

CRIME AND SOCIETY FROM THE MIDDLE AGES TO TODAY.

Crime and punishment are two universal human experiences, found in one form or another in all of recorded history. However the form they take and the way they are conceived changes dramatically over time. The way we think of concepts such as crime and punishment is radically different from the way our ancestors conceived of them several hundred years ago. On the other hand there are often surprising continuities, with ideas persisting over hundreds of years despite dramatic change elsewhere. Moreover the study of crime is an activity fraught with all sorts of traps for the unwary - much of what is thought to be "fact" proves on examination to be nothing of the sort. This course looks at the changes in thinking and practice in criminal law enforcement over the last six hundred years and at major developments such as the growth of a state monopoly of criminal law enforcement and a move from restitution to retribution (nominally rehabilitation) as the basis of punishment. It does so using the various models and theories developed by various disciplines to explain the historical reality of crime, including sociology and, particularly, the economic analysis of criminal behaviour and law enforcement.

Unit Learning Outcomes:

By the end of this unit you will be expected to have acquired, and be able to demonstrate through class participation and assessment and examination, the following skills and knowledge:

- (i) An understanding of, and familiarity with, the major models used by criminologists and historians of crime to explain criminality, the forms it takes, and the workings of the criminal legal system.
- (ii) An understanding and awareness of the major methodological problems that arise in the study of the history of criminality and the criminal law enforcement system.
- (iii) The ability to understand and analyse the documentary and other evidence produced by the criminal law enforcement system.
- (iv) An understanding of the historical development of the system of criminal law enforcement in Britain from the later Middle Ages to the present day.

Syllabus Content:

The unit has the following components.

1. Concepts and Models of Crime and Society - looking at the major explanatory models and their application to the historical record, and the methodological issues that they raise.
2. Law and Crime in the Middle Ages and Renaissance - looking at the enforcement of criminal law in the absence of a state monopoly in this area, the “judicial revolution” and the gradual move to a state monopoly and retributive system.
3. Crime and modernity - looking at crime and the law in Britain after 1700, the impact of economic modernisation and the establishment of a state police force, and the enforcement of law after 1856.
4. Crime and the Law in the Twentieth Century - looking at changing patterns of recorded crime in the twentieth century, comparisons between different countries, the appearance of “organised crime”, and current trends.

Teaching Methods:

The course will be taught using lectures, directed reading, and structured small group teaching. The lectures will introduce the basic concepts for all four learning outcomes. A handout containing the main points of the lecture will be given out each week. This will also provide guidance for the programme of directed reading throughout the year, which will help to meet outcomes I, II, and IV. The small group work will use a variety of discussion formats, normally handout based. There will also be analysis of materials and readings, consisting of both primary and secondary source material. This has particular bearing for achieving outcome III, but is relevant for the other three as well.

Assessment: The assessment is 50% examination, 50% assessed work.

ASSESSED WORK:

The **assessed work** counts for 50% of the total marks for the course.

This is divided up as follows:

- (A) Attendance at, and participation in, seminars. This will be done on a scale of 1 (for attendance of less than 20% of classes) to 5 (for attendance of over 80% of classes) - 5% of total marks. So 1 = 20% (1% of total marks), 5 = 100% (5% of total marks).
- (B) An essay of 1,500 to 2,000 words, taken from the essay list. The title should be selected after consultation with the tutor. There are a variety of questions, with bearing on learning outcomes I, II and IV. The essay must be done in the Autumn term. You will not be able to do more than one essay. The essay is 25% of total marks.
- (C) In the Spring term you will have to complete an assessment or analysis of a primary source during class hours, under exam conditions. The text will be 'unseen', that is you will not see it before the test. The document will be related to the material previously discussed in the seminars and lectures. The assessment should be about 1,000 words in length. In it you should discuss the following points:
 - (1) The nature of the document.
 - (2) Its origins.
 - (3) The nature and function of the institution that produced it (if relevant).

- (4) The content of the document, its meaning and implications.
- (5) Its historical significance.
- (6) Any problems of historical interpretation that it poses.

You will get marks for knowledge of these points, understanding of them and for the clarity and completeness of your analysis. You will lose marks for purely descriptive accounts and for errors of fact or judgement. You will be given a selection of up to five documents, of which you should choose one for the evaluation/assessment. They will be given out unseen, and the assessment will be done under timed conditions, in class hours. This is timetabled for the later part of the Spring term. You will only have one opportunity to do the assessment i.e. you cannot repeat it and if you are unable to do it on the prescribed date then the same rule will apply as in the case of an examination: that is you will have either a sit or a resit (depending upon circumstances) in September. This counts as 20% of total marks.

EXAMINATION;

The **examination** is a two hour long unseen paper with a requirement to answer two questions. The exam counts for 50% of the total marks of the course. It will cover the material covered in the reading, lectures and seminars. The purpose of the examination is to assess how far you have realised outcomes I, II and IV. That is, it complements the essays. **Consequently, there is no overlap in subject matter between the essays and the examination, i.e. topics that are covered in the list of essay topics will not be covered in the examination.**

Teaching Arrangements.

Lecture Programme.

Autumn Term.

1. What is Crime ? What is Criminal Law?
2. Economic Analysis of Crime & Criminal Justice.
3. Crime and History.
4. Moral Panics & the History of Crime.
5. Witchcraft and Witch Hunts, then and now.
6. Origins of the Criminal Justice System.
7. Crime and Society in the Middle Ages.
8. A Judicial Revolution ?
9. Criminal Law In England Before 1830.
10. Private Law Enforcement 1720-1856.
11. The Rise of the Prison.
12. December Crime and Law in the 19th Century.

Spring Term.

13. The New Police.
14. The Decline in Crime after 1850.
15. The Rise in Crime Since 1955.
16. Victimless Crime and the War on Drugs.
17. The Development of Policing Since 1900.
18. Organised Crime in the 20th Century. I
19. 19th February Organised Crime in the 20th Century - II .
20. Crime, Psychology and Genetics.
21. A Contemporary Issue - Crime & Guns.
22. Debates Over Policing and Public Order Since 1900.

23. Revision Lecture.

Small Group Programme.

1. Admin.
2. Key conceptual questions.
3. Criminological models.
4. The 'Dark Figure' - Historical Criminology.
5. Moral Panics - case studies.
6. Witchcraft and Child Abuse.
7. Anglo-Saxon Law. Ordeals and Outlawry.
8. Medieval English Law.
9. Tudor & Stuart Criminal Law.
10. Torture and the Death Penalty.
11. The Idea of the "Underclass".
12. Private Police ?

13. The idea of the "new Police".
14. The Prison.
15. The Literature of Crime.
16. Nineteenth Century Police Records.
- 17.
18. Crime Statistics from the 20th Century
19. Newspaper Reporting of Crime.
20. Organised Crime
21. Crime and Firearms
22. Document Assessment/Class Test
23. Revision Session.

In what ways can the discipline of economics help us to understand the historical workings of the criminal justice system?

Given the essential features of the criminal justice system, are witch hunts and panics an inevitable feature of its working?

In what ways, if any, was the criminal justice system transformed by the "Judicial Revolution" of the 1530-1660 period?

Of the explanations given by various historians for the introduction of the New Police, which do you find most convincing and for what reasons?

Why has the institution of the prison had such a difficult and problematic history since its creation in the nineteenth century?

Is it possible to account for the dramatic decline in recorded crime rates in Britain after 1850?

What connection might there be between consensual crimes and the growth of organised crime since the 1960s?

Does the analysis made by Lott in "More Guns, Less Crime" stand up to critical scrutiny?

What does economic reasoning lead us to conclude about the nature of crime and criminal behaviour?

Why have witch hunts and panics been a recurring feature of the working of the criminal justice system?

Are historians such as Parker and Lenman justified in describing the changes to criminal law and its administration in the Tudor and Stuart period as a "Judicial Revolution"?

Was the introduction of the New Police in the form it took inevitable, or could it have taken a different form?

Why has prison administration been such a controversial topic ever since the creation of the first prisons in the 1820s?

Critically evaluate the various explanations offered by scholars for the decline in crime in Britain between 1850 and 1900.

How might we account for the dramatic growth in large-scale organised crime since the 1960s?

Do the arguments made by Lott and Malcolm concerning the impact of firearms ownership on levels of crime stand up to the criticisms levelled at them?

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Set Texts - these must be bought.

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Crime and Society.

Lecture Handbook.

Crime And Society.What is Crime, What is Criminal Law?

The above is the first question that you need to think about in the historical study of crime and criminal justice. It may seem a strange question to ask but that is because we have been indoctrinated with a particular answer to this question, which is however empirically false and almost useless for the historian.

The received answer is expressed this way in a well known legal text book:

“A crime is an act, omission or event, the commission of which is prohibited by law, and which if committed leads to prosecution by and in the name of the state rather than an individual person and, upon conviction, to punishment of some form administered by agents of the state rather than the payment of compensation”

As a description of how the system works now this is a reasonable approximation but it begs many questions and is simply not an accurate description of the situation for most of history (or in some ways today).

It has three main elements, which contain other assumptions.

(A). Crimes are acts prohibited by law. A hidden assumption is the definition of law. It is defined as ‘positive law’ or legislation, i.e. the “will of the sovereign” in Austin’s terms. In this way of thinking the notion of crime has no substantive moral content – anything can be a crime if so defined by the legislature.

(B). Crimes so defined are prosecuted by agents of the state/government, not by private individuals. The detection, investigation, and prosecution of criminals, their trial and the determination of guilt (if any) is all done by a central element of government – the criminal justice system (CJS).

(C). The result of a conviction is a punishment, not compensation to the injured party (if there is one). The point to note is that the punishments exacted by the CJS are frequently severe and mostly irreversible.

This is not an entirely accurate picture today and is severely inaccurate for most of the past.

There are several sequelae to the above way of defining crime and criminal law.

1. A sharp distinction is made between civil and criminal law, and between crimes and civil wrongs (torts). It is not clear upon examination that this distinction has any basis in morality or fact. The only real distinction is the role of government i.e. of power.
2. Because the consequences of conviction for a crime are potentially so severe, the CJS has a wide range of rules and safeguards built into it, on the principle of “better that a hundred guilty men go free than one man be wrongfully punished” which all make the procedures and methods of criminal law very different to those of civil law.
3. The definition of the concept of ‘crime’ becomes arbitrary and is divorced from other more concrete notions such as ‘harm’. It therefore acquires an ideological character and we have amongst other things the phenomenon of ‘victimless crimes’.
4. A central element of modern criminal law is the notion of *mens rea* (criminal mind) as opposed to the older focus upon *actus reus* (criminal action)

Are there ways of thinking about what crime is that are more useful? One useful concept is the Roman distinction between *Malo in se* and *Malum prohibitum*. This can lead to the following way of thinking.

A natural crime is a wrongful act (and so no different in nature from a tort) that is treated by the legal system in a distinctive way. That is, it is handled by a distinctive element of the legal system, the CJS.

The CJS, and the body of criminal law is originally not distinct from civil law (i.e. the law in general) but gradually becomes separate and distinct. This involves a growth in the role of legislation and the appearance of the second kind of crime, acts defined as criminal and punishable by the powerful or ideologically influential.

The historical story we are going to look at is the interplay between state and society in this area and the way that the CJS and the modern notion of crime and criminality came about. We will also look at the actual patterns of crime, i.e. the occurrence of delinquent behaviour of the kind that was defined as crime over time and how this changed.

Crime & Society: Why Crime – The Answer from Economics/Rational Choice.

The question which arises after considering how crime is defined is that of why it happens. Why do people carry out criminal acts (however defined)? Also, why does (recorded) crime display certain patterns, with fluctuations with regard to many other variables such as location, time, age, etc? Why are certain groups disproportionately likely to be charged with some crimes or to be victims of particular crimes (very commonly both)?

Today we will look at one very influential way of answering these kinds of question, which leads the historian of crime to ask particular questions and look for specific kinds of information. This is the “rational choice” model of human motivation. It is a general theory of human action which has a much wider application than simply the study of criminal behaviour. (It leads for example to a particular view of politics, so-called “public choice” theory). It is the basis of the “classical” criminology of Beccaria and Bentham and is the basis for the “economic” model of criminal behaviour advocated by authors such as James Q. Wilson. This way of thinking about criminality was first clearly formulated during the Enlightenment, by Beccaria, and has replaced the predominant view of traditional Western civilisation, which was based upon the fundamental idea of the inherently sinful nature of human beings.

Rational choice theory rests on these assumptions.

1. A single human nature – human beings do not differ in kind from one time and place to another or on the basis of such uncontrollable forces as climate or genetic inheritance.
2. Human beings are choosing creatures – they constantly have to choose between different courses of action. They are not primarily instinctive creatures, but are rather reflective.
3. Methodological individualism. It is individual human beings who make choices/decisions not collectivities. (The use of terms such as ‘society’ is a kind of shorthand used to avoid spelling out the process by which individual choices and preferences are aggregated.) This means that explanations for social phenomena such as crime have to ultimately rest upon an explanation for the choices made by acting individuals.
4. Human beings are (in the overwhelming majority) rational choosers. This means the following:
 - (A) People choose things they prefer/like over things they dislike.
 - (B) Subject to a law of diminishing marginal utility, people prefer to have more of what they like and less of what they dislike.
 - (C) People have transitive preferences. That is they can rank their preferences ordinally (1st, 2nd, 3rd etc) so that if they prefer A to B and B to C they also prefer A to C. $A > B > C$ means $A > C$.

The outcome of this is that each individual has a complicated hierarchy of preferences which we call a utility function. To say that people are rational choosers is to say that they will act to maximise their utility, as they see it. (That is, utility judgements are subjective. Also, preferences can only be ranked ordinally not cardinally so there is no easy way of finding out by how much A is preferred to B).

The classical form of rational choice theory is based on the hedonistic psychology of Beccaria and Bentham. What this says. Its implications for public policy towards crime and punishment. Its implications for the study of crime.

The economic model is similar to the classical one but adds an additional premise to the list, that people are generally most interested in maximising their economic well being with the least effort. This also leads to the important notion of “time preference”. This is the extent to which people are prepared to forgo utility now, in the present or near future, for the possibility of greater utility in the future.

Problems with the model. Apart from fundamental criticisms, which reject its premises, the principal ones are these.

