CHAPTER 5

Conclusion

Historians have found it difficult to locate the Murder Act, and the regime of post-execution punishments that it consolidated and preserved for eight decades, within the broader history of penal change, and have therefore tended to leave its role largely unexplored (Chap. 1). Even Cockburn's article on 'Punishment and Brutalisation in the English Enlightenment', which did at least briefly attempt to examine the Act's role, mainly used it as an illustration of the government's failure to develop 'a coherent and consistently applied penal philosophy' during this period, and concluded that that it illustrates the problems contemporaries had in reconciling 'traditional' and 'enlightened' strands of thinking about the death penalty.[1] However, the detailed study presented here suggests that we need to see it not as an aberration or as the product of inherent contradictions in penal thinking, but rather as an important and functional part of the core penal policies that dominated the long eighteenth century. As we saw in Chap. 2, it certainly cannot be regarded as simply the result of one brief intense wave of demands for greater severity in the infliction of capital punishment. At intervals throughout the period from the 1690s to the early 1750s Parliament debated introducing various forms of aggravated death penalty procedures. Many contemporaries clearly believed that 'hanging was not punishment enough' and some advocated solutions that would have increased the torment experienced by the condemned during the execution process, such as breaking on the wheel or burning alive. These views did not in the end prevail, and two post-execution punishments were introduced instead, but in England and Wales, as in countries like Holland,

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Germany and Ireland, the first half of the eighteenth century was certainly not a period when aggravated forms of execution were being increasingly shunned.[2] Indeed a significant minority of penal writers were vociferously advocating their introduction. When the early 1750s moral panic about violent robbery and murder made it expedient to increase the depth of sanctions imposed on those fully convicted of homicide, the authorities very deliberately chose two post-execution punishments as their means of doing so. They could have ridden the storm or used temporary expedients that would have avoided introducing any form of aggravated or post-execution punishments for the long-term. Why did they choose the combination of hanging in chains and dissection that became enshrined in the Murder Act?

1 The Logic of the Murder Act and Its Role in the Capital Punishment System

In 1752, under pressure from the press and the London public, but wishing to maintain the English law's reputation as much less barbarous and torment/torture based than its continental counterparts, the authorities may well have seen post-execution punishment as a useful compromise. The superior quality of the English law was an important plank in contemporary rhetoric about the rights of every 'Free-born Englishman'. Making either dissection or hanging in chains into the standard penalty for murder not only built on already existing British penal traditions, but also avoided the introduction of what were regarded as continental extremes. These short-term factors do not, however, explain the longevity of the post-execution punishment regime introduced by the Murder Act. If the Act had been only a temporary compromise it would surely not have lasted for 80 years. Its longevity can certainly not be ascribed to its usefulness to Britain's surgeons and anatomists. Although, until the 1820s, they generally welcomed the trickle of murderers' cadavers they received, the Murder Act supplied only a tiny and ever decreasing proportion of their needs. Indeed in London, which remained a very important centre for the teaching of anatomy throughout this period, the Act probably resulted in a reduction in the number of bodies available to the surgeons. Although historians have assumed that the Act increased the number of criminal corpses that were given to anatomy teachers in the metropolis, in fact it appears to have encouraged the development of procedures that meant

that the opposite would be the case. While the Act did not specifically lay down that from 1752 onwards only the bodies of murderers were to be made available to the surgeons, it appears that from that date onwards they were, in reality, almost completely restricted to this category alone. Before 1752 the surgeons had been entitled to a certain number of executed bodies regardless of the nature of the crimes for which they had been sentenced to death. In the 1730s, for example, they received an average of five or six a year on this basis. After 1752 the supply of non-murderers bodies quickly disappeared and, given that an average of only two offenders a year were executed for murder in London between 1752 and 1832, the surgeons of the metropolis were clearly not major beneficiaries of the 1752 Act.[3] It was the judicial authorities rather than the surgeons that made sure that the Murder Act passed in the form it did. Given the power of the Law Lords in the Upper House, it could not have gone through so quickly without their approval and their leader—the powerful Lord Chancellor, Lord Hardwicke, who had great influence in both Houses of Parliament[4] —appears to have been quite intimately involved in shaping, or at the very least amending, the Act (Chap. 2). Moreover, once it was passed the judges stoutly defended it and made sure it stayed in place as an important part of the penal landscape for over three-quarters of a century. What functions did they see it as performing?

