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Felony Forfeiture in England, c. 1170-1870

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Abstract: For much of English history, offenders punishable with death also forfeited their possessions. This article offers an overview of this long overlooked practice, demonstrating its continuation through to 1870, describing its contours, and charting how and why it changed over time. Intended primarily as a platform for future work, it also elucidates the history of the felony concept. Furthermore, forfeiture – the original, defining feature of felony – was all about property. Thus, the article also suggests that as long as forfeiture survived, the criminal law was shaped by the changing nature of 'property' itself.

In 1355, a coroner's jury deemed Thomas of Scoulton responsible for the brutal murder of Maud of Amundeville in the king's highway. As such, he stood to lose not just his own life for this outrage but also his cottage, two shillings worth of freehold land, and various goods and chattels appraised at forty pence.[1] In 1573, an assize jury found Cornelius Venderstring guilty of manslaughter. The jurors then answered the standard question about what goods the felon possessed with the equally standard response that to their knowledge, he had none. Despite this answer, and despite being saved from the gallows

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[1] Charles Gross, ed., *Select Cases from the Coroners' Rolls, A.D. 1265-1413* (Selden Society, 9), London, 1895, 102-103.

by a successful plea of benefit of clergy, Venderstring had to watch the sheriff seize his bed, coverlets, kettles, loom, flax and such like.[2] A few years later, John Conway did not manage to evade the noose after his conviction for murder. But he spent the days before his execution conveying away his possessions and a valuable lease on a mill, hoping thereby 'that though they had his life yet they should not have any of his lands or goods...[I]f he should be hanged he had rather his friends should have the lease then his enemies'.[3] Many years later, in 1866, Maria Marklew of Birmingham petitioned the Treasury for the return of a watch, jewellery and other property taken upon her husband's conviction of felony; she received some of the items, but only upon presenting evidence of her being, 'from good character and needy circumstances, a fit object of the bounty of the crown'.[4]

These individuals all found themselves subjected to a long-standing but little-studied aspect of the law. For much of English history, offences punishable with death also incurred forfeiture of the offender's property. Embedded in the very origins of the common law and abolished by statute only in 1870, forfeiture in fact preceded and, in a sense, outlasted death as a penalty imposed upon all felonies. Forfeiture for treason has received some scholarly attention; so often imposed upon great barons with vast estates, such forfeitures had dramatic political effects that demanded notice.[5] The admittedly less spectacular but much more common forfeitures of regular felons, however, have received

[2] The National Archives: Public Record Office (PRO), E 199/20/30; ASSI 35/15/6, m. 33.
[3] PRO, E 134/43&44Eliz/Mich13.
[4] PRO, T 15/17, p. 484; T 15/18, p. 49.
[5] See, for example, C.D. Ross, 'Forfeiture for Treason in the Reign of Richard II', *English Historical Review* 71 (1956), 560-575; J.R. Lander, 'Attainder and Criminal Forfeiture, 1453 to1509', *Historical Journal* 4 (1961), 119-151; Stanford E. Lehmberg, 'Parliamentary Attainder and Forfeiture in the Reign of Henry VIII', *Historical Journal* 18 (1975), 675-702; William R. Stacy, 'Richard Roose and the Use of Parliamentary Attainder in the Reign of Henry VIII', *Historical Journal* 29 (1986), 1-15; J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge, 1970), 192-197; and James Bothwell, *Falling from Grace: Reversal of Fortune and the English Nobility* (Manchester, 2008).

little study.[6] Felony forfeiture slipped from view in part because of assumptions that it had ceased in practice long before being stopped by statute.[7] As such, this article has two very simple but key aims: to explain what felony forfeiture was, and to show that such forfeitures continued through to the late nineteenth century. Certainly, though, changes took place over these years. Thus, the article also offers a broad overview of developments in felony forfeiture over its long history, charting what they consisted of, and in so far as possible, explaining why they came about, as a partial and preliminary attempt to bring this overlooked aspect of the law's operation into clearer view.[8]