1. The entire model has a circular, tautological quality, so it cannot be disproved or tested empirically. (A tautology is an argument where the conclusion being argued for is part of the starting premises or assumption, so making the argument true by definition.) To the extent that it is true it is only trivially true and so not useful for analysis.
2. While good at explaining crime for gain, the economic model has trouble with “expressive” crime. (The classical model has no problem here). Both find it difficult to explain impulsive, non-calculated crime (such as most violent crime). The solution is to argue that the ‘benefit’ in such cases is emotional gratification but this is problematic.
3. There is a basic problem with the assumption of rationality, even when it is defined as broadly as here. Moreover the model assumes that people are in a real sense in control of their actions.

Crime & Society. Why Crime II – The Answer From Sociology and Psychology.

This week we will also look at a set of theories that give a very different answer to this question as compared to the “rational choice” model. There is much more variety and internal disagreement but the different theories share certain common methodological premises which distinguish them from the rational choice perspective. All of these theories derive from or are part of the disciplines of sociology and social psychology. The presuppositions which they share are these.

1. Methodological holism (as distinct from the methodological individualism of rational choice theory). The assumption here is that it is meaningless or otiose to talk about individual human beings as though each particular person is a unique and self-determined creature so that we need look no further than inside the individuals head to explain their actions (or if we do look outside, only so far as to determine what incentives or circumstances had an immediate bearing on their decision). Rather, it is held that the self or identity of particular humans is the product of a net of relationships into which they are born and through and in which they live. This means that the emphasis is upon the study of the social whole, the system or structure of relations and the way it shapes and limits the actions of individuals.
2. Following this, a distinction is made between immediate or proximate causes of social phenomena and the real or underlying cause. So, for example, the immediate cause of an assault might be a row in a pub, or alternatively the effects of drink. The ultimate cause would be a structural factor of some kind such as the nature of masculinity (whether socially or genetically determined) or the social structure or ideology of modern societies. This means that explanations for criminal behaviour or patterns of crime focus on structural social explanations rather than individual agency and responses to incentives/disincentives.
3. The assigning of blame or responsibility is eschewed. Instead the focus is upon an analytical explanation of the phenomenon of crime in its totality.

All of this has far reaching implications for policy. For one thing it leads to a strong emphasis upon therapeutic measures and social reform rather than punishment. It also makes the idea of individual responsibility dubious or moot. A criticism made by policy analysts such as Wilson is that a focus on ultimate causes leads to attention being concentrated upon areas where public policy can have little or no impact, short of a total revolution (and maybe not even then), rather than on concrete measures which can have a discernible effect. As we shall see, these models also lead to a rather different emphasis in research.

There are a number of theoretical models but the main ones, to be quickly introduced, are these.

1. Socialisation theory (or sociological positivism). This theory has two starting points. The first is methodological, the belief that scientific methods of investigation, understood as the process of induction from accumulated “facts”, can be applied to the human or social world just as much as the physical world (hence positivism). The second is the belief that such study creates a scientific picture of human beings and their functioning in society. Humans are seen to have an essential, animal, nature, which is determined by biology. However this operates only as a limiting factor in social life. Instead society embodies in its ideology, belief systems, language and social practices, a system of behaviour and action which makes it possible for humans to live together. However humans being born as little animals with little more than an instinct to eat, sleep, shit, and make loud noises, have to be trained to fit into this social system. This is done via the system of socialisation.

The two key ages of socialisation are early childhood and adolescence (when the other basic instinct – to play with yourself – appears). Socialisation is carried out by a number of institutions/practices, some universal, others socially specific. Important ones are the family, school, religious institutions, and work (especially as applied to young adults through such

practices as apprenticeship). The key factor is contact between the young human and older people such as parents, older siblings, teachers, priests, and older workmates. In this way of thinking crime is a social phenomenon, a breach of social norms or practice, which arises from inadequate socialisation or, alternatively, socialisation into a value system and way of life which is in conflict with that of the majority. This means that the actual circumstances of individual crimes at the time of their commission are less important for understanding them than the antecedents of the criminal. It also implies that the purpose of a criminal legal system is essentially therapeutic or corrective.

2. Deviancy theory. This was developed towards the end of the 19th century and is particularly associated with the great French sociologist Emile Durkheim. In this way of thinking a society is defined by a set of norms or rules of correct behaviour. In order for such rules to be defined other behaviour has to be defined (or "labeled" as the literature terms it) as "deviant", i.e. as deviating from the norm. The deviant is thus actually necessary for the creation and sustaining of norms. If deviants did not exist it would be necessary to invent them. Crime is thus deviant behaviour that is treated in a certain way. This clearly raises all sorts of questions, such as who does the labeling. The research focus here is clearly on the way definitions of deviancy, and treatment of it, change over time. A contemporary version of this (so-called new deviancy theory) amends the classical argument by arguing that there is no longer a single common set of norms or public values. There is rather a set of subcultures each with its own norms and own notions of deviancy. The public space (of law and other central social institutions) becomes contested. Crime can then be seen as partly due to the clash between different systems of norms.
3. Strain Theory. This is more limited than the other models, inasmuch as it is a theory about modern society, rather than human society in general. The central idea is that in modern society certain things (such as wealth and possessions) are valued or give high social status. People thus come to have aspirations for these things. The problem is that in many cases their aspirations are unrealistic and unrealisable, due to factors beyond their control (e.g. the class structure of society, the distribution of income, their own talent, the critical role of luck). This creates a strain or mismatch between aspiration and reality. Crime is seen as a response to or result of this strain or gap. This theory is not only used to explain criminality – it is also used to explain such phenomena as suicide, depression and divorce. It can also be combined with new deviancy theory, when arguing that social problems such as crime may arise out of different social groups or categories having different aspirations, leading to strain for some groups but not for others.

All of these models lead to a different research focus as compared to the rational choice model. In general, they lead to an emphasis on relating the legal system to the wider society and upon ideological shifts rather than legal change. They also put much more emphasis upon the criminal as a person with a historic and social identity and biography, rather than as a simple choosing individual.

THE ESSENTIAL FEATURES OF "THE ECONOMIC WAY OF THINKING".

1. WE LIVE IN A WORLD OF SCARCITY – RESOURCES ARE SCARCE RATHER THAN ABUNDANT.
2. THIS MEANS WE HAVE TO MAKE CHOICES. HUMAN BEINGS ARE RATIONAL CHOOSERS. THIS MEANS ONLY THAT:
 - (A) PEOPLE PREFER WHAT THEY LIKE TO WHAT THEY DO NOT LIKE OR WHAT THEY LIKE MORE TO WHAT THEY LIKE LESS.
 - (B) PEOPLE REMEMBER AND LEARN FROM EXPERIENCE.
 - (C) PEOPLE HAVE TRANSITIVE PREFERENCES, I.E. IF $A > B > C$ THEN $A > C$.
3. CHOICES ARE MADE BY INDIVIDUALS – IT IS INDIVIDUALS THAT ARE CONSCIOUS (NO GROUP MIND) AND ACT. CHOICES ARE MADE THEREFORE ON THE BASIS OF INDIVIDUAL PREFERENCES.
4. PEOPLE RESPOND TO INCENTIVES (THESE ARE DEFINED BY THE BALANCE BETWEEN COSTS AND BENEFITS).
5. THE FUNDAMENTAL MEASURE OF COST IS OPPORTUNITY COST, I.E. THE FORGONE NEXT BEST ALTERNATIVE TO THE CHOICE YOU MAKE.
6. **NOTHING** IS COST-FREE (**TNSTAAFL**). **ALL** CHOICES INVOLVE TRADE-OFFS.
7. DECISIONS ARE MADE AT THE MARGIN. IT IS MARGINAL COSTS WHICH DETERMINE CHOICES. (E.G. CAR USAGE).
8. MARGINAL UTILITY TENDS TO DIMINISH OVER TIME OR WITH REPEATED ENJOYMENT. (THE 10TH DRINK GIVES LESS ADDITIONAL PLEASURE THAN THE 1ST)
9. INFORMATION IS COSTLY TO ACQUIRE AND TO USE.
10. CAUSE AND EFFECT IS NOT THE SAME AS CORRELATION. NOT ALL EFFECTS ARE INTENDED OR FORSEEABLE.
11. TIME PREFERENCE: PEOPLE GENERALLY PREFER BENEFITS NOW TO BENEFITS IN THE FUTURE (WE DISCOUNT FUTURE BENEFITS RELATIVE TO PRESENT ONES).
12. ON AVERAGE, MOST PEOPLE ARE INTERESTED IN MAXIMISING THEIR UTILITY. THIS IS DEFINED AS THEIR SUBJECTIVE EVALUATION OF THEIR RELATIVE PREFERENCES.
13. THERE IS AN IMPORTANT DIFFERENCE BETWEEN STATED PREFERENCES AND REVEALED PREFERENCES (I.E. BETWEEN WHAT PEOPLE SAY THEY WANT OR VALUE AND WHAT THEY ACTUALLY DO).

CRIME AND SOCIETY. CRIME AND HISTORY

1. Historians of crime face the same basic problems of evidence and interpretation as any other kind of historian. However they also have certain difficulties of their own, which arise from the nature of their subject matter.
2. The starting point is to realize that serious history of crime (or historical criminology) has to be quantitative, i.e. it has to make use of statistics. Simply looking at individual cases is useless. If they are chosen for their spectacular nature this is worse than useless, as they are unrepresentative and you end up with "Jack the Ripper history" and other such rubbish.
3. As said, serious history of crime means some kind of statistical analysis. Only then will you be able to discern any meaningful pattern or order in the data. The kind of questions you will ask and analysis you will undertake will be determined by both the availability of sources AND the kind of criminological model you employ.
4. You will need to know the answers to certain questions no matter which model you use, e.g. how many, where, when, by whom, what kinds or categories.
5. If employing the "classical" or "rational choice" model you will want to know the balance of costs and benefits faced by individual actors. This means that crucial questions are the proportion of crimes detected and/or prosecuted, convicted, punished versus the ease or otherwise of gaining from crime.
6. For the other kind of models the key questions concern correlations of criminal activity with other phenomena such as age, sex, class, economic status, and so on. An important topic for all models is the level and significance of recidivism.
7. If you stop to think about what this means you should start to see what some of the practical problems are.
8. The big problem is that of the so-called "dark figure". The difficulty is that we only know about crimes when they are recorded, i.e. when an instance of crime comes within the ambit of the CJS. The "dark figure" is the total amount of crime that happens but is not recorded and so doesn't get into the records. Sociologists can correct this through such means as crime victimisation surveys, but clearly this is not available for historians!
9. If you cannot establish the size of the "dark figure" (or to put it another way, the reporting rate), it becomes extremely difficult to interpret the figures for recorded crime. Changes or fluctuations in this figure can have MANY other causes than changes in the actual underlying rate.
10. At this point it is also worth mentioning the way that much discussion of this (and other topics as well) is marred by misuse of statistics or even outright bullshitting. Points to notice are the mathematics of probability, the difference between mean and median and the enormous difference between absolute and relative risk.
11. Another serious problem is changes in the way that records are kept and compiled. Highly technical changes in things such as definitions or categorisation can have massive consequences for raw figures.
12. Another factor is the great importance of ideology and cultural change, which can have a major effect on such things as reporting/prosecution rates. Also important (as we shall see next week) are panics.

13. Every stage/level of the criminal justice process/system generates its own kind of records. In the past, because so much of the system was driven by private decisions there are often only scanty records for many of these and it can be very difficult to trace even one case through from start to finish. The result is that to remain methodologically sound the historian often has to concentrate on just one kind of record, i.e. those produced by just one stage of the process.
14. What are those records?
15. In addition to these there are other records that can be used, which are produced by institutions not directly part of the CJS. Can you think of examples?
16. In summary. Criminal statistics are very tricky to use and interpret in any case, and doubly so for the historian. The further back in time you go (as a rough rule) the more difficult it becomes. For the period before 1830 you can't make anything other than the most general statements. What you can talk about is how the CJS works, and its relation to the rest of society.

Moral Panics and the History of Crime.

1. The concept of a “moral panic” (hereafter referred to as an MP) was developed by the discipline of sociology, as a term/concept used to describe a recurring phenomenon in modern societies (although, as we shall see, they are found in other societies as well). The concept was first articulated by Stanley Cohen, notably in his book “Folk Devils and Moral Panics”. It was taken up and applied by other sociologists, such as Stuart Hall.
2. What is a “moral panic”? It is a period of intense concern, alarm, and anxiety (hence “panic”) about an alleged problem or phenomenon, which is a threat, to something highly valued by most people, or to society in general. The threat/problem is discussed and described using the language of virtue and morality (hence “moral”), i.e. the danger is a moral one or derives from immoral behaviour by individuals or groups, rather than being purely physical. Sometimes social problems are discussed in this mode while at other times they are looked at in a quite different one, e.g. hygiene and public sanitation.
3. Moral panics have the following distinctive features.
 - (a) The panic or anxiety is intense – while it lasts.
 - (b) However it is typically short-lived and often soon forgotten. On the other hand it may recur, although when this happens there may be no ‘memory’ of earlier episodes.
 - (c) It involves the use of highly emotive language and images with a distinctive kind of vocabulary or discourse.
 - (d) A typical pattern is the use of dramatic but unrepresentative individual cases, which are not put into any kind of context and are presented as typical instances of a much more common or widespread phenomenon. There is also the systematic misuse of statistics.
 - (e) MPs frequently involve the creation/invention and labelling of a deviant group (the “folk devils” of Cohen’s title). This can be a complete figment of the imagination but sometimes people will latch onto this creation and actually adopt the imaginary entity/pattern of behaviour. Often a set of invented or exaggerated qualities is ascribed to a specific social group, usually one that is socially or economically marginal.
 - (f) The problem that is the focus of the panic is often entirely imaginary, i.e. it has no real existence at all. Even when there is a real phenomenon, its extent, scale, and significance are enormously exaggerated. So the anxiety is disproportionate or unreasonable.
 - (g) MPs are media led and generated phenomena. Historically the principal medium for the generation and dissemination of MPs is print. Today a large part is played by other media such as TV, radio, and the internet. However the medium of print is still by far the most important.
 - (h) When the MP is at its height the media treatment and reporting of the topic becomes increasingly self-referential it is the coverage itself that becomes the main story.
 - (i) Moral panics can arise spontaneously. However, more often they are deliberately created or provoked by ‘moral entrepreneurs’. These individuals or groups have two kinds of motive, ideology and self interest (although the two are often combined). Frequently such groups will seek to take advantage of or adopt a spontaneous panic.
 - (j) MPs follow a distinct pattern, starting with a particular case, which leads to a sudden explosion of interest in, and widespread reporting of, similar cases. This creates the

impression of a problem that is “out of control” (a key element) and leads to the climax of the panic. This leads to the next stage, which may be a resolution, before the panic subsides as suddenly as it arose. Sometimes however it recurs and so some panics establish themselves as a major, long lasting and often highly influential feature of public discourse.

