I will focus on those and will ignore many crimes that would have been important to the play’s first audience.<sup>10</sup>

Within the constricted sightlines offered by this approach, however, the view is a fascinating one. *The Beggar’s Opera* might only offer us a keyhole through which to peep, but the sights we see when we peer through are genuine, not diffused through the prism of Gay’s political and social agenda. The remainder of this chapter will attempt to separate literary gloss from historical fact in order to help the reader – suitably cautioned against an uncritical acceptance of the play as historical reportage – develop a more nuanced picture of the period’s criminal underworld.

## LAWS AND LAWLESSNESS

*The Beggar’s Opera* is the most familiar work of literature to come from early eighteenth century England, and together with the works of William Hogarth, with which it shares many points of reference, it has helped to form our impressions of the time. And because Hogarth and Gay focused on criminality as the vehicle for carrying their more complicated messages of social and political commentary, it is perhaps understandable

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<sup>8</sup> Ian A. Bell, *Literature and Crime in Augustan England* London and New York: Routledge 1991 (“Bell”) p. 20.

<sup>9</sup> This is regrettable, since it seems to reinforce the notion that anything of significance in Britain happens only in London.

<sup>10</sup> In particular, a crime such as coinage gets only a passing mention, and forgery and sedition – two important crimes during this period – get no mention at all.

that we should think of London in the 1720s as a pit of criminality and dissolution, a place where truly “All Professions be-rogue one another.”<sup>11</sup>

This view of London is strengthened by contemporary accounts. In a passage that could have been lifted from Gay’s earlier poem *Trivia*, and written two years after that poem appeared, the City Marshall of London wrote:

Now it is the general complaint of the taverns, the coffee-houses, the shop-keepers and others, that their customers are afraid when it is dark to come to their houses and shops for fear that their hats and wigs should be snatched from their heads or their swords taken from their sides, or that they may be blinded, knocked down, cut or stabbed; nay, the coaches cannot secure them, but they are likewise cut and robbed in the public streets, &c. By which means the traffic of the City is much interrupted.<sup>12</sup>

Whether or not this perception of London as a criminal’s haven is a legitimate one, however, is less clear. Certainly, Ian Bell offers a contrary view, opining that the prevailing view that England in general, and London in particular, was a cesspit of organized criminality and vice is more an artifact of what he calls “ideological fantasy”<sup>13</sup> rather than historical fact. The belief that the present is a lamentable time of crime and violence when viewed in relation to some rosy, ill-defined, peaceful “past” is, Bell argues, a familiar historical phenomenon.<sup>14</sup>

Historians have addressed the question of Augustan criminality by reviewing the records of the criminal courts of the period.<sup>15</sup> But these records provide equivocal data at best. As Bell notes, much criminal behavior goes unreported today,<sup>16</sup> and it is reasonable to assume that in 18th Century London, when self-help was an accepted remedy in a police-less society, under-reporting of criminal activity was even more typical.<sup>17</sup>

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<sup>11</sup> John Gay, *The Beggar’s Opera* in *John Gay Dramatic Works Volume II* Ed. John Fuller. Oxford: Clarendon Press 1983 (“*Beggar’s Opera*”) Air I, p. 4. All quotations from *The Beggar’s Opera* appear as they do in the Fuller edition.

<sup>12</sup> Quoted by Ian A. Bell *Literature and Crime in Augustan England*. London: Routledge 1991 (“*Bell*”), pp. 13-14.

<sup>13</sup> *Bell*, p. 15.

<sup>14</sup> *Id.* pp. 15-16.

<sup>15</sup> See, e.g., J. M. Beattie, *Crime and the Courts in England 1660-1800*. Princeton: Princeton University Press 1986 (“*Beattie*”).

<sup>16</sup> *Bell*, p. 16

<sup>17</sup> For a vivid, albeit literary, account of self-help, see John Gay, *Trivia; Or, The Art of Walking the Streets of London* in *The Poetical Works of John Gay* Ed. G. C. Faber. London: Oxford University Press 1926, (“*Faber*”) p. 80. (“Whilst ev’ry honest tongue *stop* thief resounds, So speeds the wily fox, alarm’d by fear, Who lately filch’d the turkey’s callow care; Hounds following hounds grow louder as he flies, And injur’d tenants joyn the hunter’s cries. Breathless he stumbling falls: Ill-fated boy! Why did honest work thy youth employ? Seiz’d by rough hands, he’s dragged amid the rout, And stretch’d beneath the pump’s incessant spout: Or plung’d in miry ponds, he gasping lies, Mud chokes his mouth and plaisters o’er his eyes.”) Gay’s account is, of course, fictional, and so should be read with that caution.

Nonetheless, a quick detour into quasi-empiricism is helpful in gauging the extent to which *The Beggar's Opera* presents a realistic picture of criminal activity in 1728 London. The source for this enquiry is the grandly named "Proceedings of the King's Commission of the Peace and Oyer and Terminer, and Gaol-Delivery of Newgate, held for the City of London and the County of Middlesex, at Justice-Hall, in the Old Bailey" or the "*Proceedings*."<sup>18</sup> And while this publication's inherent limitations mean that the information to be derived from it is necessarily incomplete,<sup>19</sup> the insight it allows us into London's criminal world is too fascinating and valuable to ignore.

The *Proceedings* tells us that London was likely not as riddled with crime and criminals as Gay would have us believe. Between 1717 and 1727, the *Proceedings* reported that the Old Bailey heard cases in which 6,135 defendants were accused of committing a total of 6,540 offenses.<sup>20</sup> Of these, 3,805 were male, 2,248 were female, and 82 were unclassified. For the men, 1,268 were found guilty, 1,197 were found guilty in part, 1,301 were found not guilty, 6 received a special verdict,<sup>21</sup> and 33 are unaccounted for. For the women, 398 were found guilty, 798 were found guilty in part, 1,032 were found not guilty, and 20 are unaccounted for.<sup>22</sup> Six hundred or so crimes a year in a city the size of London<sup>23</sup> might have seemed a lot to people at the time, but it seems a relatively small number today.

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<sup>18</sup> The *Proceedings* is a remarkable resource, made all the more useful by its availability on the internet at <<http://www.oldbailey.org>>. First published in 1678, and in production for more than two hundred years thereafter, until 1913, the *Proceedings* provided a synopsis of selected trials conducted at the Old Bailey. Originally little more than a summary of names, charges, and verdict, the *Proceedings* developed into a summary of testimony as well, sometimes providing seemingly word-for-word transcripts of trials. But for all its value – and the accounts it provides have been described as “probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century” (John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chicago L. Rev. 263, 271 (1978)) – it is a resource that must be handled with care. Because it presents only a selection of trials, and not a complete listing of the Old Bailey's activities, it is impossible to generate hard numbers based on the *Proceedings* alone. And for those engaged in the study of criminal trial procedure, the *Proceedings* are particularly treacherous because the degree to which the accounts in it are verbatim or edited is impossible to determine. Even given these cautions however, anyone wanting to hear the authentic voice of eighteenth century London criminals can listen to them by accessing the *Proceedings*.

<sup>19</sup> Hence “quasi” empiricism.

<sup>20</sup> One of the invaluable features offered by the *Proceedings* in its on-line guise is the ability to interrogate the archive and derive statistics from it. The only drawback of this remarkable facility is the inability to provide any meaningful citation to the source of these statistics. Each search is necessarily unique, and therefore the URL for the resulting page is meaningless without providing the entire search string. For that reason, I will refrain from providing a specific citation for each search performed using this feature and note rather that these results can be reproduced with relative ease by any researcher at the site's “Statistical Search” page, located at <<http://www.oldbaileyonline.org/search/stats>>. I will provide a general citation to the *Proceedings* whenever such statistics appear.

