historical writing, and identification always will be a powerful spur to imagination. Should it be a weakness, it is an amiable one, to which Reid's counterpart has also been subject in his time. *See* B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974), in which, at least to me, Hutchinson bears a remarkable resemblance to a patrician university professor sharply beset by the irrational politics of student revolt.

10. This trenchant and descriptive term was first applied to that past master of the method, Christopher Hill. *See* J. HEXTER, *The Historical Method of Christopher Hill,* in ON HISTORIANS 241 (1979).

11. Here a word of castigation should be given concerning the antisocial parsimony of publishers, who, to save costs of typesetting, place notes at the end of the volume, thus rendering them largely unusable. Reid, or perhaps his editors, have made matters worse by restricting the frequency of citation to one footnote a paragraph, thus requiring the reader to reconstruct from an omnibus footnote which documents were quoted in the second sentence of the paragraph and which in the third.

12. 1 HOLMES-LASKI LETTERS 542 (M. Howe ed. 1953).

13. Nor is Reid always as charitable as he might be in decreasing the reader's load, as when a quotation from Blackstone is cited, correctly but unhelpfully, only to an issue of the *Boston Evening Post* of 1773. *See* CONCEPT OF LIBERTY at 78; BOSTON EVENING POST, 1 March, 1773, at 2 col. 3 (quoting 1 COMMENTARIES . . . 137). This seems to carry a fondness for the press and periodical literature a trifle too far.

14. Bailyn's IDEOLOGICAL ORIGINS, for example, progenitor and opponent though it is, is discussed only once in the three volumes, CONCEPT OF LIBERTY, 6–8. There Reid makes the crucial point that Bailyn's view of American political ideology fails to explain the reliance of American and British writers on the *same* sources of authority for constitutional argumentation. The advantage of Reid's interpretive approach is that it shows how both adversaries could have believed themselves in the "mainstream" of Anglo-American political thought, without adopting the unfortunate assumption that the Americans misunderstood their own position, believing themselves sane when they were actually slightly deranged.

Douglas Hay and Francis Snyder, eds., *Policing and Prosecution in Britain, 1750-1850,* Oxford: Clarendon Press, 1989. Pp. xv, 470. $74.00 (ISBN: 0-19-822999-2).

By the middle of the nineteenth century, professional policing of a recognizably modern character was being put into place in England[1] and in major American cities, where the English developments were surprisingly influential.[2] But the event lagged the need by more than a century. The inadequacies of the inherited system of amateur policing and prosecuting had become apparent in the early eighteenth century. Institutions of law enforcement rooted in the communal life of medieval agricultural villages could not survive the transition to urban life. Impersonal social relations, especially in London, facilitated crime, especially property crime, and exacerbated the shortcomings of amateur law enforcement.

Many of the essays in this admirable collection are devoted to the question of what the English did about policing and prosecuting before they had real police and real prosecutors. The answer, familiar in a general way since

Radzinowicz mapped out the field in his great book,[3] is that the authorities attempted to patch up the inherited system. If parish constables now lacked adequate incentive, then rewards and fee payments could motivate them. If squires could not be found in raw urban areas to shoulder the prosecutorial duties of the office of justice of the peace, then "trading justices" and hirelings would have to be tolerated—at first, the "court justice" sitting at Bow Street, later the stipendiary magistrates called forth under the Middlesex Justices Act of 1792. If the burden of voluntary private prosecution fell too heavily upon some citizens, then subsidies would be devised to shift some of the costs to the ratepayers.

This effort to forestall the establishment of police forces was driven by the fear (which has proved to be quite correct) that police forces would be difficult to control and could endanger the liberty of the citizen. Because professional policing was associated with France in contemporary perceptions, foreign taint enhanced the opposition to police, especially after the French Revolution. Ultimately, of course, it was decided that criminality posed a greater threat to liberty than did police. But into the early nineteenth century, those who feared to establish police forces held sway, and innovation was directed into other channels. From the 1690s onward, the English elaborated a pair of marketlike inducements to encourage volunteer law enforcement. The Crown offered substantial rewards for successful prosecution of certain major property crimes, and under the crown witness system the authorities granted immunity from prosecution to selected culprits in exchange for their cooperation in prosecuting their accomplices. Unfortunately, both these devices entailed serious risks of promoting false witness.