- (k) At its height the MP typically leads to demands for action. In the past this took the form of calls for individual endeavour, mass repentance or the creation of social movements. Today the call is typically for action by the state, either through legislation or some form of government programme.
- (l) Consequently, MPs in modern societies can lead to permanent changes in the law or its administration or have a permanent impact on public perceptions or ideology.
- (m) In the short term a MP leads to a panic response by the agencies of the state (or church in earlier societies), very frequently by the criminal justice system. This then shows up in the records.
- (n) Each historical period has its own distinctive theme for MPs, which reflect underlying widespread anxiety (see below). Today the two main kinds are to do with health and children. One theme that recurs constantly is the supposed threat posed by the dissolute members of the lower classes.

4. Why though do MPs happen? There are a number of explanations.

5. They tend to attach themselves to social problems that are actually diminishing instead of getting worse. (Spencer’s Law).

6. They are a form of anxiety displacement or compensation at the collective level.

7. They reflect the increasing importance for people’s view of the world of vicarious (as opposed to actual) experience.

8. As we have already said, they are promoted and started, or taken advantage of, by organised groups who stand to gain from them or have motives for starting them. These may be self interest or ideology, or (commonly) both.

9. They meet an increasingly acute need on the part of the modern mass media.

10. They often serve the concrete needs of ruling elites or dominant classes.

11. How this idea is useful for historians and particularly historians of crime. Quite simply, it can be used to explain episodes in the history of criminal law and its enforcement that would otherwise be difficult to account for. It can also explain large scale changes or episodes in that history and major shifts in ideology.

Witch-Hunts and Panics.

Witch hunts and panics or crazes about particular crimes are a recurring feature of criminal justice systems. They arise because of the interplay between social anxieties or moral panics and specific features of the CJS, above all its procedure.

Two basic points to understand, which will come up many time on this course.

1. Criminal justice is best understood as a process, with six distinct stages.

Definition. Detection (Reporting). Investigation. Prosecution. Determination (Trial). Resolution.

Each of these stages involves decisions. The most important stage in many ways is the fourth one (Prosecution) because it is the decision to prosecute that leads to an incident becoming a case within the formal institutions of the CJS.

2. The people who make this critical decision (who may be magistrates, individuals, police or prosecutors at various times and places) have enormous power. This means that what they believe is of enormous significance.

Most of us have heard about the great witch hunt of the early modern period (c 1480-1720) which produced many thousands of trials and a mass of records. Examination of these records reveals a distinct pattern or structure. If you remove the particular details or content you have an abstract pattern of a witch hunt. This pattern can be observed in many other instances than literal witchcraft, including some very recent ones.

The pattern of a witch hunt is as follows.

1. An initial accusation.
2. An initial arrest and investigation or interrogation.
3. This leads to a confession which is highly structured, produced by suggestion/leading questioning, and which incriminates other individuals.
4. These other individuals are then also arrested and interrogated.
5. They also produce confessions, which both confirm the first one and incriminate yet more persons.
6. This leads to mass trials, involving many defendants.
7. More significantly, it leads to a cascade of accusations and a rapid growth in the number of cases. This produces panic and paranoia in both the public and the law enforcers.
8. The hunt comes to an end when a number of things happen. The accusations begin to target respectable members of the elite rather than marginal people. The accusations become particularly extravagant, and even the most credulous have trouble believing them. The higher levels of the CJS become involved. There is a conscious decision by the top level of the elite that the hunt has served its purpose (many witch hunts are cynically and deliberately instigated by rulers or elites for highly pragmatic reasons e.g. Stalin's terror in the 1930s: they can however take on a life of their own).

One thing to grasp is the critical importance of the 'gatekeepers'. It is their beliefs and decisions that determine if the whole process gets going past stage 1.

How though does this have anything to do with the way the CJS works? The answer is the interaction between wider social anxiety and the key procedural features of **any** kind of CJS.

1. Criminal justice, unlike civil law, produces outcomes/penalties that are both severe and irreversible. Consequently, in order to prevent the serious injustice of wrongfully punishing the innocent, the procedure of the CJS has all sorts of safeguards built in. In particular, in cases where there are no independent witnesses or other evidence (i.e. it is one person's word against another's) the benefit of the doubt goes to the defendant.
2. At any time there are some crimes that are regarded as particularly grave or morally repugnant.
3. Often such crimes are by their nature hard to prove because of the procedural features of the CJS.
4. Consequently, such crimes will be prosecuted at very low levels or convictions will be rare or difficult.
5. At some point a moral panic arises or is created about such a crime. The central allegation is not just that the crime is more frequent than its incidence in the records would suggest (possibly true) but that it is **much** more common, in fact widespread (almost certainly untrue). A frequent aspect of this is redefining the crime in such a way that lesser but related kinds of offences/behaviour are conflated with the more serious version, so giving the impression that it is much more widespread.
6. This leads to demands that changes be made to the procedures of the CJS with regard to this crime, in order to make convictions easier to obtain. The most frequent are relaxing the rules on testimony, making use of 'trawling' (i.e. inviting accusations or even encouraging them) reversing the burden of proof, and giving greater weight to the accuser's word than the defendants. However there is no move to reduce the severity of the punishment.
7. At this point or earlier the 'gatekeepers' either become convinced of the truth of the panic or find it convenient to act as though they do. This leads them to take accusations seriously, to act on them and bring prosecutions when they might otherwise not have done so, and to devote more resources to this crime than before. This leads to more cases, confirming the idea that there is an 'epidemic' of this kind of crime and feeding the panic. If the rules of the CJS have not been changed the main outcome will be many acquittals leading to more pressure (often successful) for changes.
8. At this point there are two possible kinds of outcome, depending on the nature of the crime that is the subject of the panic.
 - (A) Some are typically carried out by individuals acting on their own. Here the outcome is a 'craze' in which there is a sudden upsurge in accusations and cases. There may not however be an increase in convictions if the procedure is not changed or if the lay public (as represented by jurors) or the higher levels of the CJS (judges) do not share the beliefs of the 'gatekeepers' (police officers, social workers, prosecutors, magistrates, coroners etc). Examples of this kind of crime are infanticide and sexual assault/rape, or sorcery (during the middle ages).
 - (B) Others are seen as collective crimes which involve the cooperation of several people, so that they are done not by individuals but a group. This leads to the very powerful notion that there is an organised conspiracy of some kind, an 'underworld' opposed to accepted standards of good, often supposed to

include many powerful, apparently respectable people. Here the outcome is reliance upon confessions or dubious testimony and the classic witch hunt. Examples of this are heresy, witchcraft (in Europe but not elsewhere), political dissidence, incest and child sex abuse, many crimes of morality.

The early modern witch hunt is therefore just one example of a wider phenomenon. The criminal justice system tends to amplify the effects of such panics enormously – compare this with comparable panics about matters such as health, which are dealt with by the civil courts. The most dramatic recent example is child sex abuse, particularly the episode of ‘Satanic ritual abuse’ in both the U.S. and Great Britain in the 1980s.

The Origins of the Criminal Justice System and Law and Order in the Middle Ages.

1. The period after the collapse of the Roman state (the so-called "fall of the Roman Empire") sees the appearance in England (and elsewhere in Europe) of a kind of legal system that strikes us today as bizarre or barbarous. In fact it was effective and sophisticated but it was very different from the one we are familiar with. In particular, there was no distinct criminal justice system, nor did government or legislation play any great part.

2. Does this mean that Anglo-Saxon England was lawless? Not at all! On the contrary, it was a highly lawful society, with an elaborate legal system. (There is no case known to history or anthropology of a human society without a legal system. In fact we may say that the defining feature of a society as opposed to a mere collection of individuals is that they live under a common rule of law. In the absence of law we have what political scientists and philosophers call a "state of nature", memorably described by Thomas Hobbes as the "war of all against all".

3. As said however, while A-S England had law it did not have a distinct criminal law. Instead there was a single, undivided legal system. The basis or purpose of this system was simple. It was to resolve interpersonal and intergroup disputes in such a way as to minimise conflict, above all violent conflict. This is the basic function of all legal systems, reflecting certain basic features of our nature as human beings and of the world we live in, above all of scarcity of resources and the propensity of human beings to violence.

4. The social context of the A-S legal system had a number of features that were vitally important for its functioning. These were: the organisation of society on the basis of extended households and large kin-groups, reflecting the persistence of such practices as concubinage and consanguineous marriage: the reality that this was a society in which all free men (and many unfree ones) carried personal weapons as a matter of course: the enormous importance of public standing or reputation ("fame" as it was called), which was something solid and real in a way that is not true now: the existence of dispersed personal knowledge of the actors in legal disputes: the lack of any large urban centres - most people lived in small rural settlements. They were not immobile however, as reading of the sources and other evidence reveals.

5. The ultimate default enforcement mechanism for disputes at this time was the blood feud. At first sight this seems a barbarous institution which could lead to trivial disputes engendering widespread violence. In fact it had the opposite effect. The cases of savage feuds found in such works as Njal's Saga were commemorated in this way precisely because they were exceptional. Blood feud raised the cost of unresolved disputes to a very high level and gave everybody involved a powerful incentive to resolve things peacefully.

6. This was done through the legal system. Disputes between individuals or groups, of any kind, were resolved through a process of mediation. The central institution was the "moot" (literally "meeting"). There were three different moots, the folk, hundred and shire moots. These were not hierarchical, so folk moots were not courts of first instance with hundred and shire moots courts of appeal. Instead they dealt with disputes of different kinds or involving different kinds of people. Folk moots handled disputes between people from the same community, hundred and shire moots ones between individuals from different communities or of higher social status.

7. The procedure was simple. A plaintiff would ask the elders to call a moot to hear the case. The court would be "fenced" which meant that an area would be literally fenced or marked off, often with a rope. By stepping over the rope and entering the court (the word "court" means a confined or defined space) you bound yourself to accept the decision of the moot and not to resort to violence while within the bounds, no matter how mad you were or became. The defendant would be "summoned". Originally this literally meant that you would be called, someone would shout your name out. If necessary this would be done by relay (qv the famous Monty Python sketch,

which makes fun of a part of modern court ritual descended from this).

If you were the other party you then had a choice. You could enter the court and take part in the process or you could refuse to do this. This was a risky course to take, as it meant you might be outlawed (see below). The court or moot consisted of a number of people, maybe even the entire adult community. It would be presided over by someone of high standing not connected to either party. Both sides would give their case and witnesses would confirm or deny the story. The court would then debate the matter and reach a decision. In doing this they would be guided by the memory of previous decisions in comparable cases and by their own knowledge of the particulars of the case.

8. The outcome of the decision, if the complaint was allowed, was almost always the reconciling of the parties and the payment of compensation by the party found to be in the wrong. This happened even in cases that we would see as criminal such as serious assault and injury or even homicide. The amount of compensation varied according to the severity of the "skaith" or harm and the social status of the injured party. The aim of the compensation was to restore the balance that had been upset by a wrongful or negligent act, and to act as an alternative to revenge via violence, which might trigger a feud.

9. Some very important points about this system.

(a) The primary aim was not punishment but the maintenance of social order by the resolving of disputes and the commutation of revenge into compensation of some kind.

(b) The procedure had none of the features that we associate with a criminal trial - there was no high standard of proof, the previous record and reputation of the accused was well known to the court and was an important part of the proceedings.

(c) The burden of compensation (or "wergild" as it was called) fell upon not only the accused but also his kin ("kith and kin" in the A-S expression). In minor cases this did not matter but the compensation for a serious injury or homicide could be considerable. It could be paid in money, in kind (frequently in livestock) or by indentured labour (which meant the loss of free status).

(d) The use of the death penalty was exceptional and rare (see below). Corporal punishment (meaning whipping) was often used, particularly in cases involving "thralls" (slaves) or those with no means.

(e) The system worked in such a way as to make use of the scattered and dispersed knowledge about both the particular case and the nature and character of the parties. (This is what "reputation" is in economic terms - think about how credit ratings work.)

10. There were a number of institutions that dealt with difficult cases or problems, particularly those cases where the facts were in dispute or could not be clearly established.

(a) If an accused party denied the general thrust of the charge or an important particular, he could "purge" himself by swearing an oath before the moot. This was a very serious step. Both pagans and Christians regarded swearing falsely as about the worst thing you could do and something that would surely bring a fearful punishment in the afterlife (even more so in the pagan case). More practically, to swear an oath when your audience suspected strongly that you were foresworn would destroy your reputation utterly and would make your future life almost impossible - nobody would ever trust you again.

You could support your own oath by the practice of "compurgation" or "oath helping" where you got friends and relatives of yours to swear that your oath was true. Their willingness to do this (given that they faced the same situation as you did with regard to the consequences of swearing falsely) added credence to your own oath in the eyes of neutrals and even your accuser.

(b) The ultimate sanction in a disputed case was an ordeal. These could only be conducted with the assistance of a priest and this was one reason why they were infrequent. The main ordeals were those of hot iron, cold water, hot water, and bread. In theory the ordeal was an appeal to the highest authority (God) to establish the truth of the case. This strikes the modern eye as particularly bizarre (worth thinking about how many of our institutions would survive scrutiny however). In fact, as other examples of this kind of procedure from other times and places reveal, the real point and purpose of the ritual ordeal was different. It was a ritual by which an outcome based on (typically) very strong suspicion or circumstantial evidence could be legitimated so that it would be generally accepted and would not lead to violent conflict. In other words it was a face saving device.