<sup>21</sup> A special verdict was usually one in which the jury decided the factual issues but legal issues were left to be resolved by a court.

<sup>22</sup> These numbers give us a very raw sense of criminal activity in London at the time. A more refined picture could be obtained by comparing the number of crimes *per capita* and compare that to contemporary crime statistics. But this approach requires so many compromises as to make the data derived from it worse than meaningless.

<sup>23</sup> Estimates of London's population in the early eighteenth century are speculative at best. The population in London in 1700 has been estimated at around 600,000 (George Rudé, *Hanoverian London 1714-1808*. Berkley: University of California Press 1971 p. 4., quoting E. A. Wrigley, *A Simple Model of*

Another possible measure of the level of criminality might be the imposition of statutory remedies to counteract perceived criminal activity. If this yardstick is used, then the London portrayed in *The Beggar's Opera* was just at the beginning of a century-long downward spiral of crime and retribution. The first, and most important, legislative response to the perceived rampant criminality of the time was the "Black Act" of 1723.<sup>24</sup> This act, and the others that followed, made up the so-called Bloody Code, by which more and more crimes were acknowledged and punished by the death penalty. This draconian response to criminality is the facet of life perhaps most often commented upon by historians interested in the criminal law of the period.<sup>25</sup>

Although it might seem that politicians would enact legislation in response to a perceived rise in criminal activity, we must temper these first impressions with skepticism. Legislative enactments, stripped of their social and political context, are difficult to interpret. And any attempt to provide the extensive analysis that such a context requires is far beyond the scope of this modest chapter.<sup>26</sup> For present purposes, it is enough to note that the pervasive criminal world presented by Gay in *The Beggar's Opera* probably owes less to historical truth and more to Gay's literary conceit whereby he attempted to portray Walpole's government as an inherently criminal enterprise.

So much for generality. What follows is a look at some of the specifics of London's criminal world in 1728. We will look at the criminals portrayed in *The Beggar's Opera*, the criminal justice system they encountered, and first, the methods of law enforcement against which these criminals would have struggled.

## LAW ENFORCEMENT

One feature of *The Beggar's Opera* that must strike the first-time reader is the absence of any form of official law enforcement. And in this, the play is historically accurate because Gay's London was a society devoid of any meaningful police force.<sup>27</sup> Indeed,

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*London's Importance in Changing English Society and Economy 1650-1750*, Past and Present no. 37, p.44 (1967)) but the number of visitors, transient workers, and undocumented inhabitants cannot be gauged with any accuracy, meaning that the actual population was likely much larger.

<sup>24</sup> 9 Geo. 1 c. 22. The Black Act was named not for the doleful effects it produced but rather for the Waltham Blacks, a band of poachers operating in Waltham Chase near Hampshire. It was this band's activities that precipitated the Act's passage in 1723. For the origins of the Black Act, see E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*. ("Thompson") New York: Random House 1975.

<sup>25</sup> Any attempt at a bibliography of works discussing the Bloody Code would necessarily dwarf this analysis. For a comprehensive discussion of the topic, see Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. New York: Random House 1975.

<sup>26</sup> For a discussion on the prevailing political and social context of the early 18th Century's criminal legislation, see *Thompson*.

<sup>27</sup> Constables were available to detain accused criminals, as shown in *The Beggar's Opera* when Peachum first apprehends Macheath. "The Gentleman, Ladies, lodges in *Newgate*. Constables, wait upon the Captain to his lodgings." *The Beggar's Opera*, Act II, Scene V, p. 31. But these constables are under Peachum's command and are not operating as an independent group of law enforcers. Although the

Britain did not begin to maintain a standing police force until the establishment of Sir Robert Peel's Bow Street Runners in the 1750s.<sup>28</sup>

In the absence of independent law enforcement, the public were left with few options to apprehend criminals and gain restitution of stolen property, none of them appealing. In some forms of street crime involving theft, the criminal could be caught quickly and the victim might initiate a hue and cry of the sort described by Gay in *Trivia* resulting in the return of a stolen item and some rough justice administered on the criminal.<sup>29</sup> But if the criminal escaped the hue and cry, or if the theft was not noticed until after the criminal had disappeared, a victim's only remedy would likely be to visit an intermediary like that represented in the play by Peachum.<sup>30</sup>

Gay's Peachum is universally recognized as being based on Jonathan Wild, the prototypical criminal mastermind. And while the specifics of Wild's career are by no means identical with Gay's fictional account, many of the principals by which Peachum operates can be seen to have been drawn from Wild's career.

Peachum makes no secret of his profession. His first speech explicitly acknowledges his dependence on criminal activity, while at the same time covering his activities with the same patina of respectability that was so important to Wild. "A lawyer is an honest Employment, so is mine. Like me too he acts in a double Capacity, both against Rogues and for 'em; for 'tis but fitting that we should protect and encourage Cheats, since we live by them."<sup>31</sup> And the way in which Peachum carries on this "double Capacity" soon becomes apparent:

But 'tis now high time to look about me for a decent Execution against next Sessions. I hate a lazy Rogue, by whom one can get nothing 'till he is hang'd. A Register of the Gang, [*reading*] Crook-finger'd Jack. A Year and a half in the Service; Let me see how much the stock owes to his Industry; one, two, three, four, five Gold Watches, and seven Silver ones. A mighty clean-handed Fellow! Sixteen Snuff-boxes, five of them true Gold. Six dozen of Handkerchiefs, four silver-hilted Swords, half a dozen of Shirts, three Tye-perriwigs, and a piece of Broad Cloth. Considering these are only the Fruits of his leisure Hours, I don't know a prettier Fellow, for no Man alive hath a more engaging Presence of Mind upon the Road.<sup>32</sup>

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constabulary would participate in hue and cries, and would sometimes act to prevent criminal activity on its own initiative, it was not a police force in any modern sense of that term.

<sup>28</sup> For a critical discussion of the Bow Street Runners and their place in English crime prevention, see Frank McLynn, *Crime and Punishment in Eighteenth-Century England* Oxford: Oxford University Press 1991 (*McLynn*) pp. 32-35.

<sup>29</sup> See note 17.

<sup>30</sup> To "peach" is to "inform against an accomplice" or "to turn informer." Oxford English Dictionary, Second Edition Oxford: Clarendon Press 1989 ("*OED*") Vol. XI, p. 389. Peachum also acts as a dealer in stolen property.

<sup>31</sup> *Beggar's Opera*, Act I, Scene I, p. 4.

<sup>32</sup> *Id.* Act I, Scene III, p. 6.