Some of the Murder Act's supporters may well have thought, at least initially, that it would act as a deterrent, and as late as 1796 the Attorney General was still suggesting that those about to commit murder might be prevented by their fear of dissection from going through with their intentions.[5] 'From what little evidence we have,' Richard Ward has suggested, 'it seems that the crowd and those capitally convicted did indeed consider the exposure and desecration of the dead body to be a terrifying and shameful fate (although such a view was by no means universal).'[6] However, while it was probably the case that, as Rawlings has argued, 'the threat of being dissected was presumed to be a great aggravation to the penalty',[7] and while it was almost certainly true that many of the poor cared deeply about the respectful burial of their remains,[8] we cannot assume (as Ward has rightly pointed out) that 'the message that the authorities intended offenders … to take from the punishment of the criminal corpse was inevitably internalised'.[9] In Holland there is no evidence that post-execution dissection caused any concern,[10] and many contemporaries were well aware that the belief that post-execution punishment had a real role in preventing a significant number of murders was based on very shaky

foundations. Several writers recognized, for example, that many of those who chose to commit murder clearly believed that they would never be detected or prosecuted. As one 1750s commentator on the Murder Act observed 'it is to be feared that this law will not produce the desired effect, for it is beyond all doubt that those who commit this crime always flatter themselves that they shall perpetrate it so secretly that it will never be discovered'.[11] Other writers quite evidently appreciated that many murderers acted without even considering the future consequences. 'I am convinced', a correspondent wrote in the *Gentlemen's Magazine* in 1786, 'that, at the time of committing the offence, the offender reflects not upon the punishment annexed to his crime'.[12] Equally, as contemporaries often pointed out, if any did consider the consequences of committing homicide, it would have been their fear of death—rather than of their corpse's post-execution treatment—that would have been crucial. 'Surely', as one nineteenth-century commentator observed, 'if the risk of suffering the extreme penalty of the law would not keep a man from crime, the extra chance of being dissected after death could hardly be expected to do so.'[13] By the early-nineteenth century even the most ardent supporters of post-execution punishment were admitting that the notion that it acted as a deterrent was almost completely irrelevant. Although both Tenterden and Grey continued, rather illogically, to suggest that penal dissection would help to 'keep up that horror of committing murder' for which the English had always been praised, by this point the idea that either penal dissection or hanging in chains would actually deter potential murderers had very little purchase, if indeed it had ever had any.[14]

When arguing in favour of penal dissection a number of the judges found it convenient to suggest that, since some convicted murderers broke down in court only after this part of the sentence had been read to them, the prospect of dissection must surely have acted, at least occasionally, as a deterrent.[15] However, a convict's post-sentencing behaviour was no guide to his or her pre-crime thinking, and the only murderers that the judges were able to observe were, of course, precisely those whom the prospect of dissection had failed to deter. The very real distress shown by a small number of convicts after sentencing cannot therefore be taken to indicate that fear of such a distant prospect had any general deterrent effect on those about to commit murder. 'It is vain to plead, as an apology for such treatment, the influence of dissecting the murderer's body upon the spread of crime. If the terrors of a violent death cannot deter the murderer, will the dread of having a few incisions drawn upon his lifeless and unfeeling

corpse wield a greater influence?' the *Leicester Chronicle* asked in 1832. 'Can it be supposed that it is the surgeon's knife after death, and not the hangman's halter before it, that binds the check upon his sanguinary purpose', it continued, 'never was there yet one life preserved by that part of the judge's sentence which consigns the body to the table of the surgeon.'[16] As Foucault has argued in relation to the use of imprisonment, it is possible for a punishment to be an almost complete failure as a means of preventing or reducing crime, but for it still to successfully achieve other social or penal effects that ensure that it remains an important part of the criminal justice system, and the Murder Act may well have survived for such a long time for very similar reasons.[17] The continued support that penal dissection received well into the nineteenth century from the judges and from influential figures of various political persuasions, such as Peel and Grey, primarily arose not from its power as a preventive measure, but from its vital role in creating a significant degree of differentiation in the punishments inflicted on murderers, compared to those imposed on the many minor non-violent offenders who were also being sentenced to death throughout the long eighteenth century.

