

**SIMON BARBER**

***R V EARL FERRERS (1760):***  
**THE TRIAL THAT SAVED ENGLAND**  
**FROM REVOLUTION?**

**Submitted for the LLB (Honours) Degree**

**Faculty of Law**  
**Victoria University of Wellington**  
**2017**

## **Abstract**

*In 1760, Laurence Shirley, the Fourth Earl Ferrers, killed his steward in cold blood. He was found guilty of the murder before his peers in the House of Lords, and subsequently hanged. Whilst the Trial is seminal in any history of 18th century English law, discussion is predominantly confined to the infamous narrative. Instead, this paper examines the Trial and execution within the legal context of 18th century England. The findings reveal an increase of discretion in criminal procedure, a reaction to a rapidly swelling set of laws. However, the Earl was afforded little discretion, and faced atypical intransigency of criminal procedure.*

*From this, the wider context reveals an ostensible affirmation of the rule of law by the powerful ruling class. The Bloody Code engendered a mode of criminal justice based on rhetoric and perception. His fellow lords were prepared to make a sacrificial example from their own ranks to extol the virtue of the English legal system. This sacrifice ultimately appeased the masses, whilst protecting their own position in society. It is not a coincidence that in the decades surrounding the French Revolution, the Trial was proclaimed by conservatives as incontrovertible evidence of the equality of English law.*

## **Key Words**

Earl Ferrers; Bloody Code; Criminal Procedure; Rule of Law; 18th Century England.

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## *I Introduction*

Laurence Shirley, the Fourth Earl Ferrers has the unfortunate honour of being the last peer of the realm to be hanged. In 1760 before his peers in the House of Lords, he was unanimously found guilty of the murder of his steward, John Johnson. The Trial of a

nobleman was a veritable cause célèbre. The public was enraptured by each development of the dramatic tale, with both the Trial and execution attracting crowds into the streets of London. Foreign observers clamoured desperately for an opportunity to watch the Trial at Westminster Hall.

The prosecution argued that the Earl had committed the act deliberately with a clear motive, purposeful actions and knowledge of the consequences. Ferrers's defence to these accusations was a reluctant plea of insanity. However, this defence was problematic for two principal reasons. Firstly, the defence of insanity had not hitherto received any authoritative judicial or legislative support. But more importantly, a defendant was not afforded the right to counsel for a felony. Therefore, Ferrers was obliged to conduct his own defence by questioning witnesses he had not concerted with, in order to prove his own insanity. Faced with this Sisyphean challenge, it is not surprising that the Earl's defence was unsuccessful.

This paper places the Trial in the context of the 18th century English legal system. From this, it considers the wider impact of the Trial in the social and political workings of the century. In doing this, I have often drawn on contemporary sources. This is predominantly because of the relative dearth of modern day material on the Trial. These contemporary sources also illustrate the immediate impact in the mindset of the masses of 18th century England. Moreover, the opinions of contemporary foreign observers provide an effective means of distinguishing the English legal system from its continental counterparts. However, in order to understand the Trial, the context of 18th century England must be dissected.

## *II Context*

By 1760, England was at a critical juncture. Criticism of the powerful ruling class was mounting.<sup>1</sup> King George II was ill, eventually dying in October 1760. The wheels of

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<sup>1</sup> J. H. Plumb *England in the Eighteenth Century* (Penguin Books, Middlesex, 1960) at 133.

the Industrial Revolution were beginning to turn.<sup>2</sup> The population was experiencing rapid growth, increasing by 133 per cent between 1680 and 1820.<sup>3</sup> Technological advancements were being made at a rapid rate.<sup>4</sup> As a result, the English grew richer.<sup>5</sup> Porter attributes the expeditious progress made by the English people of the 18th century to their characteristic pragmatism.<sup>6</sup>

Whilst it was a time of rapid growth, it was certainly not a time of tenderness.<sup>7</sup> Children of the poor were sent to work “as soon as they could walk.”<sup>8</sup> Lunatics were immured in asylums, treated like zoo animals.<sup>9</sup> The public paid to tour these asylums, ogling at the confined.<sup>10</sup> However, moralism and medicine increased as the century progressed.<sup>11</sup> Children (at least of the wealthy) came to be recognised as central members of the family.<sup>12</sup> In 1766 the practice of public visitation was curtailed at Bethlem, the infamous London asylum.<sup>13</sup> Slowly, some of the more progressive physicians began suggesting that madness was a disease.<sup>14</sup>

Class was all encompassing. The English class system consisted of “few at the top and many at the bottom.”<sup>15</sup> But, as Hay noted, this did not mean England was entirely a society of “absolute control and paternal benevolence.”<sup>16</sup> The distinctions between each individual rung of the class ladder were relatively subtle.<sup>17</sup> This subtlety provided the English people with great motivation.<sup>18</sup> Whilst a complete ascent within a generation

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<sup>2</sup> Arnold Toynbee *Lectures on the Industrial Revolution* (The Beacon Press, Boston, 1884); Plumb, above n 1, at 77.

<sup>3</sup> E. A. Wrigley “The Growth of Population in Eighteenth-Century England: A Conundrum Resolved” (1983) 98 OUP 121 at 122.

<sup>4</sup> Plumb, above n 1, at 78.

<sup>5</sup> Roy Porter *English Society in the Eighteenth Century* (Penguin Books, Middlesex, 1982) at 202.

<sup>6</sup> At 3.

<sup>7</sup> At 284.

<sup>8</sup> Plumb, above n 1, at 87.

<sup>9</sup> Porter, above n 5, at 304.

<sup>10</sup> At 304.

<sup>11</sup> At 304.

<sup>12</sup> Porter, above n 5, at 286

<sup>13</sup> At 304.

<sup>14</sup> At 304.

<sup>15</sup> At 63.

<sup>16</sup> Douglas Hay “Property, Authority and the Criminal Law” in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (Penguin Books, Middlesex, 1975) at 61.

<sup>17</sup> Porter, above n 5, at 64.

<sup>18</sup> At 64.

was inconceivable, a gradual ascent was distinctly possible.<sup>19</sup> This contrasted with other European countries at the time, with their demarcated class boundaries rendering ascent impossible.<sup>20</sup> Despite this relative fluidity, England still faced unrest.

Rioting was commonplace.<sup>21</sup> The opportunities rendered by a more nuanced class system meant the English were uniquely opinionated in political debates.<sup>22</sup> Failed Jacobite risings occurred both in 1715 and 1745. The Gordon Riots of 1780 caused ten times more property damage to London than the French Revolution caused to Paris, but crucially failed to receive rural support.<sup>23</sup> The scenes of the French Revolution inspired radicals in the 1790s.<sup>24</sup> They advocated for a similar upheaval in England.<sup>25</sup> This never happened. The English political system endured; although not through inaction.

The powerful commissioned inquiries to ascertain the causes of unrest. Henry Fielding, the novelist and magistrate, attributed it to the dangerous increase of temptation in society.<sup>26</sup> Increases in wealth brought a marked rise in places of entertainment and culture.<sup>27</sup> The lower classes were finally able to spend their money on leisure, inevitably complemented by its natural companion, alcohol.<sup>28</sup> Gin wreaked havoc, as so powerfully evoked in the 1751 prints of “Gin Street” and “Beer Lane” by William Hogarth.<sup>29</sup> The impact was so severe, Parliament desperately scrambled to enact three separate Acts within fifteen years to stem the flow of social destruction.<sup>30</sup>

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<sup>19</sup> At 65.