Despite its ubiquity in legal discourse, the term 'felony' defies easy definition. Many years ago, F.W. Maitland noted that we can only 'define felony by its legal effects; any definition that would turn on the quality of the crime is unattainable'.[9] Here, Maitland echoed Sir William Blackstone, who had noted that while the word commonly

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[6] But see Michael MacDonald, who pays the subject some attention in his writings on suicide [ie: 'The Secularization of Suicide in England, 1660-1800', *Past and Present* 111 (1986), 50-100 and with Terence R. Murphy in *Sleepless Souls: Suicide in Early Modern England* (Oxford, 1991)], and David C. Brown, 'The Forfeitures at Salem, 1692', *William and Mary Quarterly*, 3rd ser., 50 (1993), 85-111. Leonard W. Levy offered a useful overview of the history in his engagement with modern manifestations of forfeiture: *A License to Steal: The Forfeiture of Property* (Chapel Hill, 1996).

[7] See, for example, J.H. Baker, *An Introduction to English Legal History*, 4th edn., London, 2002, 509n45; David Bentley, *English Criminal Justice in the Nineteenth Century* (London, 1998), 3-4.

[8] To be clear at the outset, this article does not discuss civil forfeiture. In recent years, a number of jurisdictions have revived forfeiture provisions, but these are generally based on civil rather than criminal law precedents, *in rem* rather than *in personem*. As such, much modern forfeiture law draws less from the history discussed here than from the history of the deodand, the instrument or occasion of an accidental death that was forfeit to the king until 1846. See, for example: Elizabeth Cawthon, 'New Life for the Deodand: Coroners' Inquests and Occupational Deaths in England, 1830-1846', *American Journal of Legal History* 33 (1989), 137-147; Teresa Sutton, 'The Deodand and Responsibility for Death', *Journal of Legal History* 18 (1997), 44-55; Teresa Sutton, 'The Nature of the Early Law of Deodand', *Cambrian Law Review* 9 (1999), 9-20; J.J. Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeiture, Wrongful Death, and the Western Notion of Sovereignty', *Temple Law Quarterly* 46 (1973), 169-290. For the links between deodands and modern civil forfeiture laws, see: Paul Schiff Berman, 'An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects', *Yale Journal of Law and the Humanities* 2 (1999), 1-45; Amy D. Ronner, 'Husband and Wife are One – Him: *Bennis v Michigan* as the Resurrection of Coverture', *Michigan Journal of Gender and Law* 129 (1996-1997), 129-169; Levy, *A License to Steal.*

[9] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Cambridge, 1895), II, 467. On the felony concept, see also Julius Goebel, *Felony and Misdemeanour: A Study in the History of Criminal Law*, New York, 1937, repr. Philadelphia, 1976.

designated a type of offence, it more properly referred to the effects of an offence. And forfeiture was the defining legal effect of felony. Blackstone acknowledged that 'the idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them', but insisted that the 'true criterion of felony is forfeiture'.[10] Thus, while this survey has the modest aim of serving as a preliminary sketch upon which more detailed studies might be based in future, it necessarily touches on the history of the felony concept. It will also touch on historical perceptions of property: as long as forfeiture remained, the criminal law did not just protect property but was also shaped by conflicts and concerns about the nature of property itself.

I. Early History and Overview

The standard formula for forfeiture held that felons forfeited all goods to the king, and their lands escheated to their lord after the king had taken the waste and profits of those lands for a year and a day. Guilty of an especially serious special subset of felony, traitors lost all lands and goods to the king alone.[11] Common law forfeitures for felony and for treason had parallels, if not origins, under the Anglo-Saxons.[12] Their legal culture focused on feuds and compensation, but over time, 'compensation' of the king for the wrong done to him became an increasingly common feature. Recorded lawsuits note a

[10] Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols., 13th ed (London, 1800), IV, ch. 7, 97-98.
[11] For the notion of treason being a special sub-set of felony, see, for example, Blackstone, who cites the 1352 treason act to conclude that 'all treasons, therefore, strictly speaking are felonies': *Commentaries*, IV, ch. 7, 93.
[12] Since 'felony' is Frankish in origin, the practice of forfeitures for felony is usually dated to the post-1066 legal changes, but Patrick Wormald suggests that 'felony' came to have different meanings in England than in France precisely because of the Anglo-Saxon precedent of imposing a general forfeiture 'of all that one has' for serious offences: *The Making of English Law: King Alfred to the Twelfth Century: Legislation and its Limits* (Oxford, 2000), 19, 144-149.