As the Bloody Code expanded rapidly in the seventeenth and early-eighteenth centuries, and as the range of small-scale thefts, coinage offences, forgeries and Black Act-related offences that were subject to the death penalty constantly increased, the criminal law became very vulnerable to the criticism that it lacked sufficient differentiation. By the 1740s, when several other frequently committed felonies such as sheep-stealing were added to the penal code, these criticisms were becoming ever more strident. The post-execution punishments imposed by the Murder Act gave the authorities a means of responding to these criticisms without having to remove the capital sanction from any of the relatively minor property offences they had recently added to the Bloody Code. Although some later eighteenth- and early-nineteenth-century commentators still criticized these post-execution punishments for not creating a sufficiently large differentiation in the sanctions imposed on murderers, the representatives of the judicial establishment continued to regularly argue in Parliament in 1786, 1796, 1813–1814, 1828, 1829 and even in 1831–1832 that this was precisely what these extra punishments achieved. Even if, as seems likely, hanging in chains and dissection were not usually effective as deterrents, some form of post-execution punishment was clearly regarded by the judicial authorities as a necessary component of the capital punishment system and as an important part of its rationale, and their

belief in it as such was the main reason it remained largely intact until the early 1830s.

When the Bloody Code was criticized for punishing a starving sheep stealer or an impoverished young pickpocket with the same sentence as that given to someone who had murdered his or her master, marital partner or robbery victim, the Murder Act enabled the authorities to argue (and perhaps to believe) that this was not the case. For this reason, even as late as 1829, when they warned Warburton not to even attempt repeal, they were prepared to stoutly defend penal dissection. Only when the Whigs finally began to sweep away the Bloody Code in the early-to-mid 1830s could the differentiating role of penal dissection in particular be allowed to disappear and/or be replaced by the relatively minor post-execution sanction of burial in the prison grounds, which was to last for more than a century.[18] In order to understand why the administrators of the criminal justice system used the criminal corpse in the way they did, and why post-execution punishment survived for so long in the face of both complex changes in society's attitudes to death,[19] and growing sensibilities about violent punishments, we need to take this contemporary legal rhetoric about the need for differentiation more seriously than historians have hitherto done. Few contemporaries believed in penal dissection as a deterrent, but successive judges, Lord Chancellors, Attorney Generals and Home Secretaries (with the very brief exception of Lord Lansdowne) were well aware of its important role within the broader rationale of the capital punishment system and stoutly defended it principally for that reason.

2 The Broader Questions Raised by the History of Post-Execution Punishment and the Murder Act

This analysis of the inner logic of the Murder Act, and of the reasons why it inaugurated such a lengthy period of mandatory post-execution punishment, has also highlighted the role played by both the twelve judges, and by specific Lord Chancellors and Lord Chief Justices, in making and shaping the English criminal law in this period. The formative roles played by men like Hardwicke, Loughborough, Eldon and Ellenborough in debates and legislative initiatives about post-execution punishment clearly support Hay's suggestion that though 'few in number', the judges 'had great legislative influence.'[20] In defending the use of post-execution

punishment as a means of creating penal differentiation during the 1786 debate the future Lord Chancellor, Lord Loughborough, made it clear he believed that, by custom and precedent, the judges should have almost complete control over any major piece of criminal justice legislation. 'In all preceding times,' he suggested, 'every bill relative to the criminal justice of the country, and its mode of execution, was submitted to the opinion of the Judges in the first instance', the judges being the group 'most likely to discover any defects.'[21] In this he clearly had the support of both the Prime Minister and the Home Secretary who in the 1786 debate announced that 'he concurred entirely with the noble Lord (Loughborough) that all bills affecting the criminal justice of the country, ought to receive the approbation of the judges previous to their being proposed to Parliament.'[22]