<sup>20</sup> At 64.

<sup>21</sup> Hay, above n 16, at 23.

<sup>22</sup> At 118.

<sup>23</sup> George Rudé *Europe in the Eighteenth Century: Aristocracy and the Bourgeois Challenge* (Weidenfeld and Nicolson, London, 1972) at 202.

<sup>24</sup> Porter, above n 5, at 365.

<sup>25</sup> At 366.

<sup>26</sup> Henry Fielding *An Enquiry into the Causes of the Late Increase of Robbers and Related Writings* (Clarendon Press, Oxford, 1988) at 3.

<sup>27</sup> Porter, above n 5, at 254.

<sup>28</sup> Porter, above n 5, at 232.

<sup>29</sup> Porter, above n 5, at 34.

<sup>30</sup> Spirit Duties Act 1735 (9 Geo. II., c. 23); Spirits Act 1742 (16 Geo. II, c. 8); Sale of Spirits Act 1750 (24 Geo. II c. 40).

London's growth in particular, had precipitated its reputation as the national hotbed of criminality.<sup>31</sup> Fielding lamented the inadequacy of crime prevention.<sup>32</sup> The powerful did not. They harboured suspicions of organised police forces.<sup>33</sup> The powerful feared the implementation of policing would require a forfeiture of their power. Furthermore, many of the wealthier citizens would have travelled to France. There, they observed great unrest along with the nascent French police force's ineptitude in stifling crime.<sup>34</sup> Moreover, despite the lack of policing, observers reported that crime was far less prevalent in London than Paris.<sup>35</sup> Given this direct observation, it is understandable that the powerful were content to tarry the implementation of an organised police force. A different path was taken.

The anointed solution was a "fat and swelling sheaf of laws."<sup>36</sup> This dramatic increase of laws became known as the Bloody Code. In the 17th century, capital punishment was restricted to only the most serious of offences.<sup>37</sup> However, early in the 18th century, this changed dramatically. The Black Act was enacted in 1723.<sup>38</sup> This introduced the death penalty for over 50 offences. This extraordinary increase continued for the next 100 years. In 1688 there were fewer than 50 capital offences. By 1800, the number was said to exceed 200.<sup>39</sup> Moreover, many offences were predicated on distinctions which now appear ludicrously tenuous. An often mentioned example is the law which stated that kidnapping a child was merely a misdemeanour, whilst stealing that same child's shoes (provided they were worth over a shilling) would be a capital offence.<sup>40</sup> Evidently, the offences did little to distinguish between the gravity of offending. As Dr Johnson stated "to equal robbery with murder is to reduce murder to robbery."<sup>41</sup> Despite any theoretical or social inadequacies of the Bloody Code, the powerful favoured the harsh penal system.

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<sup>31</sup> Dorothy Marshall *Dr Johnson's London* (John Wiley & Sons, New York, 1968) at 220.

<sup>32</sup> Porter, above n 5, at 156.

<sup>33</sup> Hay, above n 16, at 18.

<sup>34</sup> At 18.

<sup>35</sup> Leon Radzinowicz *A History of English Criminal Law and its Administration from 1750* (Stevens & Sons, London, 1948) vol 1 at 712.

<sup>36</sup> Hay, above n 16, at 18.

<sup>37</sup> Radzinowicz, above n 35, at 4.

<sup>38</sup> Black Act 1723 9 Geo. 1 c. 22

<sup>39</sup> Radzinowicz, above n 35, at 4.

<sup>40</sup> Andrea McKenzie *Tyburn's Martyrs: Execution in England, 1675-1775* (Hambeldon Continuum, London, 2007) at 3.

<sup>41</sup> Samuel Johnson "Rambler 114" in *The Rambler: In Four Volumes* (1794) vol 3 at 50.

They recognised the importance of perception. The Code bestowed complete control upon the powerful. The majority of crime was still committed by poor, young males.<sup>42</sup> However, the code could be used by the powerful to create an appearance of equality before the law, even if this was not necessarily the case. Hay suggested the powerful used the law as an ideological instrument, which allowed maintenance of their hegemony.<sup>43</sup> However, confining discussion of the Bloody Code to the increasing number of offences or the anomalous distinctions made between these offences is ultimately illusory.

The actual violence concomitant with the Bloody Code must not be overstated. Despite the increase of offences created, there was actually a dramatic decrease in the proportion of criminals executed.<sup>44</sup> As Radzinowicz noted, criminal law is only one element of criminal justice.<sup>45</sup> Whilst the Bloody Code swelled, criminal procedure reacted by becoming increasingly liberal. This reflects English law's longstanding commitment to the liberality of criminal procedure, embodied in statutes as early as the Magna Carta in 1215. It also demonstrates the reverberations of the constitutional changes of the late 17th century.<sup>46</sup> When foreign observers espoused their admiration of English criminal law, they were alluding to the liberality of procedure.<sup>47</sup>

Class also played a central role in the impact of the Bloody Code. English law possessed the calculated ability to "make the courts a selective instrument of class justice."<sup>48</sup> As the century progressed, the use of the royal prerogative of mercy to pardon offenders expanded.<sup>49</sup> Utilisation of the pardon allowed many of the powerful and their families to evade the gallows.<sup>50</sup> Hay suggested that if all the wayward sons of the wealthy were hanged, there would have been inordinate "carnage in the better circles."<sup>51</sup> Equally so,

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<sup>42</sup> Frank McLynn *Crime and Punishment in Eighteenth-century England*. (Routledge, London, 1989) at 133.

<sup>43</sup> Hay, above n 16, at 26.

<sup>44</sup> Radzinowicz, above n 35, at 158.

<sup>45</sup> At 27.

<sup>46</sup> Hay, above n 16, at 32.

<sup>47</sup> Radzinowicz, above n 35, at 720.

<sup>48</sup> Hay, above n 16, at 48.

<sup>49</sup> Hay, above n 16, at 22.

<sup>50</sup> Hay, above n 16, at 45.

<sup>51</sup> Hay, above n 16, at 45.



if none of the powerful faced the wrath of the Bloody Code, unrest or even revolution was likely. This forced the powerful to occasionally make prominent examples of their impartiality.

One of the clearest examples is the Trial of Reverend Dodd in 1777.<sup>52</sup> Dodd was a well connected clergyman. He encountered pecuniary difficulties, and in desperation, forged the signature of his former employer, Lord Chesterfield. The fraud was soon discovered and Dodd was arraigned. Dodd had many influential supporters, including Dr Johnson.<sup>53</sup> Given this, one would expect some leniency but Dodd received none. He was found guilty, and duly hanged.<sup>54</sup> This is despite some 100,000 signatures requesting the royal prerogative of mercy be bestowed upon him.<sup>55</sup> The previous year, George III had sent a similar victim to the gallows.<sup>56</sup> The King recognised the public was overwhelmingly in favour of the pardon, but intimated that the alternative was worse.<sup>57</sup> If Dodd did not hang, it would damage the perception of equality before the law.

When a person was convicted of a capital offence, there would be a public display of execution.<sup>58</sup> London was scattered with execution sites.<sup>59</sup> Tyburn was the most infamous.<sup>60</sup> Every six weeks, prisoners were shepherded on the journey from Newgate Prison to the Tyburn gallows.<sup>61</sup> Linebaugh explicated the workings of the class dynamics; these prisoners were not from the upper classes, they were the “propertyless and oppressed.”<sup>62</sup> Along with the swelling Bloody Code, public executions were the other aspect of English criminal law condemned by foreigners in England.<sup>63</sup> The publicity of executions was intended to have a deterrent effect.<sup>64</sup>

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<sup>52</sup> Radzinowicz, above n 35, at 450.