11. The enforcement of the law and of verdicts was in the hands of the community as a whole. The main mechanism was the "hue and cry". This meant that if you discovered a crime, either during or after the event, you had to make a great noise to raise the alarm and chase after the malefactor. It was a serious offence not to do so. Everyone hearing the hue and cry had to join in - in practice this meant the organisation of a posse to chase after the suspect. This was linked to a right of summary justice, known as the right of "sac and soc" or "infangthief and outfangthief". A thief caught "with the fang" i.e. with the stolen goods in his possession, or a killer caught "redhanded" i.e. with blood on his hands, could be executed on the spot (although this seems to have been rarely exercised).

12. The ultimate sanction, for people who refused to cooperate or were particularly obstreperous or malevolent was outlawry. This meant that you were formally pronounced to be outside the law, meaning that you were cast out of society. From that point you had no rights of redress - people could do anything they liked to you and every man's hand was against you. This was done by a ritual involving the blowing on three occasions of a horn (hence the expression in use until the 18th century of "thrice horned" for the ritual) followed by the announcement of the ban. Sometimes people sentenced to this were let go but branded with the mark of a wolf's head, hence the use of the term "wolveshead" for outlaws. Life as an outlaw was not happy and often short (a bit like being the "Running Man"). Your best bet was to go to Constantinople and become a Varangian guard.

13. This legal system was effective and subtle. It made use of and coordinated widely dispersed "tacit knowledge". It relied upon a dispersed and localised mechanism of enforcement. Above all it created a set of very powerful incentives, the effect of which was to encourage people to resolve disputes, even very serious ones, in a peaceful way while also enforcing the good of justice by restoring situations (as far as possible) to what they had been before a wrongful act by a process of restitution.

14. The role of the king and its gradual expansion. In "dark age" Europe kings were not the powerful figures they later became. Their role in the legal system was initially very limited. Like all of the Germanic rulers of the time A-S kings issued Law Codes. These are essentially lists of penalties. They should not be confused with the legislative enactments of later rulers, whether by promulgation or Parliamentary enactment. These were clarificatory and advisory documents, intended to provide guidance for moots and to prevent the emergence of contradictory precedents in important cases. They also dealt with the relatively small part of the law that concerned the king's own affairs and those of the Church. However, during the later tenth and eleventh centuries the role of the king expanded.

15. This had two bases.

(a) The king always had a peculiar jurisdiction over his own house and anyone in it. (He was not unique in this - one of the principles of the law of the time was that the male head of a household was king in his own home). So if anyone committed an offence under the king's roof the case would be tried in his court. Initially the organisation of this court was similar to that of the moot -

the king only presided over it and had to accept its decisions even if he didn't like it - see the accounts in medieval epics such as Mallory's *Morte D'Arthur* or the *Poema De Mio Cid*.

He also had a special jurisdiction over the four main Roman roads so that an offence committed on or near one of them fell under his jurisdiction. Gradually these two jurisdictions were expanded to cover the entire kingdom via the concept of the "king's peace". The crucial element in this was the argument that the king's power over his own household ("dominus" from "domus" or house) extended over the entire kingdom, so that the entire kingdom was in some sense his household. This meant that offences against another individual were *also* offences against the king.

(b) There was always a short list of offences that were exceptional inasmuch as they did not result in payment of compensation upon determination of guilt. These were "bootless" crimes. (Originally "botleas", "bot" was the A-S term for compensation of all kinds arising out of a dispute). The four "bootless" crimes were treason, rape, arson, and murder. Some of these terms need defining. Treason meant firstly killing the king or trying to do so. It also meant "hamesucken" i.e. attacking anyone within their own home, and parricide i.e. the killing of your father or master. These were "low treason" or "petty treason" as opposed to "high treason". Murder meant a special kind of homicide, specifically one done in secret rather than before witnesses (in particular it meant a killing done at night time, hence the repeated use of the expression "under cloud of night" in murder indictments until well into the 19th century).

These crimes attracted a penalty of death or demembration or as the A-S put it "of life and limb". The reason was simple. These were all offences in some sense not just against a particular person but rather the entire community because they had implications reaching beyond the individual victim. Treason had wide implications because it might lead to civil war and because of the belief in the sacral role of the king. Murder and rape were both offences that could lead to unjustified suspicion, intense anger and conflict, not least because they were difficult to resolve. Arson is self evidently a crime against the wider public, particularly in a society without organised fire protection. Kings managed to establish that these crimes were their own peculiar jurisdiction and they became "*placitae coronae*" or "pleas of the crown".

The combination of these two factors and their use by kings meant the emergence of a new specialised element of the legal system, which dealt (initially) with serious crimes and certain other offences. This is the origin of the criminal justice system as a distinct and separate part of the overall legal system.

16. This is often presented as being an important onward step in the march of progress. The usual gloss is that the move by kings to establish a royal jurisdiction over certain kinds of offence represented the removal of vengeance from the private sphere to the public one. In fact the real motive for this aggrandisement was much simpler - money. Every case tried in a royal court led to the levying of a fine (as well as other punishment) and/or the charging of fees. All this meant extra revenue for the king.

Of course this was not popular - why start to pay for something that had been effectively free before and also the result was no longer compensation so the only one to benefit was the king - and so there was resistance or lack of cooperation. Consequently the early years of the system were marked by brutality and extortion, which in turn led to a backlash and reforms. The other critical thing to realise is that right from the start, many of the penalties exacted by criminal courts were both severe and irreversible. This had profound implications and effects. Finally it is worth pointing out that the new procedure had the fatal problem that it gave no incentive for any process that could collect the scattered and tacit knowledge found in the community, unlike the older system where this had been central to the entire process.

17. The actual story of how the legal system evolved is a complex one which has also caused much debate among historians. There is however a truly definitive work in this area *The History of English Law to the Time of Edward I* by F. W. Maitland (known officially as Pollok and Maitland,

even though the other author was only responsible for one part of one chapter). One major argument has been over how much change was brought about by the Norman conquest of 1066, but most historians now think that in this area the impact of the Normans was not that great (with the exception of the 'murder fine' and trial by battle). The really critical figure was the first Plantagenet king, Henry II.

18. The initial establishment of a rudimentary royal criminal justice system seems to have taken place under Edgar and Cnut. It was further developed by the Norman kings, particularly Henry I. Following his death there was a reaction (in this as in much else) under his successor Stephen. Henry II radically reconstructed the system and refined it, the critical date being 1166 when he promulgated the *Assize of Clarendon*. This set up firstly a series of "forms of action" to deal with disputes among the landholding elite over matters to do with title to land and ecclesiastical benefices (the main ones were *Mort D'Ancestor*, *Novel Disseisin*, and *Darrein Presentement*). These involved the purchase of a writ in standard form from the royal chancery, with the particular details filled in, which instructed the royal officer in the locality concerned to establish the facts of the matter by calling an inquest.

This procedure, when applied in criminal cases led to the development of the criminal jury. The other thing he did was to establish the system of justices in eyre, which was to remain in place until 1271. Instead of there being a single royal court presided over by the king himself or his delegate (the justiciar), representatives of the king (justices) were sent out into the shires to ride around a circuit or eyre with the country being divided up into several such circuits. Everywhere they went they would call an inquest which would be asked to identify any outstanding legal disputes in the area (the aim being to identify the cases that could either generate revenue or lead to serious disorder if unresolved). This became the origin of the grand jury (an institution that no longer exists in Britain but continues in the United States). They would then hear the cases. When not out on circuit they sat at Westminster and exercised jurisdiction over any cases brought before them plus the business of London and Middlesex.

19. Initially, the extortions of the Angevin kings led to such resentment that eventually it led to a rebellion. This led to the signing by King John of the *Magna Carta* in 1215, with as one of its central points the principle that the law had to be done according to a procedure and bound the king's agents as much as anyone else.

At the same time, in England as elsewhere in Europe, there were important developments in legal procedure. These arose from the nature of the emerging criminal justice system and were produced by the other main force behind change in this and other areas, the Church.

20. Initially the Church had supported the aggrandisement of royal jurisdiction. The Church also undermined the old system in two crucial ways.

For several centuries it waged a relentless campaign against the older family system, particularly against such institutions as concubinage and "irregular" marriage, as well as marriage to close relatives. The result was a radical transformation of the family and household system, as reflected in the language, which removed a crucial element of the old system. (There were almost certainly other factors behind this enormous social change, some believe the apparently trivial fact of the invention of gunpowder was the key).

The other was its increasing hostility to ordeals, which made it almost impossible to perform them. Finally, in 1214, at the Second Lateran Council, participation of the clergy in ordeals was banned. This meant they simply stopped. This was not a simple matter of progress and enlightenment however. For one thing the more civilised measure favoured by the Church as a way of establishing the truth was torture. Moreover, the effect (and major motive) of this change was to remove a critical power from local communities and put it into the hands of clerics and kings.

21. However there was also increasing conflict between the secular and religious authorities. The church had its own legal system (canon law) and, faced with the need to find an alternative to the ordeal and other traditional practices they came up with a set procedure for legal cases which became known as the "*ordo judiciarum*". This was based upon the practice of canon law courts which was justified by a gloss upon the events of the Fall as described in Genesis.

Essentially it contained most of the elements that we now associate with a criminal trial. Gradually it came to be adopted by secular courts, in matters criminal in particular. The reason for this was straightforward, the fact that the criminal law led to such severe results and frequently displayed an enormous imbalance between the two parties to a case.

22. The other ruler who played a major part in the development of English law was Edward I. He reformed the royal courts and created a single set of judges, the so called King's Bench. He also systematized many traditional law enforcement practices in the *Statute of Winchester* in 1285, while abolishing others. Through the *Statute of Praemunire and Provisors* he settled the division between clerical and secular courts. The other principal measure he was responsible for was the promulgation in 1278 of the *Statute of Gloucester*, usually called the *Quo Warranto* statute. This established the principle that the king was the "fountain of justice" and also put a stop to the phenomenon of "franchise creep".

Everywhere else in Europe (including Scotland) franchises or heritable jurisdictions grew in numbers and power, some becoming "regalities" which excluded the royal jurisdiction entirely, so leading to a system of legal pluralism. In England by contrast, although there were some franchises their jurisdiction did not expand (most were abolished in the 1530s) and most of the country was subject to a single system of royal justice. England was thus a unitary state in a way that no other European kingdom was, except possibly for Sicily. Wales and Ireland had their own distinct legal systems, marked by massive private power in Wales in the shape of the special jurisdiction of the Marcher Lords, and the persistence of an older stateless system of law in Celtic Ireland (the "Brehon" system), in the great part of Ireland which was 'beyond the Pale'.

A Judicial Revolution?

1. By the 13th century a new system had emerged from the reforms of the Angevin period and later rulers such as Edward I. Unlike in the Saxon system (and the Brehon system in Ireland which continued for much longer), royal courts were a central institution and the old community "moot" courts died away as recognised institutions. There was also the start of the distinction between matters civil and criminal, although initially this was not at all clear (see below). However the medieval system was still very different from the one we now have and much of the pre-1166 system survived or was surreptitiously revived.

2. There are several points to note.

(a) Although the Crown had established a peculiar jurisdiction over matters of life and limb, the majority of offences fell outside that orbit. They were dealt with either informally (in the great majority of instances) or by the many other courts which came to exist alongside royal ones. Resort to the law became a matter of last rather than first choice, given its cost and other problems.

(b) There were many other courts besides the Crown ones. Church courts had an extensive jurisdiction but were limited in the penalties they could impose. Their right to try all clerics (rather than their being taken before Crown courts) even in serious cases was established as a result of the huge row between Henry II and Thomas Beckett (culminating of course in the latter's murder). This was later limited by Edward I via the *Statute of Praemunire and Provisors* to first offences only but was still a substantial limitation of royal power, given the number who counted as "clerics" and the ease with which clerical status could be claimed. This all resulted in the institution of "benefit of clergy" which would continue well into modern times. Churches could also limit the exercise of Crown criminal jurisdiction through the right of sanctuary. There were also private courts or "heritable jurisdictions" as they were called. The commonest were courts leet or manorial courts (one of which ran Manchester until 1828). More significant were franchise jurisdictions such as the Honour of Wallingford, and Counties Palatine. In England the number and scope of these was limited by the impact of the *Quo Warranto* procedure enacted by the *Statute of Gloucester* and by dynastic accident but in Scotland and Wales these became very significant. Many cases were handled by the Law Merchant (Lex Mercatoria) through courts of "Pie Powder" while corporations such as guilds and universities also had their own courts. Finally incorporated boroughs also had their own jurisdictions.

(c) The royal jurisdiction itself was complex, due to the existence of the system of equity courts (the Court of Chancery) alongside common law ones. (The two Common Law High Courts were Common Pleas for civil cases and King's Bench or Assizes for matters criminal). The Exchequer also had its own court which often heard cases that would have otherwise gone to the Court of Common Pleas or the King's Bench/Assizes, through the legal fiction of the Writ of *Quominus*.

(d) In all of the other courts and in crown courts for crimes not involving a penalty of life or limb, compensation remained the normal outcome of many cases. This was now known as "assythment". In the case of church courts penance was the normal result (this could be severe BTW).

(e) The hue and cry remained the principal law enforcement mechanism but was now supplemented by the office of parish constable. Another important innovation was the creation by Edward III of the office of Justice of the Peace. Outlawry also remained an important institution, with the formalised escape of "abjuring the realm".

(f) The inquest, originally an inquiry or exercise in determining the knowledge of an event to be found in a community (cf the continuing case of coroner's inquests) developed into two central institutions, the Grand Jury and the Petty Jury (trial jury). However trials clearly did not have the adversarial procedure that we know today and the judge took a much more active role.

3. The sixteenth and seventeenth centuries saw a major change in the legal system and particularly its criminal element, throughout Europe. In their introductory essay to *Crime and the Law* Lenman and Parker speak of a "Judicial revolution". In England this took a different form to that found elsewhere in Europe (including Scotland) because it did not involve a "reception" of Roman law. This change had the following main elements.

(a) A pronounced shift in power away from the community and private or other courts to royal ones.

(b) A big increase in the number of cases handled by royal courts - this was not only due to transfer of business from other courts.

(c) An increased reliance upon legislation and the systematisation of the law with professional lawyers emerging as key players.