number of offenders who found themselves forced to give all they possessed to their offended sovereign.[13] The practice survived in altered guise throughout the Norman and Angevin reforms. The word 'felony', Frankish in origin, initially denoted disloyalty between lord and vassal or a violation of the feudal bond. And for these Frankish felonies, a vassal forfeited his lands to his lord. In its new English home, 'felony' took on a new meaning, designating particularly heinous wrongs more generally, and not only those dealing with the feudal bond between man and lord. The 1176 Assize of Northampton used the term in this broader sense of a serious criminal misdeed, and other writings of the day suggest that the forfeiture of goods and lands had become an expected punishment for such felonies.[14] In fact, forfeiture applied to felony earlier than did death, as it was only slowly over the thirteenth century that execution supplanted mutilation as the standard punishment due for all felons.[15] By the time of the classic legal treatise known as *Glanvill*, written *c.* 1187-1189, the standard formula noted earlier prevailed: from traitors, all lands and chattels to the king, and from felons, all chattels to the king and all lands to the lord after the king's year and a day.[16] Both Magna Carta and the *Prerogativa Regis* repeated and enshrined this rule.[17]

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[13] Wormald, *Making of English Law*, 144-149. See also *The Laws of the Earliest English Kings*, ed. F.L. Attenborough (Cambridge, 1922), e.g. 5, 27, 39, 51, 63, 65, 67, 157.

[14] John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (New York, 1996), 161-162. See also S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd edn., London, 1981, 405.

[15] Pollock and Maitland, *History of English Law*, II, 461. See also C. Warren Hollister, 'Royal Acts of Mutilations: The Case Against Henry I', *Albion* 10 (1978), 330-340.

[16] *The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill*, ed. G.D.G. Hall, London, 1965, repr. Holmes Beach, 1983, 90-91. Note one exception, though: according to the author, in cases of theft, land escheated directly to the lord, without the royal year and a day.

[17] J.C. Holt, *Magna Carta*, 2nd edn., Cambridge, 1992, 459; *Statutes of the Realm*, 11 vols. in 12, London, 1810-1828, repr. Buffalo, 1993, vol. 1, 223- 226, *Prerogativa Regis*. All other statutes are cited by regnal date and chapter. The dating of the *Prerogativa Regis* is in some doubt: traditionally assigned to 1322, it may have originated at any point in the reigns of Edward I or Edward II. See Margaret McGlynn, *The Royal Prerogative and the Learning of the Inns of Court* (Cambridge, 2003), 2, 7.

These provisions did not apply in the same manner throughout the country. The county of Kent saw the most notable exception. There, the custom of gavelkind prevailed; best known for allowing partible inheritance rather than primogeniture, these distinctive customs also mandated that the lands of a felon passed to the heir immediately upon the felon's execution, a practice summed up in the saying, 'the father to the bough, the son to the plough'.[18] Similar customs prevailed in Redesdale, too, and perhaps elsewhere.[19] In Gloucester, local custom proved less generous, but still unusual, in mandating that while the king took his year, day, and waste, the felon's land then reverted to the heir, rather than escheat to the lord of the fee.[20] But generally, the standard formula for felons applied.

The different treatment accorded lands and goods must be emphasized. The distinction between real property and personal, or moveable, property was as important as those that developed between felony and misdemeanour and, later, crime and tort; like those distinctions, an ostensibly clear-cut difference gave rise to numerous complexities and complications over time. The real property most clearly subject to seizure for felony was land held in fee simple. Newer estates in land, such as the fee tail, had more convoluted histories. The treatment of copyhold land varied enormously depending on the manorial customs or the time. Personal property came to include (or accompany) categories such as 'chattels real' and 'chattels incorporeal,' also called 'choses-in-action'. Chattels real included leases on land; chattels incorporeal covered such things as shares,

[18] *Ibid*.
[19] PRO, SP 14/31, no. 68, a seventeenth-century report on Redesdale, which blames this practice for much of the disorder for which this border enclave remained infamous.
[20] *Statutes of the Realm*, I, 223-226, *Prerogativa Regis*.

bonds, and other intangibles that had the potential to be 'reduced into possession'.[21] Different categories of chattels sometimes received different treatment.