The essays in this volume shed important new light on the patchwork innovations of eighteenth- and early-nineteenth century policing and prosecuting. Ruth Paley and David Philips stand out. Paley tells us more than has ever been known about the self-appointed, reward-seeking "thief-takers," who operated in and around London in the decade from about 1745. Philips contributes a comprehensive account of the private associations for the prosecution of felons that burgeoned toward the end of the eighteenth century. Beyond these pathbreaking works, this collection is full of interesting scholarship. Peter King provides a careful study of the prosecuting associations in Essex, corroborating Philips in a most helpful way. John Styles provides a fascinating account of the boom in crime advertising that accompanied the rise of the provincial press—a technological change in law enforcement that invites comparison to such twentieth-century advances as finger-printing, blood-typing, and hair-sample analysis. Robert Storch examines the tussle in the provinces about whether to set up county police forces in the mid-nineteenth-century. Douglas Hay describes malicious prosecution cases from the period from 1750 to 1850. Of particular interest to the student of the history of criminal procedure, Hay appears to have tracked down the origins and later history of the rule that the trial court in an unsuccessful criminal prosecution had discretion over whether to allow the victorious defendant to

bring a subsequent malicious prosecution action, through the device of granting or withholding a copy of the indictment that figured in the criminal trial (352, 383–84, and notes). Jennifer Davis recounts patterns of prosecution, with particular attention to employer-prosecutors, in the later nineteenth century. John McEldowney describes prosecutorial practice in nineteenth-century Ireland. Kit Carson and Hilary Idzikowska contribute an essay on policing in Scotland in the eighteenth century.

Paley's essay on the London thief-takers (301–41) constitutes a remarkable achievement in casting light upon heretofore shadowy historical figures. She has been able to mine thin source material of the 1740s and 1750s with great sensitivity, identifying recurrent actors and recurrent patterns. She has found an inner core of persons, not regular constables or watchmen, but rather underworld figures who had criminal reputations and in some cases criminal records (304–06). She observes that underworld thief-taking extended back at least to Jonathan Wild in the 1710s (336). She credits Henry Fielding with recruiting a better class of operative to displace these unsavory characters in the 1750s (314, 327).

Thief-takers worked for compensation. Jonathan Wild, who specialized in the recovery of stolen property, was hanged in 1725 for complicity in theft. His career led to the so-called Jonathan Wild Act of 1717, making it a felony to take a reward for the return of stolen goods without apprehending and prosecuting the thief.[4] A generation later, in the period that Paley has studied, the lure of reward money for the conviction of felons was begetting different abuses: the calculated entrapment of hapless young persons into the commission of staged crimes, and the bringing of wholly false prosecutions. Paley shows that the McDaniel gang, a group of thief-takers who engineered a series of these contrived prosecutions that came to light in a celebrated scandal in 1754, had been engaged in questionable activity back into the 1740s. The McDaniel scandal[5] was, therefore, not so isolated an incident as heretofore thought.

In explaining the success of false prosecutions, Paley points persuasively to the procedural disadvantages that afflicted the typical defendant in these cases. The victim was "invariably young and inexperienced," often a newcomer to the metropolis, without friends and character witnesses. Thief-takers sometimes employed coercive methods to obtain pretrial confessions—trickery, misrepresentations about the prospect of leniency, or alcohol. The trial was often conducted rapidly after the asserted crime. The accused was usually too poor to afford counsel, "and faced with what was in effect a professional prosecution conducted without regard to truth or rules of evidence, it was scarcely surprising that so many failed to mount an adequate defense" (328). Paley also makes a start on trying to understand how the authorities allocated reward money from the public till among the various claimants (316–22).

Alas, Paley strains to mold her discoveries about the reward-induced abuses of the London thief-takers into a conjectural conspiracy involving the bench. She voices this suspicion at the outset of her chapter and recurrently

throughout: Henry Fielding and "the whole of the contemporary legal establishment must have been well aware of what was going on" (303). Paley intimates that the attorney general and others protected McDaniel from being prosecuted for murder, for fear of "exposing the corruption of the whole system" (334). She transforms Joseph Cox, the constable who detected the McDaniel gang in false prosecution and had the culprits arrested and prosecuted, into a cover-up artist, on the ground that Cox might have done a still better job (335–36). Although Paley notices instances in which the judges worry about the reliability of reward-induced evidence (326 and note 74), she insists that "thief-takers' evidence was received with extraordinary credulity" (326). Because the judges, especially the recorders of London, saw the same thief-takers prosecuting offenders over the years, the judges must have known that they were presiding over false prosecutions, yet they did not care to intervene.[6]