<sup>53</sup> At 456.

<sup>54</sup> At 465.

<sup>55</sup> McLynn, above n 38, at 139.

<sup>56</sup> Radzinowicz, above n 35, at 462.

<sup>57</sup> At 464.

<sup>58</sup> Peter Linebaugh “The Tyburn Riot Against the Surgeons” in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (Penguin Books, Middlesex, 1975) at 67.

<sup>59</sup> Radzinowicz, above n 35, at 199.

<sup>60</sup> At 199.

<sup>61</sup> Peter Linebaugh *The London Hanged: Crime and Civil Society in the Eighteenth Century* (2nd ed, The Penguin Press, 1993) at 74.

<sup>62</sup> At 74.

<sup>63</sup> Radzinowicz, above n 35, at 722.

<sup>64</sup> At 165

It is arguable whether this intention was realised. The problem with the deterrence theory is that public executions were viewed as a great source of entertainment. The public would rush from work, or even be permitted the day off.<sup>65</sup> Grandstands were set up by the entrepreneur to accommodate spectators.<sup>66</sup> The crowds often sympathised with the criminal after seeing such an execution, forgetting the crime in the midst of the ceremony.<sup>67</sup> It is unclear how these conflicted emotions lie with the theory of deterrence. However, it is certain that they were regarded as memorable events.

The context reveals the 18th century to be a uniquely pragmatic time. This is reflected by the attitude to capital punishment. Instead of favouring certainty, the powerful preferred the flexibility of a discretionary system, which allowed strict application the instances where it was deemed necessary. The Trial of Earl Ferrers is a unambiguous example of this.

### *III Laurence Shirley, The Fourth Earl Ferrers*

Laurence Shirley was a man with a dangerous predilection for the profane. He was born in 1720, into one of the most noble English families of the time. From a young age, his family observed his eccentricities and violent temper. He abandoned his studies at Oxford, embarking on a dangerously hedonistic lifestyle in Paris. He eventually returned, accompanied by a preternatural affection for liquor. In 1745 he became the Fourth Earl Ferrers after the death of his institutionalised uncle, who had been sequestered for periodic bouts of insanity. With this ascendancy to nobility, Shirley's oddities only increased. Whilst the English aristocracy were known for their eccentricities and intemperance, Ferrers pushed these conventions. Ferrers was at the extreme end of aristocratic unconventionality, and consequently was reviled by his peers.

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<sup>65</sup> At 172.

<sup>66</sup> At 175.

<sup>67</sup> Horace Walpole *The Yale edition of Horace Walpole's correspondence with Sir Horace Mann* (Yale University Press, New Haven, 1960) vol 21 at 395.

Ferrers's wife, Mary Meredith, in an action which was rare at the time, obtained a separation order. This was passed by an Act of Parliament in 1758, on the grounds of Ferrers's cruelty.<sup>68</sup> Their matrimony was almost entirely miserable. Ferrers claimed Meredith had taken advantage of his inebriated state, cajoling him into marriage. He tortured her physically and mentally. He slept with a pistol as a constant reminder of his threats.<sup>69</sup> Because of the separation, Earl Ferrers was obliged to appoint a receiver to conduct the affairs between himself and his estranged wife. He chose John Johnson. Johnson was a faithful servant of the Shirley family. The Earl trusted Johnson, and believed his lifetime of loyalty to the family would ensure complicity to the Earl's wishes. But Johnson proved incorruptible. Ferrers began to harbour a fervent contempt for Johnson. He plotted schemes to remove Johnson as receiver of his estates, but all of these attempts proved fruitless.

Instead, the Earl conceived a cataclysmic alternative. Ferrers invited Johnson to pay him a visit at Staunton Harold (his estate) on Friday January 18, 1760. He instructed all within the house to leave, apart from three young female maidservants. Johnson arrived and was promptly ushered to the Earl's room. Upon entering, the door was locked behind them. A heated discussion ensued. Ferrers accused Johnson of villainy, and remonstrated that Johnson should confess to this. Johnson refused. The Earl fired a single pistol shot through Johnson's bowels, wounding him grievously.

When the expected death did not immediately result, Ferrers was transported into panic. He sent for Johnson's daughter, Sarah. He also sent for the local physician, Dr Kirkland. Once they arrived, he confessed to them that he had deliberately shot Johnson. Upon seeing Johnson's anguish, Ferrers began to have second thoughts. He now wished that Johnson could be saved. Kirkland knew Johnson's death was inevitable. However, he was placed in an unenviable position. Ferrers was becoming increasingly erratic, as he drank himself into a stupor. Kirkland, fearing for his own life prevaricated to the murderous Earl by optimistically exaggerating the prospects of Johnson's survival. Ferrers trusted Kirkland, and nonchalantly continued to drink before eventually stumbling to bed.

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<sup>68</sup> *For Separating Lawrence Earl Ferrers from Mary Countess Ferrers his wife, for the cruelty of the said Earl; and for settling a maintenance for the said Countess, out of the estate of the said earl (1758)*(Private Act 31 Geo. II, c 39).

<sup>69</sup> Walpole, above n 67, at 396.

Sensing his chance, Kirkland devised to remove Johnson from Staunton Harold. He gathered some local men, who carried the dying man back to his own home. However, Johnson's condition only deteriorated and by the next morning, he was dead. Shortly prior to Johnson's death, Kirkland embarked with a group of colliers to arrest the Earl. Though the Earl was initially reluctant to be arrested by a group of local men, he eventually submitted. Once told of Johnson's death, Ferrers "gloried in the fact" of his nemesis's death.<sup>70</sup> He was briefly imprisoned in Leicester Gaol before travelling to London to face a jury of his peers in the House of Lords.

#### *IV The Trial of Earl Ferrers*

##### *A Trial by One's Peers*

Blackstone regarded trial by jury as the "grand bulwark" of an Englishman's liberties.<sup>71</sup> It provided a firm barrier between a person's liberty and the Crown's prerogative. A defendant's fate was determined by a unanimous decision of twelve of their peers. Foreign observers greatly admired the liberty and protection afforded by the jury.<sup>72</sup> It was regarded as an immeasurable advantage of English law; ensuring justice was delivered impartially.<sup>73</sup>

This Trial was different. Earl Ferrers was a peer of the realm. His peers were in the House of Lords, not a group gathered to attend at the Old Bailey. The House of Lords had a criminal jurisdiction to try peers accused of treason or felony.<sup>74</sup> Blackstone viewed a trial before the House of Lords as the ultimate court of the King in Parliament.<sup>75</sup> There was no judge; instead, a Lord High Steward was appointed to

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<sup>70</sup> T. B. Howell "The Trial of Earl Ferrers For Murder" in *A Complete Collection of State Trials* (1816) vol 19 at 901.

<sup>71</sup> William Blackstone *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press, Oxford, 1966) at 342.

<sup>72</sup> Radzinowicz, above n 31, at 717.

<sup>73</sup> At 721.

<sup>74</sup> William Holdsworth *A History of English Law* (2nd ed, Sweet & Maxwell, London, 1966) vol 10 at 609.