However complicated it became over time, the core distinction between real and personal property mattered because it determined the recipient of the forfeited possessions, the procedures for their seizure, and the protections afforded the offender. In treason cases, to be sure, the distinction mattered little: all of the offender's property, of whatever sort, forfeited to the Crown. In felony cases, however, real estate technically *escheated*, whereas the personal property and the year, day, and waste of the land were *forfeit*.[22] Lands escheated to lords if tenants died without heirs; no matter how many children an attainted felon might have had, the law held that he or she had no heirs. The notion that an offender's blood had become corrupt, and thus not heritable, was used to explain the loss of lands: the corruption of the felon's blood meant that he died without heirs, and so his land escheated to his lord by right.[23] This also, incidentally, became part of the explanation for why the widow of a felon received no dower in the land. By the thirteenth century, widows typically enjoyed a right to one-third of whatever freehold lands their deceased spouses had held during marriage. Not so for the widows of felons. Technically, dower consisted of a claim against the heir. A felon had no heir, and thus a widow had no one against whom to make her claim.[24]

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[21] For useful overviews, see Lee Holcombe, *Wives & Property*: *Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto, 1983), 19-25, and C. Reinold Noyes, *The Institution of Property* (London, 1936), 396-403. Some writers treat chattels real and chattels incorporeal as sub-sets of personal property, whereas some prefer to treat them as separate categories that do not fit neatly under the labels of either real or personal property. Whether or not 'chattels incorporeal' were included in grants of 'goods and chattels' became contested by the nineteenth century; see below.

[22] Pollock and Maitland, *History of English Law*, I, 351.

[23] Goebel saw the roots of this in the Frankish concept of infamy, influenced by biblical passages and physiological theories of conception: *Felony and Misdemeanour*, 253-279.

[24] This paragraph and much of what follows draw from the following: *Glanvill* and *Prerogativa Regis*, cited above, and Henry de Bracton, *On the Laws and Customs of England*, 4 vols., ed. and trans. Samuel E.

Early legal writers bundled together escheat and forfeiture for felony, treating them as nearly inseparable. Some later writers, however, insisted upon a fundamental difference between the two. In the seventeenth century and especially in the eighteenth, as opposition to the loss of lands mounted, as notions of property rights shifted, some legal writers adamantly maintained that forfeiture had Anglo-Saxon (and hence legitimate) roots, whereas escheat by corruption of blood had Norman (and hence questionable) origins. Writing in the early 1600s, Sir Henry Spelman seems to have been the first to make this point, part and parcel of a broader debate about the nature and consequences of the Norman 'conquest'.[25] Blackstone adopted Spelman's rhetoric, and through Blackstone, the clear separation of escheat and forfeiture became axiomatic among many later writers.[26]

But long before such intellectual defences appeared, individuals found practical protections for their estates in land. Entails and uses emerged in the middle ages, primarily to promote family estate planning in ways that obviated the common law rules of inheritance, but in ways that also complicated the collection of feudal incidents and felony escheats. The entail, or fee tail, appeared as early as 1176 and became relatively

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Thorne (Cambridge, Mass., 1968-77), II, 99, 346, 353-368, 374-376; *Fleta*, ed. and trans. by H.G. Richardson and G.O. Sayles (Selden Society, 72), London, 1955, 43-48, 67, 73-75, 89; Ferdinando Pulton, *De Pace Regis et Regni* (London, 1609), fols. 216-240; Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton*, ed. Francis Hargrave and Charles Butler (London, 1832, 19th edn , 2 vols), II, 351a, 392b; Sir Matthew Hale, *Historia Placitorum Coronae*, 2 vols, ed. W.A. Stokes and E. Ingersoll, Philadelphia, 1847, I, 239-257, 353-369, 413, 492-493, 703. On the matter of dower specifically, see also: Sue Sheridan Walker, 'Litigation as Personal Quest: Suing for Dower in the Royal Courts, circa 1271-1350', in Sue Sheridan Walker, ed., *Wife and Widow in Medieval England*, Ann Arbor, 1993, 82-83; Joseph Biancalana, 'Women at Common Law: The Origins of Common Law Dower', *The Irish Jurist* 23 (1988), 255-329; and Janet Senderowitz Loengard, '"Of the Gift of Her Husband": English Dower and its Consequences in the Year 1200', in Julius Kirshner and Suzanne Wemple, eds., *Women of the Medieval World*, Oxford, 1985, 215-255.