(d) A move towards a much harsher and more punitive system and a distinct shift from restitution to retribution as the central feature of the CJS.

4. In England the crucial changes take place under the Tudors, particularly under Henry VIII in the 1530s. In Scotland the two vital periods are the reign of James VI and the period 1690-1710. Important parts of the changes in England are the Franchise Act, the Welsh Act of Union and the progressive increase in the power and role of JPs. Other changes which do happen on the continent, such as the move to an inquisitorial system and the widespread use of judicial torture, do not happen in England because of the opposition they provoke and because the means chosen by the Crown to move in this direction (the expansion of prerogative jurisdictions such as the Star Chamber) is brought to an abrupt halt in 1641.

5. An important part of the context for all of this are the severe social problems facing Tudor and early Stuart government particularly the serious problem of vagabondage, itself a symptom of widespread rural underemployment and the impact of both population growth and inflation.

6. By the middle part of the 17th century in England and the early 18th century in Scotland, you have the system of criminal law that would survive until the great reforms of the mid and later 19th century. While growing out of the medieval system and preserving many of its elements there had been a distinct shift, from community and private law to public jurisdiction. However there was one major exception to this as the investigation and prosecution stages of the CJS remained almost entirely private. You also have the growth of the idea of the "free born Englishman" and an ideology in which the law (or a romantic notion of it) plays a key part. The central figures in this are Sir Edward Coke CJ, and Sir William Blackstone.

The Old Order in Criminal Law (1660-c1830).

1. After the 'Judicial revolution' of the Tudor and early Stuart periods there was a long episode of institutional stability in the English CJS. In Scotland there were major changes between 1690 and 1710 but stability thereafter.

2. The CJS that emerged from the reforms and upheavals of the 1480-1660 period was the 'Old Order' that was to be swept away in the 19th century. As such it was the object of fierce criticism by nineteenth century reformers such as Whitbread, Romilly and Brougham. This has shaped much of the historiography until very recently and led to its domination by a 'whig' narrative of a backward order replaced as part of a move to a more enlightened civilisation. This picture is now being corrected.

3. To reprise, the 'judicial revolution' was much more limited in England and Wales than in many parts of the Continent. In particular there was no 'reception' of Roman law (unlike Scotland) and the growth of courts based on the royal prerogative rather than common law and employing the inquisitorial procedure rather than the adversarial jury trial was cut short in 1641. So much of the procedure and institutions of the medieval system created by Henry II and Edward I survived. You also have the distinctively English phenomenon of the survival of forms and language while the reality and practice to which they referred had changed. However we can still discern a number of important shifts - a growth in the power and activity of royal courts, the decline or outright abolition of private jurisdictions, a systematic attempt to prevent the private and informal settlement of disputes, a much larger role for formal legislation (after 1530 almost always Parliamentary), and a pronounced move in the direction of retributive punishment rather than restitution.

4. Between 1500 and 1815 the CJS became steadily harsher and more punitive. The punishments were physical and public. Frequently they were designed to inflict shame and disgrace as well as, or instead of, physical pain. Hence the use of punishments such as the pillory and stocks, the prominent part played by public processions, and "rough music". The purpose of public punishment was threefold.

(a) To act as a deterrent for onlookers.

(b) To articulate and reaffirm a set of values shared by the observer/participants which the offender had violated.

(c) To identify the wrongdoer in the eyes of the community so that they could be recognised subsequently (very important in a society without a 'criminal record' and which relied heavily on reputation as a social mechanism).

5. The death penalty had a central place in all of this. It was always public (cf Dr Johnson's remarks on this) and was surrounded by an elaborate ritual. From being a rare and severe punishment in the Middle Ages it became the 'default' form of punishment for an ever wider range of offences - at least in theory.

6. Between 1500 and 1815 the number of crimes attracting the ultimate sanction increased steadily, peaking at c250. Parliament also acted to make the penal code more severe by (a) changing the definition of offences, most notably by lowering the threshold for grand larceny, and (b) by seeking to eliminate loopholes in the law, above all by putting an ever increasing number of offences into the category of 'felony', which meant they did not attract 'benefit of clergy'.

7. Yet despite this the number of people hanged remained stable or even declined in per capita terms. There is clearly a conundrum here.

8. The first level explanation is that the workings of the system made it a minor miracle that

anyone was ever charged and convicted and if convicted hanged. How then was the system organised after c1660?

9. The detection and investigation of crimes and the bringing of prosecutions was almost entirely in the hands of individual victims. There were Parish constables but they were a standing joke (cf Dogberry in Henry IV pt2 and Henry V). Consequently many cases were never investigated while the rising cost of prosecution deterred action even in cases where the perpetrator was known.

10. A criminal case was initiated by the application for a 'criminal letter' or 'bill of indictment'. This was a formal document, issued by the Chancery, which gave the details of the case (time, place, nature and circumstantial details of the alleged crime), the name of the plaintiff and the name and details of the accused. This employed highly formulaic and often antiquated language (e.g. the use of the expression "under cloud of night" in a murder indictment or reference to "effusion of blood" in an indictment of assault. The indictment instructed the magistrates (JPs) to summon a grand jury and the parties together with any witnesses who were either named or had their names appended to the original bill.

11. The grand jury was the lineal descendant of the jury of presentment created by Henry II in 1166. It decided not guilty, but whether there was a sufficient case to answer. It did so by finding a 'true bill'. A grand jury would be called by the bench of magistrates for a county or borough according to the quantity of business, so one grand jury could hear several indictments. NB Grand juries were deliberately selected where possible from people with personal knowledge of the actors in a case so as to make use of dispersed knowledge and such matters as reputation. If the grand jury did not find a 'true bill' then the indictment lapsed.

12. If the grand jury found a true bill then the accused would either be arrested and confined to the County gaol or be forced to find surety, to appear before the next Assize or the Quarter Sessions of the County or Borough. Accused persons who absconded or failed to turn up at all would forfeit any security and could still be outlawed (this was now more of a civil penalty but still a serious nuisance). If caught they would be confined to gaol until trial.

13. The Quarter Sessions were the meetings, held four times a year, of the entire bench (or 'Commission' as it was called) of the County or borough. It conducted a large amount of business in addition to its judicial function. They would deal with minor cases directly while the more serious ones would be referred to the Assizes. In such cases the magistrates would handle the administrative details such as the obtaining of testimony and the securing of the accused.

14. The Assize court sat three times a year and tried all cases sent to the by the Quarter Sessions or by coroner's inquests as well as some that came direct from a grand jury. The trial was presided over by a high court judge (of the Court of King's Bench) sent out on eyre. The verdict was given by the 'petty jury' i.e. the trial jury empanelled for that particular trial (again wherever possible this was drawn from the locality where the crime was committed to make use of local knowledge). Trials were swift because lawyers were often not involved and because much of the evidence was in the form of sworn depositions or affidavits rather than oral testimony. The verdict for many years in Scotland was in the form "Proven" or "Not Proven" rather than "Guilty" and "Not Guilty" - this through a series of accidents has left Scottish criminal law with three possible verdicts i.e. "Guilty", "Not Guilty", and "Not Proven". The judge's role was much more active than is the case today and he frequently took on the role of a defence counsel, conducting the cross examination of any witnesses who appeared.

15. The trial procedures and rules of evidence enormously favoured the defendant (as they still do in many ways). One feature of this was the regular collapse of cases because of minor technical faults in the indictment or procedure.

16. The jury played a central part and had much wider powers than is admitted today. Until 1967 verdicts had to be unanimous in England (not so Scotland). Juries had the power (which they still

have although official theory denies it) of "Jury Nullification" i.e. to find in the face of the law if they believed that the law itself or its strict enforcement violated natural justice in a particular case. They also had the power (which again they still have) to find in the face of the facts, i.e. to bring in a verdict of "not guilty" even when the evidence of guilt was overwhelming. This happened constantly and became more frequent as the 18th century went on. [The situation today remains that juries have the sole discretion as to what verdict to render and cannot be asked to explain the basis for their decision. The government is proposing to change this]. Juries also had a power (which they no longer have) to 'vary the charge' i.e. to acquit on the original charge but bring in a guilty verdict on a lesser (non-capital) one. Again this was very common, the most frequent example being juries reducing a charge from grand to petty larceny by declaring the value of the stolen goods to be one penny below the threshold - again often in flagrant contradiction of the facts.

17. Even if after all these barriers had been surmounted the accused was convicted of a capital crime, he frequently had recourse to 'benefit of clergy'.

18. Even if that were not the case, many capital sentences were commuted to a lesser punishment (commonly transportation) or were set aside entirely. This was done by the regular use of the prerogative power of mercy (now in the hands of the Home Secretary) through the issuing of a royal pardon.

19. This is a first level explanation. However it isn't enough. Why did the system work this way? Why have such severe punishments if they were not used in the majority of cases and even in most that came to trial? Douglas Hay puts forward a Gramscian explanation in his article "Property, Authority and the Criminal Law" in the collection *Albion's Fatal Tree*. The working of the system is explained as being a central part of an elaborate system of ideological control or hegemony. In response John Langbein and Peter King point out weaknesses in Hay's argument and empirical problems with it, above all that most jurors and plaintiffs were not from the elite but the "middling sort" and that all of the crucial decision making powers were (at this time - marked contrast to today) in the hands of ordinary people.

20. As King and Langbein point out, there is a simpler explanation, first spelt out by Radzinowicz. For various reasons (including the opposition of the elite after the 1530s to informal and extra-legal settlement of disputes and their continuing opposition to a state police force) only a small part of all the crimes that happened led to their perpetrators being brought before a court. Consequently to maintain a given level of deterrence punishments had to be more severe. However after a certain point this became counter-productive, as the severity of punishment itself deterred people from pressing charges, grand juries from finding true bills and juries from bringing in guilty verdicts, while encouraging the ever more frequent use of pardons to mitigate the severity of the "Bloody Code".

Private law Enforcement Before 1856.

1. As mentioned in previous weeks, before the mid 19th century the investigation and prosecution of crimes was for the most part in the hands of private individuals.

2. The system faced two problems, both of which became more acute as time went on.

(a) A knowledge problem - the knowledge needed to discover who was responsible for a crime, find them and convict them in a court of law when it existed at all, most often did so in the form of dispersed, often 'tacit', knowledge. This made it very costly to collect or obtain. This problem was initially made worse by urbanisation and increased mobility, both of which increased the incentives for people to commit crimes by making it easier to convert stolen goods into cash and by increasing anonymity and so undermining the important role of reputation.

(b) A problem of incentives. By 1750 the cost of investigating a case and bringing it to the assize courts was on average about sixty pounds - at a time when average income was about a pound a week! This meant most people simply could not afford to bring cases. Even when they could, in many cases of theft the value of the stolen goods was less than the cost of bringing the case so the incentive to bring one was extremely weak. Basically you had to be both affluent and vengeful. Parliament went some way to addressing this in 1723 by establishing the County Allowance which paid 50% of the costs of a case out of public funds but this was not enough to make a real impact.

3. However between about 1750 and 1840 a number of institutions arose spontaneously which addressed these problems by means of voluntary mechanisms and by altering the incentives facing both criminals and members of the public generally. Greater urbanisation and improved communications (by turnpike, canals, and, latterly, railways) also made voluntary cooperation easier by reducing transaction costs and also reduced the costs of acquiring information.

4. The first was the use of rewards. These were of two sorts, public (further subdivided into generic and specific) and private. They worked by giving members of the public who were third parties an incentive to come forward i.e. they were an information gathering device. They also gave third parties an incentive to investigate crimes and catch criminals and so led to

5. The appearance of private detectives and thieftakers. Most of these were honest but the system of rewards did also create perverse incentives for corrupt behaviour where the thieftaker was in fact the person responsible for organising the theft in the first place - this was satirised by Henry Fielding in "*Jonathan Wild the Great*" and by John Gay in "*The Beggar's Opera*". There was also the problem that as the main source of information about criminals was other criminals thieftakers had to have close and often friendly relations with dubious people. This is an unavoidable problem however and is still a feature of full time state policing - see later classes.

6. The use of newspaper adverts from about the 1720s onwards. John Brewer has made several important studies of this. These show that in cases where the value of stolen goods was high adverts made both the apprehension of the criminal and the bringing of a prosecution more likely. Again this is an information gathering device that reduces the cost of finding information - compare to contemporary cases such as "*Crimewatch*" and (in a different context) the impact of the internet on second hand book sales.

7. The most significant development however was the appearance of Associations For The Prosecution of Felons. (See my article in D. Beito (ed) "*The Voluntary City*" for a summary of the work on this topic). These were voluntary societies or clubs, funded by subscription, usually local, which paid for the cost of investigating and if possible prosecuting a crime out of the subscribed funds. Some also paid the value of stolen goods if they could not be recovered so they acted as insurers (they would of course reinsure this risk). A member of an association would have a metal plaque affixed to the outside of their house which would be a substantial deterrent, as any

potential burglar would know that a prosecution was MUCH more probable in such a case. There were several thousand prosecution associations, ranging in size from 40-50 members to as many as 700 (in the case of the famous Barnet Association). The fees were low and well within the range of people of moderate means.

8. These associations worked by sharing the risk of incurring the cost of bringing a prosecution over a larger number of people/years. By doing this they substantially increased the likelihood of a prosecution being brought by changing the incentives facing individual actors. The deterrent effect of this on crime in general and the increasing provision by associations of such services as neighbourhood foot patrols meant they provided a "public good" of law and order. This contradicts mainstream economic theory which holds that "public goods" can only be provided at acceptable levels by government because their quality of "non-excludability" gives rise to a "free rider" problem. Prosecution associations got round this problem by "bundling up" the private excludable good of insurance with the "public good" of order.

9. By the 1830s there was an extensive and increasingly organised network of institutions and we can discern the outlines of a system of private policing, which on the evidence was working to resolve the problems described above. Its main features were:

(a) Localised

(b) Made use of dispersed and tacit knowledge through the use of incentives.

(c) Provided a neighbourhood (or public) good of order and law enforcement.

(d) Voluntarily funded (i.e. not by taxation).

(e) Responsive not preventative.

(f) Concerned only with crimes that had victims NOT with consensual or victimless crimes such as moral offences (prostitution, blasphemy, drunkenness, gambling) or political offences.

Crime and Law in the Nineteenth Century.