<sup>75</sup> Blackstone, above n 71, at 342.

conduct the proceedings.<sup>76</sup> All peers had a right to sit and vote at the trial acting as the jury.<sup>77</sup> The lords were entitled to ask questions and make interruptions as they deemed necessary. There was no need for unanimity, it was decided upon a majority.<sup>78</sup> Allowing only the legal members of the House to decide was a later development.<sup>79</sup>

The Trial of Earl Ferrers is an “example of the disadvantages of a trial by one’s peers.”<sup>80</sup> Two relevant cases show how an ordinary jury could react to a plea of insanity. Firstly, the trial of Edward Stafford in 1731.<sup>81</sup> Edward Stafford was the brother of Lord Stafford. He stabbed Thomas Manwaring outside a coffee-house in Holborn. The firsthand witness accounts deny insanity. They admitted that whilst Stafford appeared to be “distracted,” he was not in “a passion.”<sup>82</sup> Others went further; arguing Stafford even conducted himself with “bravado.”<sup>83</sup> The direct observations of the stabbing provided but a slender reed for Stafford’s defence of insanity. However, Lord Stafford deposed that on the day of the stabbing his family had attempted to procure a doctor to treat his brother’s insanity. The jury was ostensibly convinced by this. Stafford was given a special verdict of lunacy.<sup>84</sup> A similar suggestion was made in the trial of Earl Ferrers, but a different result followed.

The Trial of Robert Ogle in 1756 for murder is also instructive.<sup>85</sup> At Trial, some evidence deposed that Ogle “appeared as a madman, and sometimes not quite so bad.”<sup>86</sup> Other evidence suggested that he was completely insane. The varied descriptions of a man wavering between eccentricity and insanity are remarkably similar to those made in Ferrers’s trial. Ogle, with the benefit of counsel, was found not guilty on the basis of his deficiency “of sound mind and memory.”<sup>87</sup>

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<sup>76</sup> Colin Rhys Lovell “The Trial of Peers in Great Britain” (1949) 55 AHR 69 at 75.

<sup>77</sup> Holdsworth, above n 74, at 609.

<sup>78</sup> Blackstone, above n 71, at 342.

<sup>79</sup> Holdsworth, above n 74, at 610.

<sup>80</sup> Nigel Walker *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) at 58.

<sup>81</sup> At 58.

<sup>82</sup> “Trial of Edward Stafford” (July 1731) Old Bailey Proceedings Online <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>

<sup>83</sup> “Trial of Edward Stafford” (July 1731) Old Bailey Proceedings Online <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>

<sup>84</sup> Walker, above n 80, at 58.

<sup>85</sup> Dana Y. Rabin *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (Palgrave Macmillan, New York, 2004).

<sup>86</sup> “Trial of Robert Ogle” (3 June 1756) Old Bailey Proceedings Online <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>

<sup>87</sup> “Trial of Robert Ogle” (3 June 1756) Old Bailey Proceedings Online <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>

Another case which displayed the influence of power on the jury is the Trial of Viscount Dungarvan in 1790.<sup>88</sup> Dungarvan was arraigned at the Old Bailey for pick-pocketing a woman. The prosecution proffered damning evidence of his crime. Dungarvan's defence was vituperative, uncovering the salacious personal life of the woman to share with the jury. However, his case was supported by a number of eminent character witnesses.<sup>89</sup> The jury was affected and perhaps intimidated at being surrounded by manifold members of the elite.<sup>90</sup> They found Dungarvan not guilty.<sup>91</sup>

However, the trials at the Old Bailey are not directly comparable. The trials were conducted under completely different procedural circumstances from the unique, ad hoc court formed at Westminster Hall. A jury of 12 propertied men cannot readily be compared to one which consists of over 100 peers. Therefore, any comparison must be made with caution. Although the Old Bailey trials appear to demonstrate the apparent disadvantage faced by the Earl, they are hardly dispositive. It may be more apt to compare Ferrers's trial with another peer arraigned before the House of Lords. Lord Byron was one of the peers who unanimously found Ferrers guilty of murder.<sup>92</sup> Five years later, Byron found himself in the same unfortunate position. He was on trial for killing his cousin, William Chaworth.<sup>93</sup> Despite similarities in the trials, Byron was found unanimously not guilty of murder.<sup>94</sup>

The Trial of Lord Byron in 1765 was more conventional. Byron and Chaworth were two members of the elite, embroiled in an argument concerning whom had more game on their estates. After this argument, the facts become less clear. The crucial finding was the acceptance of Byron's evidence that the stabbing occurred in the midst of a duel. This is not altogether convincing. Other evidence suggested the murder may have been conducted in a dimly lit room. The expiring Chaworth, in his benevolence, declined to explicitly proffer an opinion on the true nature of the event. Nevertheless, his dying words intimate the possibility of a cold-blooded murder. However, without

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<sup>88</sup> McLynn, above n 42, at 148.

<sup>89</sup> At 148.

<sup>90</sup> At 148.

<sup>91</sup> At 148.

<sup>92</sup> The Uncle of the famous poet.

<sup>93</sup> *R v Byron* (1765) 193 State Trials 133.

<sup>94</sup> *R v Byron* (1765) 193 State Trials 133.

anything to the contrary Lord Byron's version of events was accepted.<sup>95</sup> The Trial unfortunately lacked a trustworthy witness, such as Dr Kirkland. Though Byron was acquitted, he spent the remainder of his life in crestfallen solitude.<sup>96</sup>

Given Chaworth was of a far higher standing than Johnson, it seemed likely the House of Lords would have punished his murderer accordingly. However, the peers may have perfunctorily accepted Byron's version of events for other reasons. Considering the impact of Ferrers' execution, it is conceivable that the lords were unwilling to hang another man from their ranks. The English people revered their lords.<sup>97</sup> Sending another to the gallows would be superfluous, or even dangerous. It could have damaged the perception of order, so adroitly cultivated by the Bloody Code. It is also relevant that in Byron's case, it was a "domestic affair" between two members of the upper class. Ferrers's crime, however, transcended class boundaries, making it susceptible to propaganda and the indignation of the common man.

The trial of Earl Ferrers is celebrated for the display of independence by the English legal system.<sup>98</sup> It stimulated intense foreign interest. The Lords were undoubtedly aware that, perhaps even more so than Ferrers, their nation's law was on trial. This likely influenced the outcome.<sup>99</sup> Walpole notes how novel it was for foreigners to witness "such deliberate justice, and such dignity of nobility, mixed with no respect for birth."<sup>100</sup> The peers seized the opportunity to assert the impartiality of English law to the world. It appeared to be successful. Four years after the trial, Beccaria pontificated on the liberty of English law, professing the merits of a system where "everyone shall be judged by his equals, because where a citizen's liberty and fortune are at stake those sentiments which inequality inspires should have no voice."<sup>101</sup> The insistence on presenting the impartiality of English law extended beyond the Trial itself.

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<sup>95</sup> J. A. Lovat-Fraser "The Trial of Lord Byron" (1912) 38 LM 159 at 164.

<sup>96</sup> At 164.

<sup>97</sup> Porter, above n 5, at 52.

<sup>98</sup> Holdsworth, above n 74, at 649

<sup>99</sup> McLynn, above n 42, at 150.

<sup>100</sup> Walpole, above n 67, at 389.