Judges like Eldon and Ellenborough, who played a vital role in delaying the repeal of the Bloody Code in the early-nineteenth century also appealed to what Hay has described as the 'quasi-constitutional doctrine that criminal law bills had to originate with the judges or at least be endorsed by them'.[23] The great opponent of capital punishment in this period, Samuel Romilly, regarded this as a 'most unconstitutional doctrine', and after being informed by Lord Ellenborough that any bill 'commenced in the Lords' would always be 'referred to the judges in the first instance'[24] he made his disagreement clear. The judges, he argued, were like 'a fourth member of the Legislature who are to have … a power of preventing any proposed measure not only from passing into law, but even from being debated and brought under the view of Parliament'.[25] Romilly's failure to get significant elements of the capital code repealed before his death in 1818, which was in no small part due to the concerted opposition of the judges, suggests that his constitutional arguments made little headway. As we have seen in this study, the judges remained very powerful right up to the early 1830s. In 1813–1814 Ellenborough and Eldon undermined Romilly's attempts to completely abolish the use of aggravated execution methods against those found guilty of high treason,[26] and right through to 1831 the judges continued to successfully defend the use of penal dissection because they believed that some form of differentiation should be preserved in cases involving murder. The longevity of both the Bloody Code and the Murder Act was in no small measure a function of the powerful voice the judges continued to have throughout the Georgian period.[27] Further research is needed on private and governmental sources in relation to other types of penal legislation before we can fully understand how deep the judges' stranglehold was, and how long

it lasted. However, the debates studied here suggest that in the eighteenth and early-nineteenth centuries the balance of constitutional arrangements between the legislature, the executive and the judicial authorities gave the judges very substantial power.[28]

We also need more research on the relationship between English policies in relation to both aggravated forms of execution and post-execution punishments, and the rituals used in colonial and semi-colonial contexts—for example in the West Indies, in America and in Ireland. The oft-repeated rhetoric about the mildness of English punishments and their lack of any elements of torture had relatively little purchase in many colonial contexts. The rulers of British colonies such as Jamaica, for example, made considerable use of aggravated forms of execution such as burning without previous strangulation and gibbeting whilst still alive. They also resorted to spiking (decapitation followed by the display of the offenders head on a pole), a punishment that was still being used quite extensively in Ireland during the crisis years of the 1790s.[29] As Clare Anderson has pointed out, 'in the colonies, gruesome forms of mutilation constituted an element of capital sentences for much longer than in Great Britain',[30] and further research is clearly needed to analyse when and why this pattern changed.

It is also clear from both the work presented here and from Rachel Bennett's research on Scotland (which was also undertaken as part of the Wellcome-funded 'Power of the Criminal Corpse' project) that the use of post-execution punishment and of aggravated execution rituals was by no means uniform across the United Kingdom. Although it was not in use during the period considered here, breaking on the wheel was still being used in Scotland in the seventeenth century despite the fact that no such usage can be traced in England. Moreover, individual Scottish criminals were still having their hands cut off prior to execution in 1750, 1752, 1754 and 1765—despite the fact that this punishment had long been abandoned in England and Wales by the eighteenth century. Conversely, the use of gibbeting in a significant number of cases was effectively over in Scotland by 1780—two decades before the same change happened in England—although the final occasion on which a Scottish offender was hung in chains was in 1810, which was not dissimilar to the timing of the ending of gibbeting in England if the two very short-lived attempts to revive it in 1832 are set aside.[31] In Ireland, by contrast, although gibbeting seems to have been less widely used after the Act of Union in 1800, it could still be resorted to quite extensively—as it was in the punishment of those found guilty of the Wild Goose Lodge outrages in 1816.[32]