1. The nineteenth century saw extensive and fundamental changes in the law both civil and criminal and particularly in the enforcement of criminal law. This was one part of the general 'modernisation' of the British state that took place between the 1820s and the 1890s. You must be careful however not to take the arguments of the nineteenth century reformers uncritically, as they themselves presented them, and to 'buy in' to their own view of themselves as the 'enlightened' battling against the forces of obscurantist reaction. This view has dominated much of the historiography of the nineteenth century in general but is increasingly questioned. Also, while there was considerable change there was also much continuity, as the legal profession was able to fight off the more radical reform proposals. Consequently we did not get a codification of the law, nor was the demand for a national police force successful.

2. The first area of change was in the understanding and conceptualisation of law and crime, i.e. an intellectual change. The crucial figures in this were Beccaria, whose *De Pene ei Delitti (Of Punishment and Crime)* is probably the most influential work ever published in the area of criminological theory, and Jeremy Bentham who through his arguments and analysis had a profound effect on many aspects of nineteenth century Britain. His followers, usually known collectively as the "Philosophic Radicals", played a major part in most areas of political, administrative and social reform. (Leading figures were James Mill, Edwin Chadwick, J. A. Roebuck, Edward Grote, Harriet Grote). The changes to note for us are these.

(a) The decline of a religious framework for the analysis of human action, including delinquent acts and its replacement by a secular one derived from a naturalistic conception of human nature. NB - this took a very long time and religious notions, particularly those associated with Evangelicalism, remained influential until about the mid 1880s.

(b) The ideas, derived from Beccaria and extended by Bentham, of a hedonistic psychology, i.e. that humans are motivated to seek pleasure and avoid pain. This replaces older notions of inherent sinfulness and moral frailty. It means that human behaviour can be directed by the creation of incentives and disincentives.

(c) Applied to criminal law this leads to the idea (the core of classical criminology) that the way to control and reduce criminal behaviour is by reducing the possible gain and increasing the possible cost, for the criminal. This means that the key factor is not so much severity of punishment as certainty of punishment i.e. the likelihood of being caught, if caught prosecuted and if prosecuted convicted and if convicted punished.

(d) Law and other human institutions are seen as human creations, designed to meet human needs, instead of being seen as an aspect of a social order that rested ultimately upon a divine sanction or one derived from 'natural law'. In other words there is the appearance of a rationalist view of the law and other institutions which sees them as the product of design or as capable of improvement by rational analysis and design.

(e) Certain specific ideas of criminality are formulated at this time. Some are still with us, such as the notion of 'juvenile delinquency' and the idea of criminal behaviour as the product of a specific kind of social circumstances or environment. Others, such as the idea of a 'criminal type' identifiable by physiognomy or other characteristics, are no longer considered respectable, although they are still articulated.

One very important development is that, as the century progresses, the concept of crime is 'demoralised' for many of the intellectual elite, though not for the mass of the population. This is associated with a development that takes place after 1890 and during the 20th century, i.e. the rise of the therapeutic notion of the state and the CJS, as opposed to the older 'justice' based conception.

(f) An old idea that gains a new lease of life is that of what we now call the 'underclass' although the Victorians commonly use the (in some ways more revealing) term "the residuum".

(g). The upsurge in rationalist (and in particular utilitarian) ideas does lead to a reassertion or reformulation of older or contrary notions. Older Christian ideas are reformulated, above all by Evangelicals, in the form of the idea of 'character' and the (very powerful) belief that to rely upon hedonistic incentives alone was futile as they had to be supplemented by 'moral reform' or 'character building'. The idea of a legal system as the product of a rational design, whether in fact or potentially via codification, was attacked by the 'historical school' of jurisprudence (derived from the German scholar Savigny), who emphasised the nature of legal systems as the outcome of a process of unplanned evolution - "the product of human action but not of human design", and so like language and many other human institutions.

3. There are major changes in the organisation and structure of the Judiciary. Many of the older jurisdictions and courts are simply swept away. This culminates in the Judicature Act of 1873 which completely reconstructs the judicial system. The one failure of the reformers is that they do not get a codification of the law, following the example of France under Napoleon. The changes in this area are much greater in civil, as opposed to criminal, law, not least through the abolition of the separate jurisdiction of Chancery.

4. There are however significant changes in criminal procedure. Among the most important are:

(a) The abolition of the Grand Jury

(b) The increasing involvement of professional prosecuting and defense counsel, particularly the latter.

(c) Changes in the rules of evidence. In particular defendants are allowed to give evidence on their own behalf under oath after 1893 and those 'interested' in the outcome of a case (such as spouses) are also allowed to testify.

5. There are massive changes in the penal code and the system and nature of punishment. These are associated above all with two Whig politicians, Sir Samuel Romilly, and Henry, Lord Brougham (the latter was Lord Chancellor). The key features of this change are

(a) A sharp decline in the use of the death penalty.

(b) A general decline in physical, corporal, punishment and its replacement by 'mental' punishment, above all incarceration.

(c) The appearance of the prison as an institution.

(d) Punishment loses its public character (which had been a major feature of the old order created by the 'judicial revolution') and takes place out of sight. The last public hanging is in 1867.

6. A radical change in the way crimes were investigated and prosecuted. This is, of course, the creation by a succession of governments of both parties, of the 'New Police'.

The New Police.

1. The biggest single change in the CJS during the 19th century is the creation of the New Police, i.e. of a full time, uniformed police force paid for out of general taxation. This is a massive change (and was so seen at the time). It is important to realise what the main feature of this change was. It was a huge shift of decision making power and responsibility for law enforcement from ordinary people to the state and its agents. Before the nineteenth century 'policing' (i.e. general law enforcement) was regulated by the *Statute of Winchester (1285)* by which Edward I had systematised traditional practices going back to Saxon times. It laid a general responsibility on all members of the public, and communities, to enforce the law and to investigate breaches of it. All members of the public had the power and responsibility to enforce law (this survives in the vestigial power of "citizens' arrest". They were supposed to take it in turns to act as Constable, the Constable being a parish official with the responsibility of organising his community to see the law was enforced and investigating crimes. (In practice this system had broken down and was being replaced by the emerging institutions such as prosecution associations).

The creation of the police takes this power and responsibility away from the general public and gives it to paid agents of the state. Originally police officers only had the same powers as members of the public, with the one critical exception that they were immune to civil action for wrongful arrest and detention. They were simply paid to do it full time. Also members of the public retained (and still have) the power to bring a private criminal prosecution. So originally the police were meant to be a supplementary force. However they rapidly took over the entire function of investigating and prosecuting crimes (as their critics had predicted), due to the phenomenon of 'crowding out' that tends to occur whenever the state provides a service of some kind. Moreover their powers have been steadily extended to the point where they now have the legal power to do things that would render any member of the public liable to prosecution, whether civil or criminal.

2. The creation of the New Police was enormously controversial and, on the evidence we have, very unpopular with large parts of society. It was strongly opposed by figures from all social groups and both ends of the political spectrum. This is why it took such a long time, from the earliest formulations of the notion in the 1760s to the County and Borough Police Act of 1856.

3. The way the police were created is a classic example of the way major change generally takes place in Britain, and shows all of the classic features.

(a) It was elite driven and not done in response to any widespread popular demand.

(b) It was achieved not by a single radical 'big bang' but by a succession of gradual, piecemeal but cumulative changes.

(c) It was to a great extent the creation of an organised intellectual minority and of pressure group politics.

(d) However these were only able to succeed because members of the political elite in key positions were persuaded (notably Robert Peel, Lord John Russell).

(e) There was repeated use of two classic techniques of political manipulation. These were the use of 'rigged' enquiries and investigations that purported to be impartial (notably the 1839 *Constabulary Report*) and the floating of radical and far reaching proposals for change as 'frighteners' to weaken resistance to less radical changes that were what had been intended all along.

(f) As well as being driven mainly by elite concerns, the whole process reflected the problems and anxieties not of the country as a whole but of the Metropolis (London and Middlesex) and, to a lesser extent, the rural South-East. This is also true of other major social reforms, such as the

reform of the Poor Law in 1834.

4. The chronology of the creation of the New police was broadly as follows.

1751 Henry Fielding makes the first suggestions for reform in "An Inquiry...." (see the extracts in the collection of texts).

1797-1806 Patrick Colquhoun publishes a series of editions of "*A Treatise on the Police of the Metropolis*" in which he formulates the full blown idea of a full time paid and preventative police force.

1798 Private action organised by Colquhoun creates the "Marine Police" to patrol the London Docks. These are put on a public footing by the Thames Police Act of 1800.

1815-1828 A series of Parliamentary Select Committees carry out enquiries into "The Police of the Metropolis" (i.e. London and Middlesex). These culminate in

1829 The Metropolitan Police Act, put through by Robert Peel (then Home Secretary), and setting up a paid, full time and uniformed force responsible directly to the HS for London and Middlesex.

1835 Parliament passes a 'Permissive Act' as part of the reform of municipal corporations, giving boroughs the power to raise rates to sustain a paid force, if they wished.

1839 A similar measure is passed for Counties.

1838-1839 The *Royal Commission on Constabulary* enquires on and reports into the state of policing in both counties and boroughs. Dominated by Edwin Chadwick it ignored the bulk of the responses to its surveys and enquiries and presented a picture of a chaotic and collapsing system while calling for sweeping reforms, including the creation of mandatory police powers, possibly on a national basis. It called for one officer per 1,769 head of population or per 4,403 acres (whichever was higher).

1853 A further major enquiry by Parliament.

1856 The County and Borough Police Act made it mandatory for all local authorities to have a full time police force (no fewer than thirteen major boroughs still had no police force by this date). The Act also set up the Home Office Inspector of Constabulary to enforce minimum uniform standards across the entire country (i.e. in England and Wales - Scotland and Ireland had their own systems). County police forces were responsible to a committee of the JPs for the county and the county council (after 1883) while borough forces were responsible to the watch committee of the borough council. This kind of set up was the standard method adopted by the Victorians, i.e. local provision and control but national supervision to enforce a minimum standard. This is also found in education, the poor law and sanitation among other areas of social policy. It survived in policing until a major shake up in 1967, which effectively took police forces out of the hands of local authorities.

5. The new forces had certain qualities which are easily ascertained from the records. Low pay, high turnover, substantial problems of discipline which were dealt with by adopting a paramilitary kind of organisation were among the most notable. There were strikes in most police forces at one time or another (e.g. in London in 1872 and 1890)

6. All of the advocates of the New Police had called for something called "preventative policing". This derived from a number of notions, in particular the ideas of an underclass and a hedonistic psychology. It implied a particular style and method of policing. This was indeed followed in most places when the New Police force was first set up.

7. However the result everywhere was that the New Police were very unpopular. This manifested itself in widespread assaults on police officers or even anti-police riots and very little cooperation between police and public. "Preventative" policing proved to be ineffective and even counterproductive. Consequently it was abandoned and even though political pressure might lead to its revival in certain times and places it was never sustained.

8. What developed instead was a form of "responsive" policing very similar to the kind that had been developing via private action through prosecution associations but with the constant additional element of the enforcement by the police (often in a capricious way) of laws against 'moral offences' or 'victimless crimes'. Essentially the police switch from being focused mainly on the maintenance of order in public places to the investigation and prosecution of crime (which was not what they were originally intended to have as their main function).

The key element was the development of the detective branch as the main investigative arm of the police force, particularly in London. Another important element in this process is the development of both properly organised criminal identification records (helped enormously by the invention of photography) and the idea of a 'criminal record' and the status of being 'known to the police'. Some key dates are:

1842 Detective Department is set up by the Metropolitan Police Commissioner.

1878 Becomes the Criminal Investigation Department, providing a model followed elsewhere.

1882 Special Branch of the Metropolitan Police is set up (to deal with Fenians).

1895 Fingerprint Directory is set up (by Sir Francis Galton).

9. This means that the institutional development of the British police is significantly different from what happens on the Continent. In that case, there is a clear institutional division of the main policing functions between a gendarmerie responsible for public order and keeping order in public places (with a paramilitary division for riot control), and a specialized criminal investigation force. (Sometimes the traffic and road police are a third distinct force). In the UK all of the functions are combined, rather uneasily, in one single force.

10. The number of police officers per head of population rises steadily in most areas. In London rises from 8,500 in 1868 to over 15,000 in 1886.

11. One obvious puzzle is this. If there was no widespread popular demand for the New Police and much opposition why did it happen? To put it another way, why did the elite support or accept the idea? Historians have generally put forward three broad classes of explanations.

(a) The traditional argument put by historians such as Reith and Tobias, that it was a pragmatic response to a problem of rising crime and the breakdown of the old system in the face of rapid social and economic change, above all massive urbanisation.

(b) The argument of others such as Hobsbawm and Silver, that it was a response to concerns about public order, which began with the Gordon Riots but became much more acute after the French Revolution and with various movements after 1815 such as Luddism, "Captain Swing" and (later) Chartism. The need was for a way of maintaining public order that would not raise the stakes in the way the use of troops did.

(c) The argument of authors such as Steedman, Storch and Rumbelow that the critical factor was a widespread belief that society was facing a moral crisis with crime only one of the consequences of this and with the police an agency of moral reform and supervision of the 'dangerous classes'.

Other historians such as Emsley and Phillips combine several of these arguments. All of the explanations have strong points but they all have weaknesses.

The Rise of the Prison.