<sup>101</sup> Cesare Beccaria *Dei delitti e delle pene* (1764) (translated ed: James Anson Farrer *Crimes and punishments; including a new translation of Beccaria's 'Dei delitti e delle pene,'* (1880) at 137.

After being found unanimously guilty by his peers, Ferrers may still have expected King George II to exercise the Royal prerogative of mercy and pardon him. Ferrers's family presented two petitions, entreating the king to extend his mercy to him.<sup>102</sup> Moreover, a doctor filed an affidavit affirming Ferrers's insanity.<sup>103</sup> The Monarch refused. George II relied on the primacy of upholding the decision of the House of Lords.<sup>104</sup> However, in actuality, the King was free to exercise his discretion despite the result of any verdict.<sup>105</sup> In desperation, the family pleaded that he should be beheaded, but this too was denied. He would face a common man's death. Smollett, a contemporary historian and novelist, noted that the English people were "crying out for vengeance."<sup>106</sup> Considering this, allowing the Earl to avoid the death penalty could well have irreparably ruptured the fabric of society. George II had to make an example of Ferrers without compromise.

Whilst plausible, these reasons may be unnecessarily complex. The outcome can also be attributed to a simpler proposition. Ferrers was detested by his peers, regarded by them as a "low wretch."<sup>107</sup> Many of the peers were disgusted by Ferrers at the Trial, and physically turned away from him when the facts were laid out.<sup>108</sup> Even the Earl of Hardwicke, acting as Ferrers's legal adviser accorded with the unanimous verdict of guilt.<sup>109</sup> This line of reasoning advances the idea that the case was simply decided upon personal attitudes. A man considered universally odious by his peers has little hope of forgiveness.

Though the exact reasoning is uncertain, the outcome was manifestly achieved. The peers, through finding Ferrers guilty were able to allay unrest. Equality of the law was promoted to the people of England and Europe. It has been argued that the execution of Earl Ferrers was a factor in why England had no equivalent of the French Revolution.<sup>110</sup> This conjecture could be dismissed as exaggeration, but any dismissal

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<sup>102</sup> Walpole, above n 67, at 397.

<sup>103</sup> At 397.

<sup>104</sup> At 397.

<sup>105</sup> Radzinowicz, above n 35, at 107.

<sup>106</sup> Tobias Smollett *Continuation of the Complete History of England* (London, 1766), at 81.

<sup>107</sup> Walpole, above n 67, at 395.

<sup>108</sup> At 396.

<sup>109</sup> Walker, above n 80, at 63.

<sup>110</sup> Arthur Crane *The Kirkland Papers: 1753-1869* (Crane Press, Leicestershire, 1990).



should not be overhasty. The Trial had continuing significance during the French Revolution.<sup>111</sup> Conservatives such as Hannah More used the Trial and execution as an element of their reasoning for maintaining the status quo.<sup>112</sup> If an Earl could be hanged in England, for all to see, their argument supposed that this must be incontrovertible evidence that “all are equal here.”<sup>113</sup>

Douglas Hay has opined that Ferrers was “undoubtedly the most useful victim” of the justification by the powerful of their legal system.<sup>114</sup> It demonstrated the “lore of politics” that English law was equal.<sup>115</sup> If they were required to occasionally take one from their own class, Earl Ferrers was a fitting candidate for sacrifice. It reflects the attempt to use the law as one of the principal methods of class control, appeasing the mob, in the 18th century, thereby preventing the build up of tensions leading to discontent, violence, rioting, or as in France, the storming of the Bastille. However despite the political and social considerations, and the odiousness of Ferrers himself, the Trial is also an early example of the plea of insanity. There were two recently contemporary notable attempts of this defence, subsequently recorded in the *State Trials*. They were both unsuccessful.<sup>116</sup> This did not augur well for the fate of Earl Ferrers.

### B *The Defence of Insanity*

The foundations of 18th century criminal insanity were built upon the works of Bracton.<sup>117</sup> His statement that an insane man was not much above the beasts had continuing impact.<sup>118</sup> Though incremental changes continued, the next truly major change came from Chief Justice Hale.<sup>119</sup> Although he died in 1676, his seminal work,

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<sup>111</sup> Hay, above n 16, at 34.

<sup>112</sup> At 34.

<sup>113</sup> Job Nott *Job Nott's Advice* (Birmingham, 1800) at 2.

<sup>114</sup> Hay, above n 16, at 33.

<sup>115</sup> Hay, above n 16, at 33.

<sup>116</sup> Walker, above n 80, at 52; *R v Arnold* (1724) 16 State Trials 695; *R v Bradshaw* (1746) 18 State Trials 415.

<sup>117</sup> Walker, above n 80, at 35.

<sup>118</sup> Joel Eigen *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (Yale University Press, New Haven, 1995) at 36.

<sup>119</sup> At 35.

*The History of the Pleas of The Crown* was not published until 1736.<sup>120</sup> At the time of the Trial it stood at the forefront of legal thought. Indeed, the Solicitor-General asserts the “weight and authority” of Hale’s opinions were known to the whole of England.<sup>121</sup>

Hale’s most prominent advance was his conception of partial insanity.<sup>122</sup> Distinguished from total insanity, partial insanity included “temporary insanity with lucid intervals.”<sup>123</sup> Proof of this alone was insufficient as a defence to a crime. The presumption remained that any crime was committed during a period of lucidity. If the accused could prove that they acted during a delusion, they ought to be acquitted. However, ascertaining the excusatory threshold was problematic. Instead, Hale suggested the judge and jury should decide upon the circumstances, negotiating a balance between humanity and justice.

*R v Arnold* in 1724 is the seminal early 18th century insanity trial.<sup>124</sup> Edward Arnold was tried for shooting Lord Onslow. Arnold had conceived this plan for some time. Fortunately for Onslow, the shot was not fatal. Witnesses recounted “Mad Ned” Arnold’s obsession with the lord.<sup>125</sup> Judge Tracy echoed Bracton, directing the jury in the harshest of terms. To reach an acquittal on the grounds of insanity, the accused must be “totally deprived of his understanding and memory,” something akin to a “wild beast.”<sup>126</sup> Harsh as this may be, it must be remembered that Arnold’s case was heard in 1724. In the early 18th century, social and medical understandings of insanity were equally primitive. These understandings only made serious advances in the latter half of the century. Moreover, Hale’s formative work had yet to be published. Arnold was found guilty. He was rescued from death by Lord Onslow’s admirable sympathy, and lived the remainder of his life institutionalised.<sup>127</sup>

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<sup>120</sup> At 35.

<sup>121</sup> Howell, above n 70, at 946.

<sup>122</sup> Eigen, above n 118, at 36

<sup>123</sup> Matthew Hale *The History of the Pleas of The Crown* (1736) at 30.

<sup>124</sup> *R v Arnold* (1724) 16 State Trials 695.

<sup>125</sup> Walker, above n 80, at 56.

<sup>126</sup> T. B. Howell “Trial of Edward Arnold for Felony (1724)” in *A Complete Collection of State Trials* (1816) vol 16 at 765.

<sup>127</sup> Walker, above n 80, at 57.

In the Trial of Earl Ferrers, the Solicitor-General, Charles Yorke, adopted Hale's reasoning, but formulated his own test for insanity:<sup>128</sup>

If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner; but if there be only a partial degree of insanity, indexed with a partial degree of reason, not a full and complete use of reason but a competent use of it, sufficient to have restrained those passions, which produced the crime, if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then upon the fact of the offence be proved, the judgement of the law must take place.