[25] On Spelman, see in particular J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957), 91-123, esp. 108.

[26] Blackstone, *Commentaries*, II, ch. 15, 251-255. See also John Cairns, 'Blackstone, the Ancient Constitution and the Feudal Law', *Historical Journal* 28 (1985), 711-717.

common by the 1220s. It essentially created an estate for life only. A fee tail settled jointly on a husband and wife – more commonly known as a jointure – did much the same. A life estate, arguably, could forfeit for no more than the lifetime of the offender. From the time of the statute *De Donis Condicionalibus* in 1285, the courts generally held that land in fee tail was immune from forfeiture, although exceptions certainly existed in respect to treason cases.[27]

When entails became more liable to forfeiture for treason, landholders found recourse in the use, a device by which an individual granted land to another but for his or her own use; the grantor could thus retain the profits and use of the land, but was not in seisin, or its possessor, at common law. The person using the land had even less than a life estate in it. With a use, a landholder could circumvent the common law rules against devising land by will and also avoid the various attendant feudal incidents. Of these incidents, wardship was undoubtedly the one most individuals sought to avoid, but in his extensive study of the medieval use, J.M.W. Bean suggests its rise may also have been influenced, in part, by the fear of forfeitures once entails had proven susceptible.[28] Such uses became increasingly common over the early to mid fourteenth century. By the late fourteenth century, uses as well as entails came to be seized in some treason cases, but this typically required a special act of parliament.[29]

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[27] A typical entail, for example, consisted of a grant from A to B and the heirs of B's body, with reversion to A and his heirs should B have no heirs of his or her body. On the fee tail, see: Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502* (Cambridge, 2001), esp. 9, 13, 39, 141-45, 180. On the forfeiture of an entail, see also Ross, 'Forfeiture for Treason' 560-575; Lander, 'Attainder,' 119-120; J.M.W. Bean, *The Decline of English Feudalism 1215-1540* (Manchester, 1968), 138-140; Bellamy, *The Law of Treason*, 192-197.

[28] Bean, *Decline of English Feudalism*, 138-40.

[29] After 1388, it seems that lands held to use should have been forfeit for treason, but sufficient doubts remained that acts of attainder were generally used to confirm or extend the crown's rights to such estates. See Ross, 'Forfeiture for Treason'.

A host of issues and impediments bedevilled the escheat of a felon's lands, then. Furthermore, lands only became forfeit upon an office or inquisition by an escheator or some other such official, and crucially, only after an attainder. That is, a mere guilty verdict did not suffice; rather, a judge had to pass sentence. This meant, for example, that successful claimants to benefit of clergy did not forfeit their lands.[30] Nor did those found guilty of homicide in self-defence or by misadventure; in such cases, after receiving the jury's verdict the judge did not pass sentence but recommended the party for a pardon *de cursu* (of course), and so the offender lost no lands.[31] Suicides, or felons of themselves, lost goods but no lands, not having been duly attainted. So, too, did those who refused to enter a plea and thus subjected themselves to *peine forte et dure* avoid forfeiting their lands: they may have suffered a horrible death under crushing weights for their refusal to recognize the court's right to try them, but they were not attainted and thus their blood was not corrupted.[32] An attainder was necessary for a felon's lands to escheat.