There is a lot to parse here. It appears that “the Gang” somehow is controlled by Peachum. After all, he possesses a Register with the gang members listed in it and an itemized list of everything they have brought in. But later in the play it seems that the gang is self-governing and that Peachum has only a collateral connection to its members. “Macheath: Business cannot go on without him. He is a Man who knows the World, and is a necessary Agent to us. . . . You must continue to act under his Direction, for the moment we break loose from him, our Gang is ruin’d”<sup>33</sup> And Matt of the Mint sums up the relationship in a pithy and contextually appropriate sentence: “As a Bawd to a Whore, I grant you, he is to us of great Convenience.”<sup>34</sup>

This second impression is more consistent with the historical record. Wild was described in contemporary accounts as “the Director of a Corporation of Thieves,”<sup>35</sup> but his genius lay in his recognition of the possibilities in potentially damaging legislation. Theft requires a market to be profitable – no self-interested thief will steal an item if there is no secondary market by which the item can be converted into money. Recognizing this, the government passed legislation rendering the receiving of stolen goods a misdemeanor,<sup>36</sup> an Act that should, in theory, have constricted the secondary market in stolen goods and served as a disincentive to theft.<sup>37</sup>

Wild’s plan was simple. Rather than “receiving” the stolen property, he would receive information where it might be found. Then he would advertise that he might have information where certain property, “lost” at a particular day and time, might be found. He would then act as an intermediary between the victim and a “broker” who could facilitate the property’s safe return, after taking a handling fee for his trouble<sup>38</sup>

Wild expanded his operation, even branching out into exporting stolen goods to Holland.<sup>39</sup> In addition, Wild started to impeach some of the men who were bringing stolen goods to him, using this technique to gain control over organized crime in London.<sup>40</sup> Although the government was aware of Wild and his activities, and even

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<sup>33</sup> *Id.* Act II, Scene II, p. 25.

<sup>34</sup> *Id.* Act II, Scene II, p. 25.

<sup>35</sup> *The Complete Newgate Calendar*, Volume Three, Ed. G. T. Crook. London: Navarre Society Limited 1926 (“*Newgate Calendar*”), p. 15.

<sup>36</sup> Anne c.3

<sup>37</sup> In fact, it appears initially to have had that effect. See, *Newgate Calendar*, p. 16 (“But after the legislature had passed an Act which made it a felony [in fact a misdemeanor] to receive stolen goods, knowing them to be stolen, a considerable stop was put to this practice. The few who continued it were obliged to act very cautiously, and, as they ran great hazards, they insisted on such extravagant profits that the thieving trade was in danger of coming to nothing.”)

<sup>38</sup> See, *Newgate Calendar*, pp. 16-17, for a contemporary version of Wild’s scheme, and *McLynn*, pp. 22-29, for a more balanced and historically informed analysis of Wild and his activities. The description of Wild here owes much to McLynn’s excellent account.

<sup>39</sup> *McLynn*, p. 26.

<sup>40</sup> See, *McLynn*, at 23-24 for an account of Wild’s impeaching activities. Impeachment was itself a money maker, with the impeacher collecting a statutory award £40 under the Highwayman Act of 1692. 4 & 5 William and Mary c.8. This amount could be supplemented by proclamation rewards offered by the government in order to capture the perpetrators of specific crimes. John H. Langbein, *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press 2003 (“*Langbein*”), p. 149. Such rewards



passed an Act in 1717 designed specifically to stop him,<sup>41</sup> it was unable to put a crimp in Wild's empire building until Wild himself gave the government an opening.

First, Wild impeached Jack Sheppard, a charismatic housebreaker.<sup>42</sup> When Sheppard escaped from Newgate, Wild's men hunted for him and eventually recaptured him. But when Sheppard was executed, the London crowd turned against Wild for his role in the affair.<sup>43</sup>

This turn in popular opinion perhaps encouraged the authorities to finally put an end to Wild, and in 1725 they succeeded by trumping up charges against him.<sup>44</sup> After failing in a suicide attempt, Wild was hanged on May 25, 1725. His demise, though, did not affect the practice of thief catching, nor was the Government motivated by Wild's example to abandon this failed "self-policing" practice and institute even a nascent police force to impartially prevent crime or to detect and prosecute criminals until much later in the century.<sup>45</sup>

Thus, while Peachum is a fictional construct, intended to convey a message far more complex than a simple depiction of the way criminals were often apprehended in 1728, his conduct is certainly consistent with his real-life counterpart and would have been instantly recognizable to Gay's audience, many of whom doubtless had traded with Wild to seek the return of goods stolen from them.

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could be worth £100, making the total reward package for each person caught as much as £140. This made impeaching against a gang an extremely lucrative profession.

<sup>41</sup> The so-called "Wild Act," or, to give it its proper name, the Receiving Act of 1717, 4 Geo. I c. 11. The Act criminalized the acceptance of a fee for returning stolen property unless the intermediary also arrested the thief and testified against him or her. Wild, of course, sidestepped the Act by acting as a broker rather than an intermediary. He declined all fees from the victim and instead took his cut from the reward fee paid to the intermediary to whom he introduced the victim. These intermediaries were unlikely to follow Wild's example and impeach him because he typically used transportees who had returned to Britain before the expiration of their period of transportation and who were therefore subject to a death sentence upon discovery.

<sup>42</sup> Shepard was one of the prototypes for Macheath, a fact slyly alluded to by Gay in his selection of the tune for Air 54, Polly's "When my Hero in Court Appears." Anyone in the audience who knew the tune in its original form as "I am a Poor Shepherd Undone" could not have failed to understand the parallel Gay was drawing here.

<sup>43</sup> *McLynn*, p. 28

<sup>44</sup> *McLynn*, p. 29, gives a detailed account of the charges and the Government's chicanery during Wild's prosecution.

<sup>45</sup> A vestige of this practice of offering statutory rewards for informing on wrongdoers, as opposed to the more informal practice of offering money to police informants or offering rewards for information relating to specific crimes, can perhaps be seen in the American *qui tam* action, a civil suite under the federal False Claims Act in which a "relator" sues a government contractor, under seal, for alleged fraudulent acts. The Department of Justice is required to investigate the allegations and can intervene in the suit if it believes there to be merit to the claim. If the Department of Justice declines to intervene, the relator can prosecute the action individually and, in either case, if the action is successful, the relator is awarded a percentage of the recovery. 31 U.S.C. § 3730.

## CRIMES AND CRIMINALS

The Beggar's Opera is populated entirely by criminals and those who associate with them.<sup>46</sup> Even Polly Peachum, the sweet *ingénue* of the plot, is well aware of her father's occupation and her soon-to-be husband's line of work.<sup>47</sup> And as with Peachum, the impeacher, and Lockett, the jailor, most of the characters' occupations or criminal specialties can be gleaned from their names. Deciphering the cant argot of London's underworld offers an interesting perspective into the types of crimes Gay anticipated his audience would recognize.

### Highway Robbery

Macheath is, quite literally, born to a life as a highway robber: his name means "son of the heath" in Gaelic.<sup>48</sup> And it is on the heaths outside London where Macheath operates.<sup>49</sup> As portrayed, Macheath is the classic gentleman robber of English mythology.<sup>50</sup> In fact, though, the type of highway robber plying his trade in London at the time was a very different figure.

A more typical example of highway robbery can be found in the trial of Edward Dalton, who was tried for theft with violence and highway robbery at the Old Bailey on October 28, 1728, eight months after *The Beggar's Opera* was first performed.<sup>51</sup> Dalton was indicted for assaulting John Dennis on the highway, "putting him in fear," and taking his

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<sup>46</sup> The exceptions to this broad statement are the Beggar and the Player who open and close the play.

<sup>47</sup> Gay makes this clear early in the play. As the Peachum family discusses the problems caused by Polly's marriage to Macheath, they are interrupted by customers in the other room. Peachum sends Polly to deal with them, instructing her that "if 'tis the Gentleman who was here Yesterday about the Repeating Watch; say, you believe we can't get Intelligence of it, till to-morrow. For I lent it to *Suky Straddle*, to make a Figure with it to-night at a Tavern in *Drury Lane*. If t'other Gentleman calls for the Silver-hilted Sword; you know Beetle-brow'd *Jemmy* hath it on, and he doth not come from *Tunbridge* till *Tuesday* night; so that it cannot be had till then." *Beggar's Opera*, Act I, Scene VIII, p. 16.

<sup>48</sup> In Scots Gaelic, "Mac" means "son of."