It is a giant leap from the observation that the recorder and the other judges presided over a lot of successful prosecutions involving shady thief-takers to Paley's astonishing intimation that the judges knew that the evidence was false and stood by idly while the perjurers prosecuted innocent persons to their deaths. Evidence does indeed abound that contemporaries were aware of the danger that the reward system could beget false witness, but Paley adduces not a shred of evidence that the authorities tolerated known cases of false witness. What Paley's evidence really underscores is the depth of the dilemma in which the judges and others responsible for administering the criminal justice system were caught. Lacking professional police and prosecution, they were dependent upon reward-seekers. In the light of hindsight we know that the English effort to avoid bureaucratic criminal justice was a grievous error, but it was not a willful lot to allow craven thief-takers to exterminate innocent victims.

David Philips's essay on prosecuting associations in the period from 1760 to 1860 (113–70) is the product of a monumental research effort. Philips has studied (and scheduled) the records of 213 associations from 26 countries. He reckons that there may have been 1,000 such societies, conceivably many more. A few date back to the 1690s, but the high tide of formation occurs in the 1770s and 1780s. The associations were local voluntary organizations. Members paid a subscription and adopted articles of association. The typical association worked as an insurance fund. When a member suffered a crime of a type covered in the association's articles, the association would manage and pay for the investigation and prosecution of the case. The association commonly advertised stolen goods (associations figure prominently in John Styles's study of crime advertising appearing in this volume). Associations sometimes offered extrastatutory rewards for the apprehension of culprits. Most important, members would look to the association to defray, at least in part, those clerical and lawyers' fees that were not state-reimbursed. Most associations limited their activity to property crimes. A handful toyed with preventive policing by supporting local police patrols, an activity that parallels

(as Philips remarks) frontier vigilantism in America in the same period (118–21 and notes).

Philips has compiled information about the size and social composition of the associations, "gentlemen, farmers, and tradesmen" of the district, sometimes including clergy and women (132–34), and about the associations' finances, which ranged from episodic levies, to annual subscriptions, to something resembling risk-related variable-rate premiums (135–36). Philips observes that the associations for the prosecution of felons develop in the period during which the commercial insurance industry was on the rise in England. One can view the association for the prosecution of felons as another form of special-purpose casualty insurance—a form that could not survive the later nineteenth century after the state socialized the main functions of law enforcement.

The timing of the appearance of the prosecuting associations is a puzzle of great interest. "Why was it in the 1770s and 1780s that associations were first established in large numbers?" (123). Philips's answer is that this was a period of growing concern about the inadequacy of the existing institutions of law enforcement. The Gordon Riots in 1780 and the crime wave incident to demobilization after the American war produced an atmosphere of crisis conducive to the formation of the associations. Philips may be correct to see such developments as disposing factors,[7] but prosecuting associations were not directly responsive to the lack of decent policing. The associations might deter some crime and facilitate the detection of some culprits, but prosecution was no true substitute for preventive policing—for cops on the beat. What the associations primarily did was to finance selected pretrial investigations and consequent trials. To explain the burst of activity in organizing prosecuting associations that occurred in the 1770s and 1780s, it seems plausible to inquire whether there was a connection to the large changes then underway in pretrial and trial procedure. Philips observes in passing that the later eighteenth century was a period "when lawyers were coming to play a much more significant role in the English criminal trial—an increasing use of prosecution counsel [at trial], and a greatly enlarged role for solicitors. . . . This development considerably increased the normal cost of a criminal prosecution for the prosecutor" (125). The relationship between the growth of the associations and the lawyerization of criminal procedure is a subject that would repay sustained investigation. We have in the records of the prosecuting associations a potential barometer of the advance of adversary criminal procedure in its formative epoch.

In his study of the Essex associations (171–207), Peter King reports that conviction rates were no higher for cases brought by associations than those that were not, from which data he concludes that "[t]he associations of Essex . . . failed to make any impact on the verdicts of juries. . . . Many associations paid lawyers considerable sums to prepare and prosecute cases on their behalf, but although this practice may have relieved them of organizational burdens it does not seem to have increased their ability to

obtain convictions" (192). This a hard morsel to swallow because King does not tell us whether the association-prosecuted and non-association-prosecuted cases are comparable. Chances are that they are not—that the associations were involved in a disproportionate number of more difficult cases, cases involving fugitives and incomplete evidence, in contrast to the caught-in-the-act cases that were the staple of criminal trials in this period. The later eighteenth century is the period in which English criminal procedure underwent a vast enhancement in the level of defensive safeguard, epitomized in the rise of adversary procedure and the law of criminal evidence. Prosecutions became harder, and that may help explain both the burst of association activity in this period and the seemingly indifferent success rate of these prosecutions.