Once that felon was attainted, however, the law considered his or her lands to be forfeit from the moment of the offence. Any conveyance or alienation made between the

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[30] After the mid-fourteenth century, offenders typically made their claim to the privilege after verdict but before sentencing. In earlier years, they entered their plea at the beginning of the trial and a separate ex-officio inquest into their guilt determined the disposition of their chattels. See J.G. Bellamy, *The Criminal Trial in Later Medieval England: Felony Before the Courts from Edward I to the Sixteenth Century* (Toronto, 1998), 134-135.

[31] A statute of 1533 allowed juries to acquit those who killed manifest felons in the act and thus to avoid the loss of goods and chattels: 24 Henry VIII, c. 5. An attempt in 1566 to save from forfeiture anyone who accidentally killed someone during the legally-mandated archery practices failed, however: *LJ*, I, 630, 631.

[32] Sir Thomas Smith, *De Republica Anglorum*, ed. L. Alston (Cambridge, 1906), 97 claimed that neither lands nor goods were forfeit, but most legal writers of the time wrote that goods were, in fact, forfeit. See, for example, Pulton, *Pace Regis*, fol. 223v. Parliament abolished *peine forte et dure* in 1772, making a refusal to enter a plea equivalent to a guilty plea; in 1827 parliament switched this to a default plea of not guilty. 12 George I, c. 20; 7&8 George IV, c. 28. On *peine forte et dure* more generally, see: H.R.T. Summerson, 'The Early Development of Peine Forte et Dure', in E.W. Ives and A.H. Manchester, eds., *Law, Litigants and the Legal Profession*, London, 1983, 116-125 and Andrea Mckenzie, '"This Death Some Strong and Stout Hearted Man Doth Choose": The Practice of Peine Forte et Dure in Seventeenth- and Eighteenth-Century England', *Law and History Review* 23 (2005), 279-313. A desire to avoid forfeiture of estates is often cited as a reason for individuals to undergo this alternative to a jury trial; Mckenzie, notably, argues that this cannot be considered the likeliest reason by the seventeenth century.

date of the offence and the attainder was then null and void.[33] In this respect, and this respect only, were a felon's lands more at risk than his chattels. Chattels only became forfeit from conviction; gifts or sales in the interval between offence and verdict could be considered legitimate, depending on how they were made. Otherwise, a felon's goods were easily lost. Those who claimed benefit of clergy lost their goods, as did those who killed in self-defence or by accident. Those who subjected themselves to *peine forte et dure* forfeited their goods; so did outlaws, abjurors, and even those who fled but subsequently returned for a trial at which they were acquitted. And, of course, those upon whom the judges passed sentence of death forfeited their goods, too.

The procedural protections for such goods and chattels were few. A statute of 1483 held that a sheriff could only seize these goods upon conviction; after an individual's arrest, the sheriff might inventory the goods of the accused and take sureties for them, but was to take possession only upon a conviction. Later legal writers thought this statute merely a restatement of common law with the addition of a penalty for overhasty officials; but they also thought the provision was generally ignored.[34] Furthermore, although sheriffs sometimes received directives ordering them to seize a

[33] Such conveyances to avoid forfeiture remained a problem. Garrard Glenn had suggested that the act 13 Elizabeth, c. 5 against fraudulent conveyances was motivated primarily by political concerns and a desire to protect the royal interest in forfeitures. Charles Ross, however, has recently and persuasively argued that the statute in question was motivated mainly by commercial considerations. Only subsequently was the phrase defending the interests of 'creditors and others' interpreted to include the Crown, particularly in Pauncefoot's Case (1594) and Twyne's Case (1601), and then the judges insisted that the law merely 'declared' and repeated earlier common law protections of the royal interest in forfeitures. See: 'Origins and Present Status of the Law Against Fraudulent Conveyances', in Garrard Glenn, *Fraudulent Conveyances and Preferences*, 2nd ed., 2 vols (New York, 1940), 77-103; Charles Ross, *Elizabethan Literature and the Law of Fraudulent Conveyance* (Aldershot, 2003), 29-31, 101-111; for Twyne's Case, 76 *English Reports* 809 (3 Co. Rep. 80b), Pauncefoot cited at 816-17 (3 Co. Rep. 82b).