<sup>49</sup> Macheath appears to rob people often on Bagshot Heath. Early in the play, Mrs. Peachum tells her husband that "If he comes from *Bagshot* at any reasonable Hour, he hath promis'd to make one this Evening with *Polly* and me, and *Bob Booty*, at a Party of Quadrille." *Beggar's Opera*, Act I, Scene IV, p. 8. Gay had previously identified Bagshot Heath as a location where highway robbers operated. In his "Epistle to the Right Honorable the Earl of Burlington," Gay had written "now *Bagshot-Heath* we cross, Where broken gamesters oft' repair their loss." *Faber*, p. 153. One must wonder if Gay's repeated use of Bagshot Heath was linked to his own experience. The Earl of Burlington's Epistle narrates a journey from London to Exeter, a town in the south-west of England not far from Gay's native Barnstaple, and Bagshot Heath was on the route for coaches traveling to the south-west. *McLynn*, at 68-69. Perhaps Gay had met with Macheath-like robbers on his journeys to and from his home region. This might explain why he used Bagshot as Macheath's patch instead of more common haunts of highway robbers such as Woolwich, Blackheath, Epping Forest, Finchley Common, or Hounslow Heath. *McLynn*, p. 68.

<sup>50</sup> In keeping with the mythology, Macheath cautions the gang to "act with Conduct and Discretion. A Pistol is your last Resort." *Beggar's Opera*, Act II, Scene II, p. 25. His caution, though, has little effect: the gang sings its marching song "Let us take the Road," with its conclusion that "Our Fire their Fire surpasses, And turns all our Lead to Gold," load their pistols "and stick them under their Girdles," and march off to rob the Western stagecoach. *Id.*

<sup>51</sup> *Proceedings*, at <[http://oldbaileyonline.org/html\\_units/1720s/t17281016-53.html](http://oldbaileyonline.org/html_units/1720s/t17281016-53.html)>.

hat, valued at five shillings.<sup>52</sup> Dennis claimed that Dalton had taken his hat after Dalton had intervened upon seeing Dennis knock a woman to the ground, but several other witnesses testified that Dennis had picked up “a Woman of the Town” – a woman that turned out to be Dalton’s wife.<sup>53</sup> After hearing the evidence, the jury acquitted Dalton.<sup>54</sup>

Hardly the picture of highway robbery one might have expected. And certainly there were some “stand and deliver” highwaymen in England at the time.<sup>55</sup> But they practiced their trade outside London rather than within the city, and when they were tried it was not at the Old Bailey. This, in turn, meant that they were not imprisoned at Newgate, which adjoined the Old Bailey, before trial. As to highway robbery then, it seems that Gay’s facsimile of the Hanoverian court set in London’s criminal milieu is almost entirely fictitious.

Nor was highway robbery as ubiquitous a crime as *The Beggar’s Opera* might lead us to believe. In the ten years before the play’s first performance in January 1728, 241 people were accused at the Old Bailey of highway robbery, of whom 121 were convicted – an average of 12 a year.<sup>56</sup> Of these, 108 were sentenced to death, five were imprisoned, two were fined, two were pilloried, two were required to provide sureties for their future good behavior, one was transported, and one had punishment respited.<sup>57</sup>

### The Gang

Gay’s depiction of Macheath’s gang also seems to be less than historically accurate. Although each character proclaims his particular criminal specialty in his name – Filch,<sup>58</sup> Jemmy Twitcher,<sup>59</sup> Crook-finger’d Jack,<sup>60</sup> Nimming Ned,<sup>61</sup> Harry Paddington,<sup>62</sup> Matt of

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Interestingly, the Old Bailey heard ten other cases of highway robbery on the same day as they heard Dalton’s case. The jury found the seven defendants in the first three cases guilty, and acquitted the defendants, including Dalton, in the remaining eight cases.

<sup>55</sup> For an anecdote-laden account of some of these more traditional highway robbers, see *McLynn*, pp. 56-82.

<sup>56</sup> *Proceedings*.

<sup>57</sup> *Proceedings*. Of all the criminal activities mentioned in *The Beggar’s Opera*, only highway robbery and brothel keeping are sufficiently distinctive crimes to be identified in the *Proceedings*.

<sup>58</sup> A “filch” is described as “a staff with a hook at one end, used to steal articles from hedges, open windows, etc.” *OED* Vol. V, p. 902. The word also means “to steal, [especially] things of small value, to pilfer.” *Id.*

<sup>59</sup> The meaning of “jemmy” is confused, the term referring to a dandy, a riding boot, a light cane, a piece of cloth or coat, or a sheep’s head eaten as a dish. *OED* Vol. VIII, pp. 212-213. But in this context, it seems more likely that Gay is referring to the “crowbar used by burglars” identified as another of the meanings of the word in the *OED*. The problem with this identification is that the *OED* recognizes the first use of the term with this specific meaning as occurring in 1811. *Id.* at 213

<sup>60</sup> Presumably a pickpocket.

<sup>61</sup> To “nim” means to steal, filch, or pilfer *OED*, Vol. X at p. 423

<sup>62</sup> A footpad, not someone named for the district in London. Peachum is distinctly unimpressed with Harry, calling him “a poor petty-larceny Rascal, without the least Genius. . . .” *Beggar’s Opera*, Act I, Scene III, p. 6.

the Mint,<sup>63</sup> and Ben Budge<sup>64</sup> -- this motley band was more likely assembled for the comic effect of their names and the recognizable crimes associated with them than with any eye to verisimilitude. It seems unlikely that skilled specialists like coiners or housebreakers, who would use jemmys, would work with simple footpads, filchers, or budgers.

Indeed, it is highly unlikely that highwaymen like Macheath would work with such men either. Although highway robbery, in the more traditional, Dick Turpin-like sense used by Gay in the play rather than the real-world sense reflected by the *Proceedings*, was a crime likely to carry the death penalty without remission,<sup>65</sup> that fate was even more likely if the highwayman used violence. And violence was much more likely if the perpetrator was on foot, like a footpad, than if he was mounted, like the traditional highwayman, because the mounted highwayman could make a quick escape from the scene of the crime in a way the footpad could not.

Even though the particular type of criminal gang depicted in *The Beggar's Opera* might not have existed, there certainly were gangs of criminals operating at the time. One of these, that of John Hawkins and Ralph Wilson, was active in the early 1720s around London.<sup>66</sup> This was a remarkably active gang, with Wilson claiming that they robbed eight stage coaches in one three day period:

One Morning we robb'd the *Cirencester*, the *Worcester*, the *Glocester*, the *Oxford*, and *Bristol Stage-Coaches*, all together; the next morning the *Ipswich* and the *Colchester*, and a third morning perhaps the *Portsmouth Coach*. The *Bury Coach* has been our constant Customer; I think we have touch'd that Coach ten times.<sup>67</sup>

The Hawkins gang overreached itself, however, when it went after the mail. Wilson, somewhat disingenuously, claimed to have tried to prevent the gang from going forward.

I endeavored all I could to hinder this Attempt. I told them, that the Nature of our circumstances were such, that of necessity we were firmly attached to one another's Interest, as being all impeached together, which hindered any one designing Person amongst us injuring the other two. That that Union would be dissolved when a Promise of the King's Pardon

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<sup>63</sup> Perhaps referring to the district of London which had a reputation as a sanctuary for debtors. For a discussion of the Mint as sanctuary, see, e.g., Lucy Moore, *The Thieve's Opera: The Mesmerizing Story of Two Notorious Criminals in Eighteenth-Century London* New York: Harcourt Brace & Co. 1997, ("Moore") p. 128. Matt's name, however, is more likely a reference to the practice of coining, or the false minting of coinage. This practice was historically one of the most likely to lead to a death sentence if the perpetrator was caught. See *McLynn*, p. xii.