It is not to be expected that, within the compass of a forty-odd-page chapter, Philips should exhaust every aspect of a topic heretofore so little studied. For the future, I would direct attention to an issue that does not receive sustained treatment from Philips: the role of solicitors in launching and running the associations. Philips mentions that "[m]ost associations . . . had the important advice of one or more solicitors" (132). Peter King devotes an interesting paragraph to the difficulty of "ascertaining how many associations used lawyers to conduct their prosecutions. The Colchester Association clearly had its own attorney. . . . [T]he attorney, William Mason, . . . acted as clerk to at least five prosecution associations in the north-east of Essex" (192). Philips reports that "the regular salary for the secretary or treasurer who usually doubled as the association's solicitor" was not very large (135), but he does not explore the extent to which the managing solicitor used the association as a source of captive business beyond the annual retainer. Philips gives us glimmers of the activity of solicitors in managing the associations' prosecutions (136, 138), but this is not a theme of his work. It ought to become a theme of somebody's work. One of the great mysteries of English criminal procedure in the eighteenth century is the question of how extensively solicitors were involved in the gathering of evidence and the instructing of counsel. The records of the associations for the prosecution of felons are the best window we are likely to get on the work of solicitors in the conduct of criminal cases.

The association records may also turn out to be our best sources on the subject of the costs of criminal investigation and prosecution in this period. It looks as though the charges made by clerks, solicitors, and barristers became an increasing burden across the eighteenth century. Henry Fielding and others complained that these costs deterred citizens from prosecuting. Parliament intervened several times from 1752 onward to provide limited subsidies for prosecution costs, especially for the poor.[8] Philips supplies some illustrations of the associations' disbursements on detection and prosecution (135–36), but neither he nor King has undertaken serious investigation of the costs of prosecution in these cases and the mesh of public and private funding.[9] John Beattie, anticipating these essays, thought that "[b]etter evidence of actual costs may emerge from the detailed work now underway on the activities of prosecuting associations,"[10] but that has not yet happened.

Well-coordinated studies on a suitable theme of the sort exemplified in this volume do not just happen to fall together. This volume reflects careful planning and nurture on the part of its editors, who deserve great credit for having organized and carried out the project.

John H. Langbein
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NOTES

1. For a succinct and thoughtful account of the development, *see* Philips, *"A New Engine of Power and Authority": The Institutionalization of Law-Enforcement in England 1780–1830,* in CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500, at 155–89 (V. A. C. Gatrell, B. Lenman and G. Parker, eds. 1980).

2. A convenient overview on the American history: S. H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND 1780–1850, at 19–24 (1988).

3. 2L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE CLASH BETWEEN PRIVATE INITIATIVE AND PUBLIC INTEREST IN THE ENFORCEMENT OF THE LAW (1956).

4. *See generally* G. HOWSON, THIEF-TAKER GENERAL: THE RISE AND FALL OF JONATHAN WILD (1970).

5. I have elsewhere directed attention to the significance of the McDaniel scandal for the subsequent development of criminal trial procedure in the eighteenth century. J. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,* 50 U. CHI. L. REV. 1 105–14 (1983).

6. Paley: "Between 1742 and 1753, three men served the office of Recorder for periods that varied from two to five years. It is difficult to believe that any of them could have been unaware of the thief-takers' tactics. As the man who authorized the distribution of rewards, the Recorder was in a position to know just how often thief-takers stood to profit from a convinction. He, more than anyone else, was best placed to note the distinctive and repetitive pattern of conspiratorial prosecutions. At best, the conduct of successive Recorders amounts to malicious complacency; at worst one is led to suspect outright corruption." (328).

7. The connection is tenuous because the associations were active primarily in the countryside. They were most concerned with the theft of horses and other livestock, as opposed to the urban developments (e.g. gang crime, the Gordon Riots) about which there was so much alarm.

8. For detail *see* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660–1800, at 41–47 (1986).

9. In an earlier work Philips did compile some data on aggregate prosecution costs in the second quarter of the nineteenth century. D. PHILIPS, CRIME AND AUTHORITY IN VICTORIAN ENGLAND: THE BLACK COUNTRY 1835–1860, at 110–23 (1977).

10. BEATTIE, *supra* note 8, at 46 n. 26.