There were also, as we saw in Chap. 3, very significant differences within England and Wales in the use of post-execution punishments. The geography of gibbeting polices analysed in Chap. 3 indicates clearly that the main areas on the western periphery—Cornwall, Cumbria and almost all of Wales were much more reluctant to hang offenders in chains than the rest of the country, and almost completely refused to gibbet those only accused of property crime. This new research therefore confirms Peter King and Richard Ward's recent work on the very different penal regimes to be found on the western periphery. Not only, as they have shown, were these regions very reluctant to execute offenders for anything but murder but there was also concerted and often vocal opposition in many of these areas to the use of gibbeting.[33] The complex reasons behind these patterns require further research, but the limited colonial and Irish evidence available suggests that there may well have been a relationship between the level of post-execution or aggravated execution methods resorted to and the degree of threat that the authorities perceived themselves to be under in any particular area.[34]

The intensive study of contemporary discourse and practice in relation to post-execution punishment presented in Chaps. 3 and 4, when combined with recent work by Devereaux and Poole and others on various aspects of the capital punishment system, raises important questions not only about the geography but also about the chronology of penal change. Why did the period from the late 1780s to the early-nineteenth century witness such important changes in execution policies, and in attitudes to both gibbeting and scene of crime hangings? The mid-1780s, it seems, marked the high watermark of the Bloody Code regime. In the midst of yet another post-war panic about rising crime rates, Madan's pamphlet demanding the execution of all capitally convicted offenders coincided in 1785 with a brief experiment in which certain assize judges did just that.[35] However, this policy quickly proved unsustainable, provoking a very negative reaction in the press, and within a few years it began to be very gradually reversed. By 1788 Pitt was quietly but systematically upping pardoning rates, and within three years the aggravated punishment of burning at the stake was ended by Parliament.[36] During the first decade of the nineteenth century gibbeting was almost completely abandoned, scene of the crime hangings nearly ceased and another very distinct policy change by the judges further reduced the proportion of capital convicts that were actually hanged.[37] Historians have yet to fully explore some of the paradoxes of this period. Precisely why Pitt's so called 'Reign of Terror' was a period of relatively low hanging rates still needs to be fully researched,[38]

and some historians have struggled to explain why Eldon and Ellenborough, both of whom were staunch supporters of the Bloody Code, decided to drastically cut the proportion of capital convicts that were hanged in the first few years of the new century. On reflection, however, the policies pursued by these leading judges, which also included ending the use of hanging in chains against property offenders (Chap. 3), were entirely logical. These men set about quietly modifying the use of post-execution punishment and expanding the pardoning system not for reasons of humanity but as a defensive strategy. The policies they pursued were designed to achieve a broader goal—the preservation of the Bloody Code. In the face of increasing opposition to the hanging of property offenders, higher pardoning rates were the price that had to be paid in order to maintain the judges' ability to use capital punishment against a wide variety of offences. In the 1820s Peel followed the same broad logic, making relatively minor legislative concessions in Parliament in order to delay the large-scale repeal of the capital code.[39] Indeed Peel and Eldon, as Home Secretary and Lord Chancellor, combined in that decade to deliberately keep the numbers going to the London scaffold down. Eldon had clearly learnt important lessons from the wave of anti-hanging publicity produced when as many as twenty metropolitan offenders were hanged at one time in the mid-1780s.[40] 'Times are gone by when so many persons can be executed at once' he told Peel in 1822,[41] and the significance of Eldon's remark was clearly not lost on the Home Secretary. Peel was aware of 'the increasingly obvious moral and practical limits of England's bloody code,' and it is no coincidence that he worked hard throughout his tenure at the Home Office to insure that no more than three or four offenders usually went to the London gallows at any one time.[42] Both the positive changes in pardoning policies adopted by Pitt, Eldon and Peel, and the changes made during the same period in post-execution punishment policies—seen in the abandonment of burning at the stake, the virtual ending of gibbeting and the partial repeal in 1814 of the aggravated penalties imposed on the bodies of traitors—can best be seen as gradual but cumulative retreats in the face of a growing groundswell of opinion that was increasingly critical of both the Bloody Code and of the public post-execution punishments that remained part of the same penal package.