<sup>64</sup> A "budge" was one who would slip into a house to steal clothes or whatever he could find. *OED*, Vol. II, p. 620.

<sup>65</sup> See *McLynn*, p. xii.

<sup>66</sup> This John Hawkins might also be the John Hawkins who was acquitted of highway robbery in 1719 after the jury was apparently unconvinced of the victim's identification of the robber. *Proceedings*, <[http://www.oldbaileyonline.org/html\\_units/1710s/t17190115-15.html](http://www.oldbaileyonline.org/html_units/1710s/t17190115-15.html)>.

<sup>67</sup> *Beattie*, pp. 157 -158, quoting Ralph Wilson, *A Full and Impartial Account of all the Robberies committed by John Hawkins, George Simpson . . . and their Companions 1722* ("Wilson"), p. 17.

should be published after such a Robbery, with a Reward as usual. I told them, that the Post-House was indefatigable in their Searches after Men who had robbed them; and lastly, that we should get nothing by it but a Gibbett.<sup>68</sup>

Wilson's concerns were well-justified. Those who could provide the authorities with information about mail robberies were often offered rewards of £400 in addition to the statutory £40 bounty. In addition, those with first-hand knowledge of the robberies were offered a royal pardon if they would testify against the robbers.<sup>69</sup>

But the temptation for Hawkins, and an accomplice called George Simpson, was too great, and on April 6, 1721, they robbed a postboy, Thomas Green, and James Ladbrook (or Ludbrook) of the Bristol mail on the highway in Slough.<sup>70</sup> They stole mail, goods, money, and a horse, to the value of £19, as well as the unvalued "goods of Charles Praty."<sup>71</sup> When they later divided up the money in the mail, they discovered they had "three £20 bills, one of £25, half a £50 bill, and [two] halves of £25 each which they equally divided."<sup>72</sup>

Wilson, though, had apparently been impeached for other crimes by Hawkins' brother<sup>73</sup> and was in a mood to earn his pardon and reward. He informed against them and they were taken prisoner in a house in London ten days after the robbery.<sup>74</sup> After briefly threatening to shoot the constables who came to arrest them, Hawkins and Simpson were persuaded to surrender quietly by Hawkins' brother.<sup>75</sup>

Hawkins and Simpson sought to discredit Wilson during their trial as being an admitted highway robber who was only testifying under a grant of immunity,<sup>76</sup> and offered evidence of their good character.<sup>77</sup> The evidence was unavailing, however, and they were sentenced to death after they were both found guilty.<sup>78</sup>

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<sup>68</sup> *Beattie*, at 157, quoting *Wilson*, at 19-20.

<sup>69</sup> *Beattie*, at 156.

<sup>70</sup> *Proceedings*, <[http://hri.shef.ac.uk/db/bailey/pprocess.jsp?p\\_sur=pratly&s\\_typ=exa&p\\_giv=&p\\_ali=&p\\_occ=&p\\_link=&p\\_type=&p\\_gen=&a\\_month=00&a\\_year=&b\\_month=13&b\\_year=>](http://hri.shef.ac.uk/db/bailey/pprocess.jsp?p_sur=pratly&s_typ=exa&p_giv=&p_ali=&p_occ=&p_link=&p_type=&p_gen=&a_month=00&a_year=&b_month=13&b_year=>).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* Capitalization and the pound ("£") symbol have been altered to conform to modern usage.

<sup>73</sup> *Id.* "Wilson said to [the witness] ["I am sorry I have wronged Simpson, but I'll hang that Rogue Hawkins if it is possible, because his Brother has impeach'd me.["*Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Witnesses testified that they had lent Hawkins money at various times which he had repaid without trouble, and that after some years as a livery servant to Sir Dennis Dutry, Hawkins had been a trader in French wines and brandies. Witnesses on behalf of Simpson testified that he too had been a servant, as an under butler and footman, and that he had recently returned to London after helping a widowed sister in Yorkshire get out of debt.

<sup>78</sup> In a pre-echo of contemporary life, Wilson went on to write a book about London's underworld.

## The Women

The principal women in the play all depend on the indirect proceeds of crime for their livelihoods, Mrs. Peachum and Polly on Peachum's thief-taking and Lucy Lockit on the bribes and "garnishes" her father receives from his job as Newgate jailer. And as their names make clear, the supporting women in the play – Diana Trapes,<sup>79</sup> Dolly Trull,<sup>80</sup> Mrs. Vixen,<sup>81</sup> Betty Doxy,<sup>82</sup> Mrs. Slammekin,<sup>83</sup> Suky Tawdry,<sup>84</sup> Jenny Diver,<sup>85</sup> and Molly Brazen<sup>86</sup> – are criminals, prostitutes or, in the case of Mrs. Trapes, a brothel keeper.<sup>87</sup> These women also engage in thief taking, the flip-side of criminality, in order to supplement their income.<sup>88</sup>

Women certainly committed crimes during this period. Between 1717 and 1727, 2,248 women were prosecuted, with 398 being found guilty, 1,032 not guilty, 798 part guilty, and 20 unaccounted for.<sup>89</sup> Of the 398 found guilty, 139 were sentenced to death.<sup>90</sup> And

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<sup>79</sup> "Trapes" or "Traips" is defined, as only the Oxford English Dictionary can, as "an opprobrious term for a woman or girl slovenly in person or habits; 'a dangling slattern.'" *OED*, Vol. XVIII, p. 373..

<sup>80</sup> A "trull" is "[a] low prostitute or concubine, a drab strumpet, trollop." *OED*, Vol. XVIII, p. 609.

<sup>81</sup> "An ill-tempered quarallbone woman; a shrew, a termagant." *OED*, Vol. XIX, p. 717.

<sup>82</sup> A cant term meaning "the unmarried mistress of a beggar or rogue." *OED*, Vol. IV, p. 1004.

<sup>83</sup> A slammekin, or slammerkin, is "a slovenly female, a sloven, a slattern." *OED*, Vol. XV, p. 649.

<sup>84</sup> "Tawdry" has no cant meaning but carries with it its familiar contemporary meaning of "untidy, slovenly, ungraceful." *OED*, Vol. XVII, p. 675.

<sup>85</sup> A "diver" is a pickpocket. *OED*, Vol. IV, p. 884. Mary Young, who used the alias "Jenny Diver," was prosecuted in 1741 for theft with violence and highway robbery. *Proceedings*, <[http://www.oldbaileyonline.org/html\\_units/1740s/t17410116-15.html](http://www.oldbaileyonline.org/html_units/1740s/t17410116-15.html)>. According to the testimony, she was working with a male accomplice who immobilized the victim's arm in the guise of helping the victim over some standing water. *Id.* The victim, Judith Gardner, felt a hand in her pockets and seized hold of Young. *Id.* Although the man escaped, another woman – Elizabeth Davis – was captured after helping the man get free of the assembled crowd. *Id.* Although both women tried to pass off the blame on the unidentified man, both were convicted and sentenced to death.