The facts were proven with certainty. Ferrers had killed Johnson. He proposed a defence of "occasional insanity of the mind."<sup>129</sup> He was "convinced from recollecting within myself, that at the time of the action, I could not know what I was about."<sup>130</sup> The defence was unsuccessful. There were two main contributory factors. The first factor is the unconvincing evidence provided by the Earl's witnesses. Many of the witnesses had known Ferrers for some years. They attested to his insanity, which was beyond other men.<sup>131</sup> They insisted that they had always considered him to be so. There was significant evidence supporting the thread of insanity running through the Shirley family. It was true that the Earl's uncle was insane, and had died whilst confined in Bethlem. The Earl's brothers, Walter and Robert Shirley, corroborated the "taint of madness" running through their family.<sup>132</sup> A local publican Peter Williams claimed Ferrers was locally known by the sobriquet of "the mad lord."<sup>133</sup> The Earl had clearly aroused some infamy.

However upon examination of the witnesses, complications ensued. Their attestations did not reach the level of insanity which would preclude Ferrers from distinguishing

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<sup>128</sup> Howell, above n 70, at 947.

<sup>129</sup> At 923.

<sup>130</sup> At 923.

<sup>131</sup> At 938.

<sup>132</sup> S McCalmont Hill "Earl Ferrers" *Belgravia: a London magazine* (England, June 1892) at 147.

<sup>133</sup> Howell, above n 70, At 939.

between good and evil. Walter Shirley was the sole witness who expressed the belief that the Earl was unable to make this distinction. Other witnesses drew a vague caricature of a flighty, volatile man. The Lords would have been unmoved by this, many of them even shared these characteristics. Walpole believed the peers who were most active in the examination of witnesses were “at least as mad” as the Earl.<sup>134</sup> The apprehension of the witnesses to point to specific speech or acts to affirm the insanity of Ferrers rendered their evidence unconvincing. Furthermore, many of the witnesses created problems by making various admissions.

The evidence of Walter and Robert Shirley was vitiated by an admission, which became central to the prosecution’s case. They both recalled the family’s intention to take out a commission of lunacy against the Earl. The family eventually refrained from this action, unsure of their ability to successfully prove this. Certainly, if the Earl had acted with the composure as he had displayed in the Trial, their fears were justified. Their uncertainty unraveled the efficacy of the defence. In Stafford’s case, a doctor had apparently been called for the insane man, but it had been too late.<sup>135</sup> Here, the Shirley family’s forbearance is paramount. If the Earl’s own family was vexed by the quandary of whether his disposition truly reached the standard of insanity, it is difficult to imagine how a group of his peers could be convinced.

Thomas Goostrey, a local lawyer, made another admission. He acknowledged that he had refused to do legal work for the Earl as he considered him insane. However, this did not preclude him from witnessing the Earl execute a deed. Goostrey justified this by stating that the Earl was not always in a state of insanity. He goes further, expounding that the Earl was actually shrewd and organised with his business affairs. This assertion fundamentally damaged Ferrers’s case. If the Earl was capable of conducting business cogently, it is eminently conceivable that he showed the same organisational capacity whilst preparing and executing the murder of Johnson.

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<sup>134</sup> Horace Walpole *The Yale Edition of Horace Walpole's Correspondence with George Montagu* (Yale University Press, New Haven, 1941) vol 9 at 280.

<sup>135</sup> “Trial of Edward Stafford,” above n 81.

The medical evidence also failed in its application. The Trial is notable for being the first to call on expert medical testimony.<sup>136</sup> Dr John Monro, the physician superintendent of Bethlem was called to give evidence on the Earl's behalf. There were inevitably doubts with how Monro could be examined, and the weight of his evidence. Monro was called to provide a general definition of insanity encompassing the Earl's actions. This proved to be difficult.

Challenged by inexperience, and the novelty of medical testimony, some of the questions asked by the Earl have questionable application to insanity. This is a reflection of his own attempt to prove insanity. There is an inherent contradiction in cogently arguing for one's own insanity. It requires the proponent be sane. An insane person could not argue for insanity, but rather only demonstrate it. If one can persuasively argue that one is insane then in all probability, one is not insane. This is demonstrated by the stilted insistence of Ferrers, struggling to form a compelling argument. When Monro responded hesitantly, the utility of the medical testimony was nullified. The mere use of the testimony illustrates the transformation in attitudes beginning in the latter part of the century.

The second contributory factor to the failure of the defence of insanity, and an incisive counterpoint to the vagueness of the witnesses was the articulate summation of the Trial by the Solicitor-General. After setting out the law for insanity and applying the test to the case, he presented the prosecution's case. It should be noted that his ability was greatly enhanced by the valuable witnesses, Dr Kirkland and Sarah Johnson. The Solicitor-General attempted to prove that the Earl had a motive, took deliberate actions and had knowledge of the consequences. Together these would establish that Ferrers was wholly capable of distinguishing between good and evil when he murdered Johnson.

There was ample evidence of the motive. The relationship between Ferrers and Johnson had descended into animosity. The Earl made repeated attempts to remove Johnson from his role as a receiver. After these failed, only one method remained. There was evidence of the Earl's deliberate actions. He told both witnesses that he intended to kill

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<sup>136</sup> Walker, above n 70, at 57.

Johnson. He mentioned to them that he had recently tested the pistol in preparation. Furthermore, it appeared the Earl was aware of the consequences of the murder. He promptly sent for Dr Kirkland and Sarah Johnson. He tried to convince Sarah Johnson into accepting a payment for not taking action against him. Moreover, Ferrers openly admitted to Dr Kirkland that if Johnson died, he would find it difficult to justify his case before the lords. But, importantly, he felt that he had justified himself. This intimates that he knew he would face the consequences of the law. It even suggests the Earl was aware that he would be offered as an example. The vacillating display of the Earl's witnesses, contrasted with the surety of the Solicitor-General led to an inevitable result. The defence of insanity failed.

In 1800, after the pre-eminent Trial of *R v Hadfield*,<sup>137</sup> the defence of insanity finally received legislative support.<sup>138</sup> However, Walker noted that the eminence of this legislative change has resulted in cursory dismissals of any trials before this moment.<sup>139</sup> Whilst 1800 signifies the pivotal moment of change, an understanding of the 18th century defence of insanity remains important. Although the trials of Ferrers and Arnold are the seminal insanity trials of the century, they may not wholly reflect the 18th century English law on insanity.<sup>140</sup> Considering how vividly Ferrer's trial captured the public's excoriation, the law on insanity required strict application. If it were not applied so, the Solicitor-General expressed fears "it would put a sword into the hand of every savage and licentious man, to disturb private life, and public order."<sup>141</sup> Due to the limited recording of 18th century trials, we have a less than pellucid understanding of the exact place of insanity in English courts of law. The *State Trials* serve as touchstones of the advances made in the 18th century, but do not necessarily reflect the unvarnished application of the defence of insanity.

The *Old Bailey Proceedings Online* reveal 48 instances in the 18th century of acquittals on the grounds of insanity.<sup>142</sup> To suggest the defence was impossible before 1800 is fallacious: it fails to appreciate reality. Eigen states that judges in the Old Bailey trials

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<sup>137</sup> *R v Hadfield* (1800) 27 State Trials 1281.

<sup>138</sup> *The Criminal Lunatics Act 1800* (40 Geo. III, c. 94).

<sup>139</sup> Walker, above n 80, at 52.