[34] 1 Richard III, c. 3. As Sir Matthew Hale complained in the mid-seventeenth century, 'And yet I know not how it comes to pass, the use of seizing of the goods of persons accused of felony, tho imprisoned or not imprisoned, hath so far obtained notwithstanding this statute, that it passeth for law and common practice as well by constables, sheriffs, and other the king's officers, as by lords of franchises, that there is nothing more usual': *Placitorum Coronae*, I, 366-7

particular felon's goods, or convened inquests into the goods of people recently convicted, they did not need such things. A sheriff or his agents could seize felons' goods *ex officio,* without the need for a writ or inquisition. At times, more than one bailiff descended upon a felon's moveable goods: although all went, in theory, to the crown, kings very often favoured lesser lords and corporations with grants of the right to collect the goods of felons who lived on their lands, sometimes resulting in competing claims to an individual offender's possessions.

The range of things subject to forfeiture as a felon's goods and chattels needs to be appreciated, both to understand the effects of such forfeitures on a felon's family and to comprehend criticisms that arose over the years. If the felon had debts due him, they now became due to the crown; in contrast, if the felon owed debts, these now died with him. If the felon possessed stolen property, such property forfeited to the crown. Only if the victim of the theft bore the burden of an appeal against the offender did he or she merit the return of the stolen items.[35] If the felon had been a married man, his widow lost whatever rights she might have had (depending on the time and place) to her so-called 'reasonable parts' of his personal property; her rights to such things began only at the moment of her husband's death, and if he died as a convicted felon, he had no property against which to claim. Leases or other chattels held jointly also forfeited. Creditors, victims, and family members thus all lost their claim to things that might, in other circumstances, have been considered theirs.

II. Early Modern Developments

[35] This did change somewhat in 1529 with an act allowing that restitution be made to the owner if the felon was convicted upon evidence provided by the owner: 21 Henry VIII, c. 11.

As one might imagine, then, criminal forfeiture prompted criticisms throughout its long history. In the middle ages, such criticisms as can be found tended to centre not on forfeiture per se, but on its abuse. The fourteenth-century parliament rolls record concerns that sheriffs who seized goods upon an individual's indictment failed to return those goods upon an acquittal, and that sheriffs and justices too close to men with the rights to such forfeitures proved overzealous in the pursuit of their masters' profit, sometimes convicting men unjustly.[36] The rolls do, however, note a few expressions of discontent that widows and heirs of offenders suffered too, a somewhat more direct attack on the justice of forfeiture as a practice. (Yet, as one group of petitioners noted, the women were 'married at the great expense of their kinsmen': perhaps it was the unexpected need to support a widowed daughter or sister that rankled most. [37]) Writers in the sixteenth century and beyond echoed the medieval concerns about abuses and offered ever louder complaints the sufferings of 'innocent' parties. From sixteenth-century writers, it seems, one begins to find more direct criticism of forfeiture itself. Thomas Starkey, for example, writing in the 1530s, maintained that forfeiture unfairly deprived both heirs and creditors.[38] Henry Brinkelow offered a lengthier and more scathing attack. Writing in the 1540s, this Protestant reformer and social critic began by asking: 'O merciful God, what a cruel law is this? How far wide from the Gospel? Yea, from the law of nature, also, that when a traitor, a murderer, a felon, or an heretic is condemned and put to death, his wife and children, his servants and all they whom he is debtor unto

[36] *The Parliament Rolls of Medieval England*, ed. Chris Given-Wilson et al, CD-ROM, London, 2005, 1343 April (3:38, 3:42); 1354 April (262:51); 1365 January (2:14); 1372 November (3:22); 1376 April (10:71).
[37] Quotation from *Ibid*, 1327 January (1:13); see also 1327 January (1:14) and 1399 October (6:130).
[38] Thomas Starkey, *Dialogue Between Pole and Lupset*, ed. K.M. Burton (London, 1948), 115, 177.

should be robbed for his offence...[H]e forfeits unto the king not only all his own goods and lands, but also that which is none of his. O most wicked laws...'[39]