<sup>86</sup> A brazen is one "hardened in effrontery; shameless." *OED*, Vol. II, p. 502. Gay's use of "Molly" in this context is perhaps more provocative than might at first appear. The word "Molly" could mean "an effeminate man" (*OED*, Vol. IX, p. 977) and "molly houses" were public houses, taverns, or private houses "Used as a meeting-place by homosexual men." Oxford English Dictionary, Additions Series (Volume 3) Oxford: Clarendon Press 1997, p. 320, quoting J. Dalton *Narr. Street Robberies* 36 (1728) "They fell in among a Company of Sodomites; one . . . told Dalton . . . that . . . if Dalton and Susan Haws would go to such a Place, naming a noted *Molly-House* . . . they would come to them." In context, the name "Molly Brazen" might well mean that Gay intended the character to represent a male prostitute. Although Fuller gives the first night portrayer of the role as "Mrs. Sallee" (*Fuller*, p. 4), it is not impossible that the gender attribution is intentionally misleading.

<sup>87</sup> Brothel keeping was a crime, but not one that was strenuously enforced. In the ten years between 1717 and 1727, the *Proceedings* reports only one prosecution.

<sup>88</sup> Jenny Diver is a pickpocket as her name indicates, Betty Coaxer admits to being a pickpocket Molly Brazen steals cloth, and Mrs. Vixen specializes in stealing lace from women. *Beggar's Opera*, Act II, Scene IV, pp. 28-29. The supporting women are also involved in the first capture of Macheath (*Beggar's Opera*, Act II, Scenes III – V, pp. 26-31) as well as numerous other men (*Beggar's Opera*, Act II, Scenes V, p. 30, and VI, pp. 31-32), and Mrs. Trapes helps Peachum and Lockit recapture Macheath in the Third Act. *Beggar's Opera*, Act III, Scene VI, pp. 51-53.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

here, women experienced two unique features of the system, one that worked for them and one that worked against them.

Women had a special mitigating factor available only to them: they could avoid capital punishment, at least for a time, if they were pregnant. This was well known to Gay and his audience: “Filch: “Sir, Black *Moll* hath sent word her Tryal comes on in the Afternoon, and she hopes you will order Matters so as to bring her off. Peachum: “Why, she may plead her Belly at worst; to my Knowledge she hath taken care of that Security.”<sup>91</sup> And Filch’s efforts to help the women in their attempt to plea their bellies is the source of some of *The Beggar’s Opera*’s ribald humor: “Filch: One had need have the Constitution of a Horse to go though the Business.—Since the favorite Child-getter was disabled by a Mis-hap, I have pick’d up a little Money by helping the Ladies to a Pregnancy against their being call’d down to Sentence.—But if a Man cannot get an honest Livelyhood any easier way, I am sure, ‘tis what I can’t undertake for another Session.”<sup>92</sup> In reality, the plea was not often successful. Between 1717 and 1727, only 53 women successfully mitigated their death sentences by pleading pregnancy.<sup>93</sup>

The other unique factor confronting women was not comical at all. Women who were convicted of murdering their husbands, and other acts grouped together under the catch-all term “petty treason,” were sentenced to be burned at the stake.<sup>94</sup> And while they were usually strangled by the hangman prior to being burned, sometimes – as in the case of Catherine Hayes – the hangman was unable or unwilling to provide this service and the woman was literally burned to death.<sup>95</sup>

## THE CRIMINAL JUSTICE SYSTEM

Once having been apprehended, either by a professional thief taker or by some other means, an accused criminal would come into contact with the full power of London’s criminal justice system. Imprisonment at Newgate was the first step, not as a punishment – although the conditions were so appalling as to constitute severe punishment in their own right – but rather as pre-trial detention. A short trial would follow, with the defendant acting in his or her own defense, and then, if convicted, punishment from a very short list – transportation if lucky, execution if not, with a few other options in rare cases.

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<sup>91</sup> *Beggar’s Opera*, Act I, Scene I, p. 4.

<sup>92</sup> *Id.* Act III, Scene II, p. 47.

<sup>93</sup> *Proceedings*.

<sup>94</sup> *McLynn*, p. 121.

<sup>95</sup> *Newgate Calendar*, Vol. III, pp. 30-40. The *Newgate Calendar* gives a detailed account of Mrs. Hayes’ death. The shocked and pious tone used by the writer of *The Newgate Calendar* does not prevent him from providing graphic details of the execution, and seems somewhat disingenuous.

## Imprisonment

After being captured, Macheath is taken to Newgate to await trial.<sup>96</sup> Here he is subjected to a series of fees in order to obtain comfortable (or, at least, more comfortable) fetters,<sup>97</sup> is visited in his cell by both Lucy and Polly<sup>98</sup>, but not by a lawyer acting on his behalf, and after a brief escape and recapture, is tried and sentenced,<sup>99</sup> and drinks himself into a stupor awaiting execution.<sup>100</sup> And while Gay's portrayal of prison life seems outlandish to our eyes, it would have seemed familiar, even a little tame, to his contemporaries.

We see Macheath during the processing for entry into Newgate when he has to pay Lockit, the jailor, ten guineas for the lightest pair of fetters available.<sup>101</sup> Even if he did not pay for the lightest set, he would still have had to pay something for his manacles: Lockit makes a point of telling Macheath that the price range runs from one guinea to ten.<sup>102</sup> Gay, who had visited Newgate on several occasions, knew well what he was talking about here. It was customary to fetter all incoming prisoners, although it seems that a sufficient bribe could persuade the jailer to dispense with this custom.<sup>103</sup>

Once inside, Macheath would likely first have been placed in a communal room. A Jacobite prisoner, sent to Newgate after the 1715 uprising, described conditions in the condemned hold where prisoners accused of capital crimes were held, and where he was first placed. "The floor and walls were made of stone and it had an open sewer running through the middle."<sup>104</sup> The Jacobite continued:

By the light of a candle, which you must pay through the nose for before it will be handed to you over the hatch, your eyes will lead you to boarded places, like those raised in barracks, whereupon repose yourself if your nose will suffer you to rest from the stench that diffuses its noisesome particles of bad air from every corner.<sup>105</sup>

After a short time in the hold – presumably to give the prisoner a sense of what his life would be like if he failed to pay any of the charges still to come – the prisoner would likely be offered accommodations in the Press Yard. The fee to enter this area was twenty guineas, with an additional eleven shillings a week in rent.<sup>106</sup> This area, at the

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<sup>96</sup> "The Gentleman, Ladies, lodges in *Newgate*." *Beggar's Opera*, Act II, Scene V, p. 31.

<sup>97</sup> *Beggar's Opera*, Act II, Scene VII, p. 32.

<sup>98</sup> *Id.* Act II, Scene IX, pp. 33-35 (Lucy), and Scene XII, pp. 39-42 (Lucy and Polly together).

<sup>99</sup> *Id.* Act II, Scene XIV, p. 62.

<sup>100</sup> *Id.* Act III, Scene XIII, pp. 60-62.

<sup>101</sup> *Id.* Act II, Scene VII, p. 32.

<sup>102</sup> *Id.*

<sup>103</sup> Anthony Babington, *The English Bastille: A History of Newgate Gaol and Prison Conditions in Britain 1188-1902* New York: St. Martin's Press 1971 ("*Babington*") p. 72., citing Anon., *The History of the Press Yard* (1717).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 73.



eastern end of the prison, consisted of large, spacious, airy rooms, and the prisoners also had the use of a paved passage as an exercise pen.<sup>107</sup>

The anonymous Jacobite prisoner was lodged in a room with three beds and some old tables and chairs.<sup>108</sup> Life there was, if not pleasant, then at least bearable. “Outside visitors came and went almost as they pleased, and ‘conviviality, was general . . . liquor being freely called for, potations were deep, and the Press-Yard of Newgate at night-time was like the taproom of a common inn.’”<sup>109</sup> The inmates even had a laundress who cleaned rooms and made up fires for a salary of one shilling a week from each inmate.<sup>110</sup>

The conditions for prisoners who had once escaped Newgate, however, were much less pleasant. When Jack Sheppard was recaptured after escaping the condemned hold, he was imprisoned in a “strong room called the ‘Castle,’ handcuffed, loaded with a heavy pair of irons, and chained to a staple fixed in the floor.”<sup>111</sup>

### Lawyers

Contemporary audiences might be struck by the absence of criminal lawyers in *The Beggar’s Opera*. Although lawyer jokes abound,<sup>112</sup> they are all to do with civil lawyers<sup>113</sup> not what we would now call criminal defense lawyers. Macheath certainly mentions the existence of lawyers in the criminal law context,<sup>114</sup> but he implies that they are ranked against him in court.