<sup>140</sup> At 53.

<sup>141</sup> Howell, above n 70, at 952.

<sup>142</sup> Old Bailey Proceedings Online <[www.oldbaileyonline.org](http://www.oldbaileyonline.org)>

would often effectively instruct the jury with their own personal opinion regarding the prisoner's insanity.<sup>143</sup> Because of the unique nature of the court assembled in the House of Lords, the lordships were not afforded a judicial summary.<sup>144</sup> However, given Ferrers's nefariousness and the intense public scrutiny, it would not have served much purpose. Strict application was almost a certainty. Accordingly, the Trial became the third of the *State Trials* in the century to reject the defence of insanity. However, behind the failure of the insanity defence lay the most damning revelation of the harsh application of criminal procedure in this Trial. Namely, that Ferrers had no right to the representation by counsel. He was tasked with arguing the defence of insanity on his own behalf.

### *C The Right to Counsel*

Perhaps the most surprising feature of 18th century English criminal procedure is the lack of a uniform right to defence counsel. The accused had no right to counsel on factual matters for a felony.<sup>145</sup> A defendant was only allowed to call for assistance on a point of law or collateral issues.<sup>146</sup> This limitation on the right to counsel for the defence was justified on two grounds. The first justification was the assumption that the accused should know the facts better than anybody else. This reasoning proposed that the best defence was a simple account of what transpired, as William Hawkins maintained, "it takes no manner of skill to make a plain and honest defence."<sup>147</sup> This rule allowed for an impressionistic judgement, judge and jury ascertaining direct guidance from the character of a defendant's response.<sup>148</sup>

This justification would be tenable if the rule was universal. But it fails to explain the anomalous distinction regarding why a defendant had no right to counsel for a felony, but was afforded the right for for misdemeanours and civil offences. Blackstone, one of English law's most steadfast defenders regarded the defence's lack of right to counsel

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<sup>143</sup> Eigen, above n 118, at 42.

<sup>144</sup> Walker, above n 80, at 63.

<sup>145</sup> Felix Rackow "The Right to Counsel: English and American Precedents" (1954) 11 WMQ 3 at 7.

<sup>146</sup> At 7.

<sup>147</sup> William Hawkins *A Treatise of the Pleas of the Crown*, (8th ed, London, 1824) volume 2 at 554.

<sup>148</sup> J. M. Beattie "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" (1991) 9 LHR 221 at 231.

to run counter to the liberty of his nation's law. He found it incongruous that "assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass."<sup>149</sup>

The second justification was the considerable procedural flexibility afforded to the judge. It was postulated that the court would act as counsel.<sup>150</sup> A generous judge could step in to assist the defence in the interests of fairness. Though Blackstone acknowledged this justification, he regarded it as far "too important to be left to the good pleasure of any judge."<sup>151</sup> In such a public trial, the Lord High Steward was never going to provide partial assistance to the Earl. A display of partiality would only amplify public criticism. Furthermore, the justification that a judge could provide assistance was predicated on the proceeding occurring without professional lawyers.<sup>152</sup> However, the advancement of the prosecution's right to counsel occurred more rapidly than for the defence.<sup>153</sup> Procedural changes were discretionary, and as a result, uneven. It is especially pertinent in Ferrers's Trial, where the prosecution included two of the finest advocates of a generation in Charles Pratt and Charles Yorke.<sup>154</sup> One could hardly imagine a less even contest.

The Trial of Earl Ferrers plainly demonstrates the practical difficulty of the rule. There is scant embellishment when Ferrers claims he is tasked with:<sup>155</sup>

The miserable necessity of proving my own want of understanding. The law will not assist of counsel in this case. Which of all cases it should be most wanted. The more I stand in need of assistance, the greater reason I have to hope for it from your lordships.

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<sup>149</sup> Blackstone, above n 71, at 349.

<sup>150</sup> John H. Langbein *The Origins of Adversary Criminal Trial* (Oxford University Press, Oxford, 2002) at 28.

<sup>151</sup> Blackstone, above n 71, at 349.

<sup>152</sup> Beattie, above n 148, at 221.

<sup>153</sup> Beattie, above n 148, at 225.

<sup>154</sup> Charles Pratt (1714-1794) became Lord Camden; Charles Yorke (1722-1770) became the Lord Chancellor.

<sup>155</sup> Howell, above n 70, at 944.



Ferrers had to conduct the defence of insanity himself. His plight was advanced further by his own reluctance to pursue the defence. He had initially intended to plead guilty, but reluctantly accepted the remonstrations of his family to pursue a defence. Therefore, he was obliged to ask the witnesses questions without knowledge of how they would respond.<sup>156</sup> The Earl also faced another impediment owing to his position in English society. As a peer, he was not even afforded counsel on collateral issues, as they were deemed to be resolved by the lords as a whole.<sup>157</sup> Considering the intransigency of criminal procedure faced by Ferrers, he conducted his trial with unexpected dignity.

His defence was nigh on impossible. It is not anachronistic to question the absurdity of the defence, when even Walpole at the time noted the “strange contradiction to see a man trying by his own sense, to prove himself out of his senses.”<sup>158</sup> The Newgate Calendar recorded that the facts were clear, whilst Ferrers’s defence served to prove the “sanity in his mind.”<sup>159</sup> He took the stand and questioned witnesses, wrote an oral defence and asked it to be read by the clerk. He received no procedural sympathy. He asked twice for an adjournment but was rebuffed in each instance. His defence was admired by the Lord High Steward for its “exactness of a memory more than ordinarily sound.”<sup>160</sup> It is questionable to ask what else Ferrers could have done. Perhaps, if he had acted less rationally he would have had a far greater opportunity of success.

However, he made some damaging admissions to his own case. In summing up his defence, he conceded his failure to meet the high threshold of insanity. It is relevant that this desultory admission would not have been made with the representation of skilled counsel. Instead, Ferrers suggested he was “driven and hurried into that unhappy condition upon very slight occasions.”<sup>161</sup> Walker notes that this is similar to what became the defence of “irresistible impulse.”<sup>162</sup> Alas, Ferrers was two hundred years too soon.<sup>163</sup>

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<sup>156</sup> Crane, above n 110, at 23.

<sup>157</sup> Hawkins, above n 147, at 555.

<sup>158</sup> Walpole, above n 134, at 279.

<sup>159</sup> “Laurence, Earl Ferrers” *The Newgate Calendar* (England, 1760) at 166.

<sup>160</sup> Howell, above n 70, at 959.

<sup>161</sup> At 945.

<sup>162</sup> Walker, above n 80, at 62.

<sup>163</sup> At 62.

Ferrers also failed to cross-examine the prosecution's witnesses, Dr Kirkland and Sarah Johnson.<sup>164</sup> If he had done so, he could have questioned their behaviour in the hours following Johnson's death. They claimed that they were afraid of facing the same fate as Johnson. However, if the prosecution's case is correct, then Ferrers's actions were controlled and delineated by his clear motive for the murder. According to the prosecution, this motive ensured his cool, premeditated actions. If he was able to distinguish between good and evil, it could be suggested that Kirkland need not be concerned, as he would have been in little danger. But if the Earl was in a period of delusion, where he was unable to control his actions, then the fear was entirely justified.<sup>165</sup> Ferrers could have noticed this opportunity.