1. Apart from the New Police, the other major innovation in the criminal justice system during the nineteenth century was the appearance of the prison as the central element of the penal aspect of the CJS. Prisons do not exist before the nineteenth century, they are a modern innovation. What you have before then is gaols, that is, places of safekeeping for people awaiting trial or sentence to prevent them absconding or to detain a limited number of people for whom incarceration is the punishment (usually political offenders). In terms of their organisation and internal regimen these are nothing like prisons, which are structured total institutions with a highly organised regime and a quite different kind of goal or institutional purpose. Above all prisons have two functions that gaols do not have, they are both penal and reformatory.
2. The change in the nineteenth century had two aspects. The first was the decline and eventual near disappearance of physical and public punishment, which had been a central feature of the criminal justice system since the 'Judicial Revolution' of the Renaissance. Instead there is a shift to psychological and private punishment. The appearance of the prison as the main agency to replace public corporal punishment was the second aspect of the change, reflecting a shift in the nature of government from a residual household and clientage based system to a modern institutional and bureaucratic one, and a shift in its perceived purpose from a penal and war-making one to a therapeutic one.
3. One of the things Henry II did in the Assize of Clarendon in 1166 was to set up a system of County and Borough gaols. These were for holding people who had been caught committing crimes or were suspected of the same until they could be brought before the Justices in Eyre. This system broadly continued until the early nineteenth century. The largest and most famous gaols were in the Metropolis, notably Newgate, the Fleet, and the Bridewell. The gaols were crowded, unsanitary and unhealthy, with high death rates due to infection, above all typhus ('gaolhouse fever'). They were also unstructured as regards their internal regime. The prisoners were not segregated by either age, sex, or severity of charge or previous record. There were no rules about clothing (no uniform), no regular hours, while prisoners could bring in food and drink at their own expense along with such things as newspapers, reading materials etc. They were places of confinement where the only real requirement was that they should be secure. These gaols came under severe criticism in the later 18th and early nineteenth century from a number of reformers, notably John Howard and Elizabeth Fry. They advocated changes such as segregation of the different categories of prisoners, higher standards of cleanliness and space and more activities for the inmates (of a religious or morally elevating nature) but they did not propose a fundamental change in the nature of the institution nor its being made into the main form of punishment for convicted criminals.
4. The idea behind the prison was articulated in 1801 by the English philosopher Jeremy Bentham, in a short book called *Panopticon*. This set out a model for a kind of total institution, the aim of which was to bring about a change or transformation in the outlook, character, mentality and behaviour of the person subjected to it. Bentham argued that this method or type of institutional practice could be applied to a school, workhouse, or factory as much as to a reformatory penal institution – a prison (revealingly called a penitentiary in many of the early writings on the subject). The central elements of this idea were no communication among the objects of the regime (so no peer group influence) and constant surveillance of the objects by a small number of supervisors or monitors, this being made possible by the physical design of the fabric, typically a central point or Argus (after the 100 eyed giant of Greek mythology) surrounded by radial blocks or wings. The regime itself was marked by segregation of the occupants, and strict timekeeping along with rigid prescription of every detail of activity (so no choice of any kind on the part of the inmates) and the use of work. The idea was to literally take apart

- the personality and identity of the inmate and reconstruct it to re-form them. In other words the idea was to use a highly structured environment and regime with the psychological pressure of constant surveillance to programme the person to adopt a new kind of behaviour and character in a way that would become automatic and unthinking. In Bentham's own words it was to be "a great machine for grinding rogues into honest men".
5. Bentham's ideas had an immediate and dramatic impact both inside and outside the UK (they were particularly influential in the US and Latin America). One reason for their reception was that they provided an alternative to the increasingly discredited penal code. If you were going to abandon capital punishment, whipping, branding etc something had to replace them. The idea of a reformatory penal system filled that gap nicely.
 6. In Britain the first model prison of the new kind was built at Pentonville in 1828. It was soon followed by many others all over the UK. All of the famous prisons such as Wormwood Scrubs, Wandsworth, Walton, Armley, Wakefield, Dartmoor, Winston Green, Strangeways, and Barlinnie were built to this design. The new prisons had a central round tower with viewing platforms with multi-story radial cell blocks in which the cells were in rows looking into a central well that went from the lowest floor to the roof. The cells were built so that the inmate was isolated in a secure and soundproof box and unable to make contact with other prisoners. (Under the 'separate system' as it was called any contact or communication between prisoners was not only prohibited but made impossible by a variety of expedients, of which universal solitary confinement was only one). The design of the prison also totally isolated the inmates from the outside world so that they were cut off in a sealed and regulated environment. All prisoners wore uniform and were addressed only by number not name (cf *The Prisoner*) and all had to conform to a uniform, unchanging, and strict timetable. They also had to work.
 7. The Victorians soon discovered that the system did not work in the way it was intended to. Bentham had thought it would be self financing as the work of the prisoners would generate income (compare to the practice of modern totalitarian regimes such as Nazi Germany, Soviet Russia and Communist China in their systematic use of slave labour via a large penal system or the increasing practice in countries such as the US, UK and Netherlands of using inmates in commercial and public prisons as contracted labour for e.g. airline bookings) but this did not work out, as the economists had warned. The separate system led not to reform but insanity and in particular compulsive masturbation which was **not** what was intended. They also discovered from a series of scandals that leaving prisons under the control of local authorities and therefore allowing democratic input into their management led to serious mistreatment of and brutality towards inmates.
 8. The result was that in 1877 Parliament passed the Prison Act and effectively nationalised the prisons, taking them away from local authorities and creating a single national Prison Service for England and Wales under the Home Secretary (Scotland and Ireland had their own systems under the Irish Secretary and Secretary of State for Scotland) with the system run in a rigidly centralised fashion under a single Director General. The first DG was Sir Edmund Du Cane. He introduced a regime that would last until the early 20th century. He stopped the separate system, made the warders adopt a paramilitary form of organisation and behaviour (this was to keep the warders under control), and introduced a system based upon harsh conditions and 'hard labour' (i.e. repetitive and exhausting but unproductive labour such as turning the crank or the treadmill) plus a penal system in which many crimes attracted a custodial sentence, even minor ones, but the sentence was typically short (less than a year, often just a few weeks).
 9. However in 1895 a Royal Commission reported on the prison system and recommended sweeping changes. This was the Gladstone Report (after the Chairman Herbert Gladstone the son of **the** Gladstone) and its recommendations were put into effect by the 1920s and have dominated official policy ever since. The Report recommended that

prisons move from the basically punitive (i.e. punishment oriented) regime of the Du Cane system to one oriented more towards reform. However the original Benthamite idea of reform by a controlled environment was now discredited so it recommended a reformatory system based upon education and counselling.

10. However the years since 1895 have seen a series of crises and a cycle of unresolved argument about the nature, purpose and effectiveness of the prison system. This reflects a fundamental problem with the whole idea of the prison once the original Benthamite idea is revealed as a chimaera. The difficulty is that the prison ever since its creation has had to combine three different functions which are at odds with each other. If any one is dominant it leads to a quite different kind of prison service and regime than would apply if one of the other two were dominant.
11. One idea is that the primary purpose of prisons is confinement on the basis that somebody in prison is not in a position to commit crimes. If this is the basic philosophy then the internal regime is a matter of indifference as prisons simply become secure warehouses or hotels. This is to some degree the philosophy followed in the US since the late 1980s and (to some extent) in the UK since 1992. However it is difficult to apply this to a large number of people, i.e. the majority of convicted criminals, because of the cost given that consistent application of this philosophy would lead to large numbers of people being detained for long periods to stop them offending. In practice, given competing claims on the public purse, elected politicians are not prepared to put enough resources into the system to make this its general philosophy. It would be possible to make this the operating principle of the system if prison was used only for a small number of very dangerous and/or evil people who would be detained for long periods for public safety but that would require there to be an alternative to prison for the great majority of convicted criminals, and this has proved problematic in a democratic political system where the elite also rejects non incarceration based punishment (such as corporal punishment) – see below.
12. Another idea is that the primary purpose of prison is punishment, i.e. that prisons should be primarily punitive institutions. This would produce something like the regime set up by Du Cane with many people going to prison but typically only for short periods (this is because of the cost of long sentences and because the punishment of a long sentence under this regime is too severe for most crimes). The problems with this are those identified in the Gladstone Report, that this does not lead to a change in behaviour on the part of criminals as evidenced by very high recidivism rates among the key group of repeat offenders (as opposed to the one –off offenders who would probably not reoffend even if they weren't sent to prison) and evidence that the threat of imprisonment is a very blunt deterrent.
13. The third model is the one put forward by the Gladstone Report, that prisons should be reformatory institutions. In that case many criminals would be sent to prison but for longer terms, as it would take time for the reformatory process to work. (Bentham had thought it would only take a few months but that also hasn't worked out). The immediate problem is that this is horrendously expensive and no government is prepared to spend the kind of sums required, given that spending public money on criminals rather than other causes such as children, the sick and the poor or defence is always unpopular – remember the basic principle that resources are scarce. Consequently it never works very well and in particular leads to serious and chronic overcrowding, a problem prisons have experienced from their very invention.
14. However the reformatory model has an even more serious problem if one tries to make **prisons** essentially reformatory. This is that a prison is by its very nature also a punitive institution (given that it necessitates deprivation of liberty which most people experience as punishment to at least some degree). Moreover, the criminal justice system in order to

command public support, has to have a punitive as well as a therapeutic aspect. So prisons have to be places of punishment as well as reform. Consequently there is always a contradiction between the two purposes of the system with neither clearly in the ascendancy. In terms of human relations this is reflected in the tension or even outright conflict between the views and opinions of the higher management of the system and various pressure groups on the one hand and the lower level administrators and prison warders (the POA) on the other, which has been a growing feature of the system since the 1920s and has made the administration of the system extremely difficult. A possible solution is to look to substitutes for prison such as community service and probation. The evidence is that close supervision and provision of assistance and services to convicts has a much higher success rate at preventing recidivism than prison (where the rate is 80% within one year). However this is not only very expensive, and so subject to the democratic budgetary constraints outlined above, it is also unpopular because these measures are not seen as punishment. Moreover, although recidivism is lower it is still very high. The basic problem is that since the reforms of the nineteenth century there has only been one form of punishment for serious crime, which is imprisonment, as the other kinds of punishment have been done away with and restitution has not been considered.

15. One way to cut this particular Gordian Knot would be to revert to the practice of most human civilisations and take the view that the reform of criminals, while very important, is not a function of the criminal justice system which should be concerned only with righting wrongful actions and punishing the perpetrators. Reform would then become a function not of the CJS but of a different branch of government or of private institutions such as charities, churches, the mosque etc. This however would require either a move to restitution as the central element of the penal system (barely on the agenda) or the revival of something such as corporal punishment rather than imprisonment for most criminals (which might be popular with the public but is unanimously rejected by the policy making elite). So it is very unlikely to happen and the current unhappy situation is set to continue.

The Decline in Crime After 1850.

1. A common view is that high and even rising levels of criminality and recorded crime are an inherent feature of modernity. However there are too many counter examples (notably Switzerland and Japan) for this to be the case.
2. When we look at the historical record the picture becomes even less clear. The second half of the 19th century saw a decline in levels of recorded crime in most parts of the world for which we have records, and a particularly sharp decline in the last third of that century. This has a direct bearing on the argument about modernity as it was the post-1850 and in particular the post 1870 period that saw the arrival of what we think of as the central aspects of modernity.
3. The decline in crime is very clear and quite dramatic in the British case. After major reforms in the way that criminal justice system records were compiled in the 1820s it becomes possible to make serious estimates about both long and short term trends in the pattern of recorded crime and even more importantly about the underlying real level of criminal and delinquent behaviour.
4. The figures show that there was a peak of recorded crime in the 1840s – in fact the level of recorded criminality per capita for that decade would not be surpassed until the end of the 1980s. Revealingly the 1840's also saw peaks for a number of other statistics notably illegitimate births, single parent headed households, drink consumption, and poor relief.
5. After 1850 the level of recorded crime starts to decline. There is a slight reversal of this trend in the middle years of the 1860s, particularly in districts affected by the Cotton Famine, but after 1870 the downward trend resumes and becomes much steeper.
6. The figures for some crimes, such as sexual offences, are too much affected by moral panics and fluctuations in the policy of the CJS to be of much use (because the dark figure problem is especially acute) but when we look at other areas the pattern is much easier to discern. There are significant declines in homicide and all other kinds of violent crime, especially wounding but also the various categories of assault. There are even more dramatic falls in recorded rates of crime against property such as theft, robbery (which is also a violent crime) and criminal damage. The one major exception is burglary, which rises after 1880. By 1900 the per capita figure for all kinds of crime is at an all time low. There is also a massive decline in the other indicators mentioned.
7. One response is to argue that this is an illusion, caused by changes in reporting rates. Geoff Pearson argues that Victorian Britain sees just as much serious crime as before or later. However he supports his case only by citing particular cases from reports such as the *Police Gazette*. This is to use qualitative data to address a quantitative argument – the evidence he cites shows that crimes of this kind were still being committed but no one has ever denied that, the argument is over how many and whether the trend was upwards, downwards or flat. To prove his case he would have to produce quantitative data and he does not do this. The more sophisticated argument is that the decline is a product of changes in the functioning of the CJS and of reporting rates. However investigation reveals that reporting and detection rates actually went up sharply after 1870 so in fact the change in this area leads to the real decline being understated not overstated. In reality the decline was even more dramatic and steep than the figures would suggest.
8. So why did this happen? There are a number of possible explanations. These are not mutually exclusive, that is they could all be true, in which case the argument is over their relative weight.