Once again, Gay is being historically accurate here: the 1728 criminal justice system had no place for defense lawyers. Trials were contests between victims and accused, and the defendant was forbidden to use a lawyer in court to aid in the defense. One reason offered for this policy was that, “[i]f falsely charged, the accused would clear himself through ‘the Simplicity and Innocence’ of his responses, whereas the responses of the guilty would ‘help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them.’”<sup>115</sup> Accordingly, trials in this

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<sup>107</sup> *Id.* at 78.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Newgate Calendar* Vol. 3, p.7. Notwithstanding these precautions, Sheppard escaped again and was recaptured only after two weeks on the run. *Id.* at 12.

<sup>112</sup> A depressing reminder to contemporary attorneys that what is true today was also true in 1728: one of the easiest and surest ways of getting an audience to laugh is to tell a lawyer joke.

<sup>113</sup> For example, Filch sings that “Suits of Love, like Law, are won by Pay.” *Beggar’s Opera*, Act I, Scene II, Air II, p. 5. And Peachum’s song “A Fox may steal your Hens” (*Id.*, Act I, Scene IX, Air XI, pp. 16-17) deals with examples of stealing and concludes “It ever was decreed, Sir, If Lawyer’s Hand is fee’d Sir, He steals your whole Estate.” After the inevitable laughter dies down, Peachum continues “The Lawyers are bitter Enemies to those in our Way. They don’t care that any Body should get a Clandestine Livelihood but themselves.” *Id.*

<sup>114</sup> “The Charge is prepar’d; The Lawyers are met, The Judges all rang’d (a terrible Show!).” *Id.*, Act III, Scene XI, p. 59.

<sup>115</sup> *Langbein*, pp. 2-3, quoting William Hawkins, *A Treatise of the Pleas of the Crown* Vol. 2 London 1721, p. 400.

period were inquisitorial rather than adversarial, with the judge questioning the witnesses if clarity was required.

The system was changing in Gay's time, and defense counsel were permitted in felony trials during the 1730s, even though they were still forbidden to address the jury.<sup>116</sup> This decision appears to have been made<sup>117</sup> in response to the developing role played by prosecuting lawyers in the early part of the eighteenth century.<sup>118</sup>

For a legal historian, the 1730s and succeeding decades are exciting times: the present common law adversarial system, with its emphasis on forensic lawyering and evidence rules to regulate the proceedings developed during this period.<sup>119</sup> But for our purposes, these developments are tantalizingly out of reach. If we restrict our view to the world as it existed in January 1728, then these future developments, fascinating though they are, are just outside our field of vision. Setting them aside, we must look at the criminal trial that Macheath would have experienced.

### Trials

Before looking at the trial itself, however, some general observations. Though things would likely look pretty bleak for a highway robber, like Macheath, caught in the jaws of the criminal justice system, the absence of defense counsel was not the calamity for defendants we might expect. Of the 6,453 criminal trials at the Old Bailey between 1717 and 1727 reported in the *Proceedings*, more than a third – 2,335 – ended in an acquittal: 87 because the accuser failed to testify against the defendant, 26 because of a procedural defect in the indictment, 7 because the defendant was found to be insane, 2 because the jury accepted the defendant's plea of self-defense, and 2,213 for non-specified reasons.<sup>120</sup>

Why it should be that so many defendants were acquitted during this time is a complex question that cannot be easily answered here. Certainly juries were aware of the draconian punishments awaiting those convicted of crimes, and they were likely to be unwilling to condemn a prisoner to death or transportation if they were unsure of the evidence. They also knew, and likely mistrusted, the professional thief catchers who, like Peachum, viewed the prosecution of criminals as a commercial endeavor. But in the absence of records or contemporary studies of jury behavior, it is dangerous to speculate as to the motivations for jury verdicts.

While we might not be able to extrapolate about jury activity in the abstract, however, the *Proceedings* allow us to look at specific verdicts and sometimes offer us an insight into the way juries reached their decisions and the strategies employed by the accused in his

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<sup>116</sup> *Id.*, p. 5.

<sup>117</sup> Langbein notes the absence of historical records documenting this common law development. *Id.* pp. 107-108.

<sup>118</sup> *Id.* pp. 111-167. The presence of prosecuting, but not defense, lawyers in court explains why Macheath complains about the presence of lawyers in his pre-trial prison scene. *Beggar's Opera*, Act III, Scene IX, p. 59.

<sup>119</sup> *Langbein* provides a valuable introduction to the rise of lawyer-based criminal proceedings.

<sup>120</sup> *Proceedings*.

or her defense. One such case is that of Giles Hill, accused of murdering Nicholas Moore, Esq., on August 26, 1719.<sup>121</sup>

The facts of the case are relatively simple. Hill and Moore got into a bar fight over a tune, “The Duke of Ormond’s March,” that Moore had asked some visiting musicians to play. The argument quickly grew heated and, as Moore struggled to get out of the booth where he was sitting, Hill stabbed him with his sword, killing him instantly.<sup>122</sup> The date of the case provides some important background here. The 1715 Jacobite rebellion was still fresh in everyone’s mind two years later and the Duke of Ormond was a noted Jacobite who had fled to France after the rebellion’s failure. Moore’s behavior – drinking to the Duke’s health because he was an “Honest Gentleman” and Hill’s response that Moore was “a Rogue and a Lyer, for [Ormond] is a Rebel to his Country”<sup>123</sup> tells us that this was a politically charged dispute.

Hill’s case was heard on September 7, 1720, meaning that Hill had likely been detained in Newgate for more than a year. Nonetheless, he was alert enough to raise a procedural challenge immediately, successfully calling for the removal of the jury foreman, Edward Jarman.<sup>124</sup> Although no explanation was given for this challenge, the political context of Hill and Moore’s dispute might well have been the reason.