*R v Hadfield* is also relevant. Whilst the social and medical understanding of insanity made great advances in the latter part of the 18th century, Hadfield's case also demonstrates the value of a defendant's right to counsel. In that case, counsel for the defence, Thomas Erskine persuaded Baron Kenyon, and ultimately the legislature, that the defence of insanity required codification. This legal change could be partly attributed to the value of being afforded counsel on such a matter. If the Earl was allowed to employ the services of an advocate such as Thomas Erskine, his fate may well have been different.

A notable concern with the right to counsel was the irregular and discretionary application of the rule. Despite strict adherence to the rule in Ferrers's case, changes in the right were occurring many years before the Trial. Langbein suggested that as early as the 1730s, some of those accused of felonies began to be afforded the right to counsel.<sup>166</sup> This dramatic change was precipitated without legislation.<sup>167</sup> It was created by the flexibility of English criminal procedure, which allowed a sweeping degree of judicial discretion. A mere two years before Ferrers's trial, William Barnard, whose

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<sup>164</sup> Crane, above n 110, at 26.

<sup>165</sup> Crane, above n 110, at 26.

<sup>166</sup> Langbein, above n 150, at 106.

<sup>167</sup> At 107.

case was also recorded in the *State Trials*, was granted counsel.<sup>168</sup> A defendant's lack of a right to counsel was not as unequivocal as conventionally suggested.

However, when a defendant was not afforded a right to counsel, the result was typically a formality. Rackow suggested a justification behind the a general lack of right was the seriousness of the crimes themselves.<sup>169</sup> When crimes threatened to endanger the very fabric of society, it is understandable that the powerful would use discretion of criminal procedure to their advantage.<sup>170</sup> This was especially necessary in the absence of an organised police force. Becker and Heidelbaugh go so far as to say that the lack of a right to counsel meant “prosecutions were often nothing more than legal murders.”<sup>171</sup> In the Trial of Earl Ferrers, this is not an overstatement. The unanimous guilty verdict was delivered. George III did not relent. Ferrers was destined to meet the Hanging Tree at Tyburn.

## V The Execution

Earl Ferrers was hanged at Tyburn on May 5, 1760. He left his confines in the Tower of London and made the procession through the crowded streets in his own carriage. The journey, a distance of around four and a half miles, took almost three hours. The crowd was enormous.<sup>172</sup> Mother Proctor, a local entrepreneur who had erected a grandstand, made apparently unprecedented ticket sales of 500 pounds.<sup>173</sup>

Ferrers wore his wedding suit, “a suit of light-coloured clothes, embroidered with silver.”<sup>174</sup> It was evident he blamed his marriage for his fate. His calmness shocked the public. Many had only heard hyperbolic tales of the wicked Lord, yet seeing the malefactor for the first time sent the crowd into a “respectful silence, mixed with

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<sup>168</sup> James Fitzjames Stephen *History of the Criminal Law of England* (Macmillan and Co, London, 1883) vol 1 at 424.

<sup>169</sup> Felix Rackow “The Right to Counsel: English and American Precedents” (1954) 11 WMQ 3 at 7.

<sup>170</sup> At 7.

<sup>171</sup> Marvin Becker And George Heidelbaugh “Right to Counsel in Criminal Cases an Inquiry into the History and Practice in England and America” (1953) 28 NDLR 351 at 357.

<sup>172</sup> Walpole, above n 67, at 401.

<sup>173</sup> Radzinowicz, above n 35, at 175.

<sup>174</sup> Howell, above n 70, at 975.

pity.”<sup>175</sup> Instead of chastisement for his flagrant murder, “they almost forgot his crime.”<sup>176</sup> Ferrers finally reached the gallows. It is notable for being the first execution to make use of the trapdoor mechanism.<sup>177</sup> Despite some initial difficulties, it was successful. After a few moments, Ferrers was dead. His body was subsequently taken to Surgeon’s Hall. He was reputedly dissected “like a common criminal,” which Hay noted was repeated in multiple accounts of the execution, undoubtedly a jejune attempt to reinforce the admirable equality of English law.<sup>178</sup>

His composure in these moribund moments adds another layer of mystery to this complex individual. Prior to the execution, in his letters, Walpole avoided mentioning the Earl’s name out of disgust for the “wild beast.”<sup>179</sup> Afterwards, he struggled for words to explain his perplexed admiration for the Earl.<sup>180</sup> This does not comport with the traditional deterrence theory. It illustrates the sympathy that the people felt for these publicly hanged criminals. Certainly, it demonstrates the undeniable impact of public executions. The execution was remembered for many decades.<sup>181</sup> Whether deterred or not, the English did not quickly forget the fate of the mad peer.

## VI Conclusion

The Trial of Earl Ferrers is most widely remembered as the allegoric ending of a man whose life was marred by his inability to control his own eccentricities. He was the wicked lord, who erroneously considered himself above the law. He made the dramatic Via Dolorosa to Tyburn, and was hanged as an example for all to see. With such an indelible narrative, any legal issues have become commodiously ancillary. The fact that this has occurred, however, appears to reflect the exact intentions of the powerful ruling

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<sup>175</sup> *The Tyburn chronicle: or, villainy display'd in all its branches* (J. Cooke, London, 1768). vol 4 at 136.

<sup>176</sup> At 136.

<sup>177</sup> Walpole, above n 67, at 402.

<sup>178</sup> Hay, above n 16, at 34.

<sup>179</sup> Walpole, above n 67, at 395.

<sup>180</sup> At 395.

<sup>181</sup> Hay, above n 16, at 34.

class. Criminal procedure, so often the bastion of hope and liberty for the English people, turned on the Earl.

Without the right to counsel, the Earl displayed a rare tenacity in attempting to assert his own insanity before his peers. The legal context demonstrates that Ferrers's Trial can hardly be typical of the century. This is unsurprising, because a trial of this nature could never be typical. The problem lies in the innumerable banal statements of the time, asserting the Trial as an application of the rule of law, extolling the "impartial majesty of the English Law."<sup>182</sup> This is ultimately misleading. If it were truly to be so, then Ferrers would have received at least a modicum of the discretionary treatment which had been demonstrated in other contemporary cases.

From this legal context, an understanding of the social and political machinery of 18th century England can be asserted. The Trial and execution demonstrate the subtle skill of the powerful elite – the willingness to sacrifice one of their own, albeit not a pleasant individual, for the greater good. This allowed retention of their power, control of the unrest from the lower classes and the maintenance of social order. An example of a case of ostensible fairness demonstrates the wisdom and beneficence of the powerful, together with an affirmation of the rule of law and the rights of the common man. An exemplar of the statement "no man is above the law" and a thread of continuity to the Magna Carta. The appeasement of the masses and directing their indignation at a peer of the realm moves toward the profoundly political consequence of a discretionary system of justice, rather than one which was clearly demarcated.

The Trial and subsequent execution of Earl Ferrers was an epochal example of the law preserving the gradual change of society without the ramifications of revolutionary change. It certainly was a sentinel moment in avoiding the catastrophic breakdown of society and the upheaval of the ruling class, as so graphically exemplified less than thirty years later in the French Revolution. Laurence Shirley the Fourth Earl Ferrers, my sixth great grandfather, a sacrificial pawn, greater in death than life, whose significant contribution can only be seen in the context of historical review.

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<sup>182</sup> Peter Burke *Celebrated Trials Connected with the Aristocracy in the Relations of Private Life* (W. Benning & Co, London, 1851) at 193.

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### ***Word count***

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7990 words.