9. One, put forward by a number of authors such as Victor Gatrell, is that the decline reflects a shift in the balance of advantage between criminals and the forces of law enforcement. The significant changes for him were these: the creation of a full time police force; reforms to the judiciary that resulted in a large increase in the scope of courts of summary jurisdiction; the replacement of the fearsome but seldom used punishments of the 'Bloody Code' by milder but more effective and more frequently used punishments such as imprisonment and fines; significant developments in the technology of personal identification and forensic science. All of these meant that it was much more likely that a crime would be detected, that if detected it would be investigated, that if investigated it would lead to prosecution, that a prosecution would lead to a trial, that a trial would produce a 'guilty' verdict, and that a guilty verdict would result in a punishment. Consequently the perceived and actual costs of criminal activity (i.e. the likelihood of being caught and punished) rose relative to the benefits and so changed the incentives facing potential criminals leading to a change in behaviour.
10. Another explanation stresses the social impact of economic change and above all of changes in the functioning of the world economy. The years after 1850 see a prolonged boom and a sharp rise in economic growth and productivity increase, which really takes off after 1870. (British agriculture has a very hard time after 1870 but this is more than outweighed by the boom in manufacturing). This leads to a dramatic and historically unprecedented rise in living standards. The argument is that this reduces both the economic incentives for crime and the social stress of poverty which is a major contributory factor to violent crime. The change in the organisation of production brought about by the appearance of the modern business corporation and the general shift to factory production after 1860 leads to a pattern of increasingly stable and long term employment and a decline in casual and short term work, all of which has substantial effects on the outlook and psychology of the mass of the population – in particular it leads to a much more future-oriented outlook, i.e. it reduces time preference.
11. Another argument emphasises demographics and the way in which a combination of changes in the birth rate and massive emigration reduced the proportion of young, single males in the population. As this is the group responsible for the overwhelming majority of crimes it would naturally lead to a decline in criminality. The rise in wages also led to a decline in the age of marriage, which had a similar effect, and an increase in the stability of households as well as a reduction in female labour market participation, which for many authors means less chances of young men at the margin growing up to be delinquent.
12. The final argument, is the 'moralisation' thesis, put forward by authors such as Steve Davies, Christie Davies, Gertrude Himmelfarb, and James Q. Wilson. Here the argument is that the critical factor is a sociological and cultural one, that is a marked strengthening of civil society and its institutions and the development of a moral code of respectability that came to be accepted and internalised by the great majority of late Victorians. As such it led people to behave and to respond to incentives in a different way, one that emphasised orderly and law abiding behaviour. The notion of respectability was both embodied and inculcated and enforced by the institutions of civil society, through what sociologists call informal sanctions, and expectations, to the point where it became second nature to many. One very important point is that respectability was not linked to income but to behaviour. As such respectable status, and with it social respect and standing, was open to anyone regardless of their income or class. This removed what many observers see as a major cause of the rise in criminal and anti-social behaviour in the 20th century, the cycle of competitive consumption in a vain effort to achieve social status and the stress and delinquency that arises from a perception of being of low status due to (relative) lack of income. One very significant aspect of the 'rise of respectable society' was the sudden disappearance of the duel and with it of the code of honour,

which had been a major cause of violence in earlier times (and remained so in places like the South of the US which retained an honour culture).

13. After 1900 the level of crime remained generally stable throughout the first half of the 20th century, although there was a rise between 1909 and 1914 and fluctuations due to the impact of the two world wars. Perhaps surprisingly the 1930s see a slight decline in recorded crime. However after 1955 we have a mirror image of the post 1850 situation with a progressive rise in recorded crime. How and why this happened is the subject of the next lecture.

The Rise in Crime 1955 – 1995.

1. During the first two thirds of the 20th century the level of recorded crime in the UK was broadly stable, while being slightly higher than the all time low reached in 1900. There were short term fluctuations, associated with the impact of the two World Wars, but the long term trend was stability. (There was a rise 1909-14, a decline during WWI followed by a rise after the war, then a slight decline during the 1920s and 1930s, stable figures during the first part of WWII then a rise in 1944 to 1951 followed by a decline 1952-6).
2. However after 1956 there was a rise in the level of recorded crime that was sustained and not reversed. Slow at first, there was a marked acceleration in the rate of increase after the later 1970s and a dramatic rise after the mid 1980s. By 1990 the previous record for per-capita crime rates set in the 1840s had been overtaken, and subsequent years saw new records being set.
3. The peak was 1995. Since then there has been a decline in most kinds of recorded crime with particularly steep falls in the recorded incidence of certain kinds of theft such as burglary. The major exception is serious violent crime, (less serious violent crime, after rising has which has shown an increase, to such an extent that Britain is now a more violent society than the US, despite the historical pattern being the opposite).
4. Both of these trends are broadly global but with significant exceptions and variations (such as there being no significant rise in crime in both Switzerland before 1990 and Japan throughout the period). Clearly the forces causing this pattern of large scale behaviour change are at least to some extent global in nature. They are also ultimately mysterious – trying to explain such large scale changes in human behaviour is very difficult. However there are a number of things that can be said about the smaller level of the national political/social community.
5. The initial response of many observers to the rise was to argue that it was not real but reflected such things as changes in definitions or a rise in reporting rates. However in the early 1980s the politicians became sufficiently disturbed to spend money on a series of crime victimisation surveys. This was done both by local authorities (Merseyside County Council, Islington and Newham London borough councils) and by the Home Office (the 1981 and 1983 British Crime Surveys). Eventually the Major government made the BCS a regular event and it is now carried out biennially by the Office of National Statistics.
6. The crime surveys showed firstly that the rise in crime was real and secondly that it was, if anything, even more rapid than the official figures indicated. It was no longer possible to deny the reality of the rise or to argue that it was simply another moral panic. It is also impossible to deny the decline in crime since the middle 1990s (with the important proviso made above).
7. This obviously poses questions, just as the rapid decline in crime in the second half of the 19th century does. A number of explanations have been offered. These tend to have clear implications for current economic and social policy and so there is sometimes a clear agenda (not always however). One problem that has not really yet been surmounted is that of how to explain both the rise between 1956 and 1995 and the decline of the last decade.
8. One explanation is that it was caused by the high unemployment of the period after 1973. However this by itself is not an adequate explanation, because even higher levels of unemployment in the 1930s did not go along with a rise in crime (in fact the opposite was true). So you have to show how the effect of unemployment was different in the 1980s compared to the 1930s, so making some other factor equally important. Moreover this does not explain the rise in the 1956-73 period.

9. The stronger explanation is to emphasise macro-economic and social changes of a certain kind. The two key things are firstly rapid economic change, the effect of which was to make all kinds of employment much less secure (exactly the opposite tended to happen in the later 19th century) and secondly the marked increase in inequality and decline in social mobility, coupled with an ever greater emphasis upon consumption as the key to happiness and income as the main source of social status. This builds on the work of social psychologists in 'happiness studies' which indicate very strongly that it is relative social status and esteem that tends to determine happiness rather than absolute income. An increase in inequality of status will tend to generate both self-harming behaviour and depression and violent or anti-social acts including criminal and delinquent behaviour. The increase in job instability and the impact that this and the decline of pay for unskilled labour have produced severely disruptive social effects, as is argued by authors such as William Julius Wilson. The major difficulty for this model is that while it fits the rise up to 1995 very well, it has great problems with the decline since that date – it suggests that the increase should have continued or at best flattened out.
10. The second major set of explanations is rational choice ones, put forward by authors such as James Wilson and Richard Posner, ultimately deriving from Gary Becker. They argue that the crucial thing is a decline in the effectiveness of the criminal justice system and a corresponding shift in the incentives facing potential criminals, leading to a change in behaviour as they respond to the changed incentives. The decline after 1995 is explained as being caused by a combination of a shift in policy that has made the CJS more effective and a number of social or technological changes that have reduced the gains from crime. This works quite well for the US, where the decline in crime corresponds to a sharp rise in incarceration rates and a shift to 'zero tolerance' policing methods, but does not fit the UK data so well (that the CJS has become much less effective since the 1950s is indubitable).
11. Another set of arguments is put forward mainly by social scientists and relates to a perceived breakdown in the socialisation process, particularly among the poor and for young men in general. According to this theory, put forward in the British case by authors such as Norman Dennis and A. H. Halsey, the main institutions of socialisation such as work, schools and family have all been undermined by a combination of social and ideological change and misguided public policy, particularly a welfare and taxation policy that has reduced the incentives for poor people to form stable households. This has led, it is argued, to the formation of an 'underclass' as described by writers such as Charles Murray and 'Theodore Dalrymple'. This model also emphasises a general decline in authority at every level of society and a corresponding decline in informal sanctions and restraints on delinquent behaviour.
12. Closely connected is the final model, the 'demoralisation thesis' put forward by authors such as Christie Davies, James Wilson, Gertrude Himmelfarb, and Steve Davies. The argument here is that the critical element is a decline in the effectiveness of the institutions of civil society and the gradual unwinding of the moral consensus created in the later 19th century. The blame for this is widely spread, with factors such as the decline of religious belief, technology (particularly TV), the modern (i.e. post 1960s) welfare state, modern capitalism, and ideology all coming in for their share of brickbats. Two things of particular significance for this model are the decline in inter-generational social contact and the appearance of a distinct 'youth culture' (a true novelty) that has propagated a set of hedonistic values previously only found among the spoiled and pampered children of the rich.
13. Some people emphasise the part played by specific causes such as the ill-advised 'War on Drugs' but these cannot explain the full range of the phenomenon. As in the case of the 19th century decline, these arguments are not mutually exclusive and it is probably a

combination of these factors that explains things – the question again is that of where to put the emphasis.

Crime and Society: Consensual Crime.

1. Consensual crimes (also known misleadingly as 'victimless crimes') are a prominent feature of the CJS. Well known examples include consuming and selling certain drugs, prostitution, gambling, certain sexual practices such as anal or oral sex, homosexuality, assisted suicide, selling or distributing pornography, people smuggling, smuggling in general, selling organs such as kidneys, and the selling of firearms.
2. A few points to note. Firstly, there is much wider variation in the criminalisation of actions of this kind as compared to offences such as homicide, theft, assault, or rape. While these attract some kind of legal sanction in every society that we know of, the kind of actions that come under the heading of consensual crime are subject to criminal sanction in some jurisdictions but not in others. So, for example, gambling and prostitution are both legal in Nevada but criminal offences in most other parts of the US. This reflects the way that consensual crimes are ideological constructs in a way that other kinds of crime are not. Secondly, it is not always the case that all aspects of an act are criminalised in such cases. Thus suicide itself is no longer a crime in law in the UK but assisting one is, selling sex for money is not but 'living off immoral earnings' is.
3. What though is a 'consensual crime'? The concept can be best understood by thinking about other crimes. In most crimes such as robbery, theft, assault, murder or rape, there is a perpetrator and a victim. That is the action involved is non-consensual since the victim did not consent (this does raise interesting questions at the margin as to what counts as 'consent' in cases such as those of violent sport, sexual practices such as BDSM as in the 'spanner' case or exceptional cases such as that of the German cannibal).
4. By contrast, in a consensual crime the act that is criminalised, whether completely or partially, is a consensual one, that is both or all parties have consented to it. In one sense therefore there is no victim. The crucial point is that neither party has a desire or interest in prosecuting the other or in assisting their prosecution. A drug user does not want to prosecute or pursue the dealer, a punter does not want to pursue the prostitute. Therefore the criminalisation of such actions does not derive from the efforts by victims to gain redress (as is the case with other kinds of crime). Instead it derives from the use of political power to criminalise some, specific consensual acts, to render some or all of the parties to such acts liable to criminal sanction.
5. What though is the basis for this? Leaving aside reasons of pure expediency, the criminalisation of consensual acts is justified in the following ways.
6. Firstly, on the basis that the action in question is simply morally wrong (major premiss) and that the state or public authority has a responsibility to uphold and enforce morality (minor premiss). The argument is usually made historically on the basis of appeal to the authority of a revealed religion, but can be supported by an appeal to 'common decency' or 'what everyone knows', i.e. to generally accepted moral conventions. (See for example the 'spanner' case).
7. Secondly, on the paternalist grounds that people should be protected from the consequences of their foolish or misguided decisions. Nobody (well almost nobody) denies this in the case of children and the mentally incompetent. Some however would extend it to cover mentally competent adults. In that case the public authority takes on the role of the parent or guardian. The underlying argument is firstly that people are not in general the best judge of their own interests and secondly that someone else knows better than they do or is in a position to do so.

8. Thirdly on consequentialist moral grounds. The argument here involves a deliberate rejection of the libertarian position articulated by J. S. Mill in *On Liberty*. Mill makes a distinction between 'self-regarding' and 'other-regarding' actions and argues that government and law should not concern themselves with the former. The response is to say that most if not all actions are not purely self-regarding because they have significant effects on third parties (what economists would call externalities or spillover effects) or on the public in general. Thus the sale and consumption of alcoholic liquor does not simply have an effect on the seller and purchaser. The argument is that where the effects of actions of a certain kind are severe and widespread the state has a responsibility to discourage them through the use of criminal sanctions as part of its general responsibility to promote the general welfare (not everyone accepts that government has such a responsibility but that's another matter).
9. All of these are rejected by the libertarians. They argue absolutely against the first three positions on grounds of principle. This debate is one of political and moral philosophy and as such empirical evidence has only a tangential part to play.
10. However, in practice most argument and public debate is consequentialist on both sides. That is, the argument is about the costs and benefits of criminalisation versus non-criminalisation of the act in question, rather than its moral desirability or status or the role of government and the extent of individual independence and judgment. This explains why the criminal law is inconsistent in this area, for example why the sale of cannabis is illegal while that of tobacco is not (at least not yet).
11. Criminalising and prohibiting certain kinds of action or exchange will make that action more costly and therefore less likely to take place. To the extent that the action in question brings costs that are borne by third parties or the wider public there will therefore be a benefit. In some cases such as the sale of organs there is no cost to third parties (in fact a benefit) and so the criminalisation of such actions can only be justified on *a priori* grounds such as religious prohibition not those of consequential costs.
12. However the act of criminalisation will also bring costs and in many cases these will outweigh the benefits, in some cases significantly. These costs arise firstly from the fundamental fact that there is no aggrieved party and therefore nobody with an interest in assisting the law enforcement authority which makes their job vastly more difficult and ultimately corrupts the system, and secondly from the way that the actors involved (suppliers and consumers) respond to the changed incentives produced by criminalisation. These have very severe and often counterproductive and counterintuitive results.
13. The key variable is demand. In cases where the demand for the service or action that is criminalised or prohibited is low criminalisation will have limited effects and so on balance the impact of criminalisation or prohibition will be positive. However in such instances there isn't much of a problem in the first place (e.g. necrophilia). Where the demand is high, the problem caused by the service or action being legal will be much greater but the negative consequences of prohibition and criminalisation will also be much, much higher (as in the paradigmatic case of alcohol prohibition in the US).
14. What this means is that for criminalisation to enforce prohibition to 'work' that is to have a positive payoff, it has to target consumers rather than suppliers in order to reduce demand. This can work (and has worked in some cases) but can also fail spectacularly for a number of reasons. The implications are also worth thinking about – why was this not tried with alcohol for example?
15. Another element to bear in mind is that demand can fluctuate dramatically over time and so the payoff can also switch from positive to negative or vice versa. British policy on

drugs is the classic example of this. There was no prohibition on the sale or consumption of drugs for most of the nineteenth century and very little of any kind until 1922. However the system introduced in that year worked in the sense of having a net positive payoff for about fifty years. Since about 1970 however the payoff has clearly become negative because of a sharp rise in demand together with a hopelessly misguided attempt to target supply rather than demand.