The prosecution was relatively straightforward. Three witnesses testified, two of whom saw the dispute. No witness saw Moore’s sword during the incident, but all three testified that they found his unsheathed sword by his side when he was moved.<sup>125</sup>

In his own defense, Hill testified to essentially the same facts as the prosecution witnesses, adding the important detail that Moore had drawn his sword first and that he therefore drew his own sword and stabbed Moore only in self defense.<sup>126</sup> In addition, Hill called seven eyewitnesses, most of whom testified that, just as with the prosecution witnesses, they had not seen Moore’s sword in his hand during the incident, but that it was found lying beside him afterwards.<sup>127</sup> Hill also called several character witnesses “who gave him the Character of a Quiet, Civil, Courteous, Good-Humour’d Man, not given to Quarrel, but the Reverse.”<sup>128</sup>

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<sup>121</sup> *Proceedings*, <[http://www.oldbaileyonline.org/html\\_units/1720s/t17200907-47.html](http://www.oldbaileyonline.org/html_units/1720s/t17200907-47.html)>. Hill was also indicted under the “Statute of Stabbing.” *Id.* This was, for Hill, a serious problem. The Stabbing Act of 1604 provided that any person who killed another by stabbing would be guilty of a capital crime. *McLynn*, p. 38. The practical effect of this was to remove a manslaughter plea from those accused of stabbing deaths, making a conviction much more likely. *Id.*

<sup>122</sup> *Proceedings*, <[http://www.oldbaileyonline.org/html\\_units/1720s/t17200907-47.html](http://www.oldbaileyonline.org/html_units/1720s/t17200907-47.html)>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* The character witness was a crucial element of a defendant’s strategy in trials of this period. Almost all defendants, no matter how violent and inhuman the trial testimony made them appear, had one or more character witness ready to testify on their behalf. The most remarkable group of such witnesses perhaps ever assembled testified on behalf of Joseph Baretta, an Italian working in London on the compilation of an Italian-English dictionary who, like Hill, was accused of stabbing someone to death in

Interestingly, the prosecution then called two rebuttal witnesses who challenged the testimony of two of Hill's eyewitnesses, claiming that they were not at the Inn when the fight occurred.<sup>129</sup> Viewed dispassionately, this seems an odd decision: all witnesses, whether for prosecution or defense, had told essentially the same story and there would seem to be no value in challenging a story that was, in all significant details, the same as that told by the prosecution's own witnesses.

But the prosecution knew what it was doing. When the jury began its deliberations they were apparently troubled by the rebuttal testimony and were unsure whether to credit one of Hill's witnesses' testimony. In a move that would certainly startle contemporary common law lawyers, two witnesses – one prosecution and one defense – were recalled to the witness stand and “the Questions which the Jury desired were put to them for their Satisfaction.”<sup>130</sup>

After this reopening of the evidence, the jury continued to deliberate and then returned with a compromised verdict of guilty of manslaughter. The jury explained<sup>131</sup> that they believed the prosecution's evidence and indicated, correctly, that the defense testimony did not contradict the prosecution's witnesses.<sup>132</sup> Startlingly, one of the jurors vouched for one of Hill's challenged witnesses, saying that he had “known [the witness] for several years and believed he was an Honest Man.”<sup>133</sup>

Hill was sentenced to be burned in the hand, a painful branding but one that could, for a fee of course, be rendered benign by having the brand first placed in cold water before being applied to the hand.<sup>134</sup> Whether his good fortune resulted from a skilful presentation before the jury or the political feelings his case aroused is impossible to tell. A highway robber, without the patina of being a “gentleman” and without any mitigating factors like the political context of Hill's case, would more likely face a verdict of death.

### Punishment

There is little of interest to say about the process of execution in early eighteenth century London<sup>135</sup> The condemned were taken on carts from Newgate to Tyburn and hanged. Despite the ceremony and celebrations for the more popular prisoners, the result was always the same: the reprieve contrived by Gay for Macheath was intentionally

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1769. Proceedings, <[http://www.oldbaileyonline.org/html\\_units/1760s/t17691018-9.html](http://www.oldbaileyonline.org/html_units/1760s/t17691018-9.html)>. Amongst those testifying to Baretto's good character were Dr. Johnson, Sir Joshua Reynolds, Edmund Burke, Oliver Goldsmith, and David Garrick. Baretto was acquitted.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Another remarkable feature for contemporary lawyers, at least American ones.

<sup>132</sup> Proceedings, <[http://www.oldbaileyonline.org/html\\_units/1720s/t17200907-47.html](http://www.oldbaileyonline.org/html_units/1720s/t17200907-47.html)>.

<sup>133</sup> *Id.*

<sup>134</sup> Moore, p.191. How Hill escaped the death penalty under the provisions of the Stabbing Act is unclear from the account of his trial found in the Proceedings.

<sup>135</sup> This is not, of course, to say that there is nothing to say about the policies underlying such executions. But this rich vein is beyond the modest scope of this chapter.

theatrical, even in 1728, and would have been all the more amusing to the first audience because they knew such things did not happen.<sup>136</sup>

For the others in Macheath's gang, transportation was the only likely alternative to execution after a guilty verdict was returned. That certainly is the fate predicted by Mrs. Peachum for young Filch: "Poor Lad! how little does he know yet of the *Old-Bailey!* For the first Fact I'll insure thee from being hang'd; and going to Sea, *Filch*, will come time enough upon a Sentence of Transportation."<sup>137</sup>

Transportation in these days meant transportation to North America.<sup>138</sup> Under the terms of the 1718 Transportation Act, convicted felons could be transported for seven years, fourteen years, or for life, depending on the perceived severity of their crime.<sup>139</sup> Some did return from transportation, as did Ben Budge. "But pr'ythee, *Matt*, what is become of thy Brother *Tom*? I have not seen him since my return from Transportation."<sup>140</sup> If Ben returned early from transportation, he was taking a risk: early returners could be returned for a longer sentence or could be executed.<sup>141</sup>

## CONCLUSION

The draconian punishment scheme that was so much a part of the Bloody Code was intended to deter crime. But deterrence based on punishment ignores two crucial factors: hardly any criminal commits a crime with the expectation of being caught, and any punishment scheme that fails to consider, in some way, the underlying causes of criminal behavior will punish the individual but will likely have little effect in stemming the tide of criminality.

And so it proved in eighteenth century England. Transporting or executing people who committed crimes out of a desire to be criminals would, and did, have no deterrent effect on others who were similarly motivated, and punishing those who committed crimes for socio-economic reasons did nothing to mitigate the harsh conditions under which people lived and was therefore doomed to failure as a means of behavior control. The failure of punishment to prevent criminality caused politicians to add more and more crimes to the

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<sup>136</sup> Because hanging involved slow strangulation, not the broken neck of later hangings, there were some remarkable post-hanging reprieve stories. The *Newgate Calendar* tells the story of Margaret Dixon, a Scotswoman who was convicted of murdering her new born baby and hanged in 1728. *Newgate Calendar*, Vol. III, pp. 44-46. After execution, her body was cut down and was taken by her friends for burial. *Id.*, p. 46. The funeral procession stopped off for a drink at a local pub and were stunned when Dixon sat up in her coffin. *Id.* The next day, she had recovered enough to be able to walk home. *Id.*

<sup>137</sup> *Beggar's Opera*, Act I, Scene VI, p. 11.

<sup>138</sup> James Cook, the man who "discovered" Botany Bay, to European eyes at least, was not even born when *The Beggar's Opera* was first performed in January 1728 (although he was born nine months later, almost to the day) and the First Fleet of Australian transportees did not set out from England until 1778. Robert Hughes, *The Fatal Shore: The Epic of Australia's Founding* New York: Vintage Books 1986, p. 70.

<sup>139</sup> *McLynn*, p. 286.

<sup>140</sup> *Beggar's Opera*, Act II, Scene I, p. 23.

<sup>141</sup> *McLynn*, p. 286.

statute books, thus fuelling the spiraling increase of crime and punishment without any discernible effect.

That this would be the result of the criminal justice system we can observe from *The Beggar's Opera's* vantage point was not, of course, something Gay could have known in 1728. And whether there are lessons for our own time to be learned from the ultimate failure of the Hanoverian attempt to get tough on crime is the proper subject for another time.

What we can learn from this brief review of *The Beggar's Opera's* criminal context is that Gay, although not always the most accurate of reporters, gives us a picture of his time that is not entirely inconsistent with the historical record. Once the distortion of focus inherent in his choice of the criminal milieu to make his broader political point is corrected by applying a historical lens, the view we get of a segment of 1728 London's population is as accurate as any other document we have from the time. And from a playwright, that is all we can ask.

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