From this perspective Gatrell's model of criminal justice reform, which argues for a sudden and unprecedented change in the early 1830s and against any notion of an effective medium- to long-term erosion in support for the death penalty before that date, appears highly problematic.[43]

By highlighting key changes in post-execution policy, such as the fundamental collapse in the use of hanging in chains in 1802, this study has added further weight to those who have put forward a very different view.[44] This suggests very strongly that public attitudes were changing well before the end of the eighteenth century, forcing the judicial authorities to increase pardoning rates at fairly regular intervals and to abandon or heavily curtail those execution processes that the public were finding increasingly unacceptable or barbarous. The capital punishment system did not therefore, as Gatrell has argued, suddenly fall off a cliff around 1830. Nor is it possible to agree with his suggestion that sensibilities only changed at this point because the Bloody Code was already collapsing.[45] As Devereaux has pointed out as part of an excellent and much broader critique of Gatrell's position, the latter's own analysis acknowledges a growing public sensibility compared to earlier periods, but then ignores the implications of his assertion that the people 'would not put up with' mass executions by the early-nineteenth century.[46] There are many other problems with Gatrell's analysis.[47] He wrongly minimalizes the significance of the mass petitions against capital punishment that were received by Parliament in the 1820s, by comparing them with other campaigns, such that against slavery, which would inevitably have attracted greater attention because they invoked the sympathy of large sections of the population, rather than being simply concerned with the treatment of a group towards whom most people would inevitably have felt ambivalent (if not downright hostile).[48] Gatrell also failed to understand the chronology of what was happening outside the metropolis and its immediate environs. My own recent work with Richard Ward, for example, has shown that on the periphery of England and Wales the inhabitants began to oppose and largely end capital punishment for property crimes more than three-quarters of a century before 1830.[49] Moreover, the history of post-execution punishment presented here casts further doubt on Gatrell's view. The collapse of hanging in chains in 1802–1803, for example, which clearly coincided with an increasing sense that this practice was now seen as barbarous, indicates that sensibilities were already changing well before 1830 and that the authorities recognized that fact.

The fundamental problems that undermine Gatrell's insistence on discontinuity—on the primacy of the 1830s as a moment of sudden and unprecedented change—can, however, lead us into putting too much emphasis on continuity. The changing policies towards post-execution punishment (or towards capital punishment more generally) we have

observed here cannot be explained by any simple unidirectional model based on the assumption that the main driver of change throughout this period was the gradual growth of humanitarian ideas and sensibilities about the use of violent punishments. Rather than a pattern of general long-term decline in support for the use of post-execution punishments throughout the period from the early-seventeenth century to 1832, this detailed study has suggested a very different chronology. As Ward has pointed out the Murder Act 'cuts across the growing humanitarianism, civility and urbanity which several historians have posited as defining features of penal reform.'[50] Rather than a picture of continuous decline in both execution levels and in the degree to which execution processes contained extra and aggravating procedures, the eighteenth century stands out as a separate and very distinct era in the history of capital punishment, and this is further confirmed when the patterns found in England are compared to those on the continent.

As Ward has pointed out in his recent comparative overview, the growing use of post-execution punishments in England—both informally in the first half of the eighteenth century and then formally from 1752 to the early nineteenth–was part of a much more general eighteenth-century European resurgence in execution levels and in the severity of the capital sanctions meted out to offenders.[51] Citing evidence from Holland, Germany and Ireland he argues that in many parts of eighteenth-century Europe (and indeed of North America), aggravated forms of the death penalty became more frequent, especially in the first half of the century.[52] However, since by 1700 most of these aggravated execution procedures had been quietly transformed by the authorities from pre- to post-execution punishments, (by, for example, discretely strangling the victim before breaking on the wheel or burning at the stake) in many parts of Europe the net effect was to make the eighteenth century into the prime century of post-execution punishment.[53] However, although there was a brief but large surge in the numbers executed in England during the crime wave that followed the end of the Napoleonic wars, this eighteenth-century European resurgence did not continue into the nineteenth century. Spierenburg has argued that increased sensitivity moved the authorities to discontinue the display of the bodies of executed offenders in Western Europe around 1800, and there is considerable evidence suggesting that he is correct.[54] The exposure of criminal corpses in the Netherlands was ended in 1795, in Bavaria in 1805, in Prussia in 1811 and in Wurttemberg—where many of the bodies where then given to the anatomy schools—in