Beginning in the sixteenth century, critics added to traditional complaints about abuses with more criticisms of forfeiture as an evil in itself, particularly in that the punishment applied not just or even primarily to the offender, but to innocent family members and creditors as well. It is unwise, however, to make too much of a case for the novelty of these criticisms based on the slender evidence of relative silence in earlier years, especially given the print revolution and changes in record keeping and survival that separated medieval from early modern. What can be said with certainty, however, is that the sixteenth century witnessed key changes to forfeiture. Lawmakers began to use forfeiture in ways that introduced flexibility in defining and punishing offences. And whereas Henry VII and especially Henry VIII sought to extract more revenue from this ancient privilege – a project that had its legislative culmination in the Statute of Uses (1536) – the parliaments of Edward VI began to add unprecedented protections for the widows and heirs of felons. These changes manifested an altered notion of felony and suggest a growing perception of property as private.

Even as the Tudor parliaments busily created more and more felonies by statute, they used the term 'felony' and applied its effects more flexibly than had been the case in the past. One concern of historians of the law has been the separation of 'felony' from capital punishment, or the introduction of punishments for felony other than death, such as transportation and imprisonment. Despite the usual focus on the eighteenth and nineteenth centuries, this process started in the sixteenth.[40] Admittedly, in none of the

[39] Henry Brinkelow, *The Complaynt of Roderyck Mors* (London, 1548), sigs. C3r-C4r; quotation at C3r.
[40] See K.J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge, 2003), 23ff.

Tudor statutes did an offence explicitly labelled felonious receive a penalty less than death. Instead, statutes made some actions felony if committed a second or third time. An Elizabethan statute against the export of sheep, for example, made a first offence punishable with a year in gaol, the loss of a hand, and the seizure of the offender's goods; only the second offence became a felony with the punishment of death by hanging.[41] The Tudor parliaments passed at least fifteen such statutes, each creating new offences with graduated sentences that culminated with the penalty of death.[42] Forfeiture of land and goods, or of goods alone, was used as a punishment for a first offence, whereas only a subsequent offence would be called felony and incur death. In a sense, these statutes created felonies without the death penalty. Parliament experimented with a couple of examples of the reverse, as well. The Edwardian act that made sodomy a felony stipulated, most unusually, that while the offender should suffer death, no forfeiture of any goods or lands whatsoever should follow.[43] A Jacobean act to restrain plague victims in their homes similarly created a felony without any loss of goods or lands.[44] In these two measures, forfeiture, which had been the original, defining feature of felony, made no appearance. Hanging, more than forfeiture, had become the defining legal effect of offences specifically labelled felonious.

Lawmakers showed a similar flexibility with a couple of statutes that labelled offences as acts of treason, but specified that forfeiture applied as in cases of felony. While Henry VIII's notorious poisoning statute made murder by poison an act of treason,

[41] 8 Elizabeth I, c. 3
[42] Kesselring, *Mercy and Authority*, 35-6; for other examples, see 31 Henry VIII, c. 14; 5&6Edward VI, c. 11; 5 Elizabeth I, cc. 14, 16.
[43] 2&3 Edward VI, c. 29. The text of the act suggests that there was a particular concern that no one profit financially from making accusations of sodomy.
[44] 1 Jas 1, c. 31.

it nonetheless stipulated that land must forfeit as in cases of felony; that is, it would go to the lord and not to the king.[45] King Edward's 1549 measure against riotous assemblies did much the same. The offender would be called a traitor and suffer a traitor's death, but the forfeiture would be that of a felon.[46] This ensured that the lord of the fee would not lose the land to the king. Here, there was one earlier precedent: under Henry VI, the use of threats of arson to extort money became treason, but with forfeitures as in felonies.[47] All three of these measures emerged from high-profile emergencies, in a sense, and might be understood as attempts to show that something was being done, that a particular offence would henceforth be punished with the utmost severity, without in any way infringing on the property of lords.[48] With different people receiving the land of felons and traitors, defining the line between these two categories of offences had long had the potential for conflict. The great 1352 Treason Statute was passed, in part, to clarify and restrict the definition of treason precisely because the king had been expanding its scope in such a way as to seize and keep the lands of an ever growing collection of offenders.[49] With a willingness to mix and match the penalties for felony and for treason, lawmakers

[45] 22 Henry VIII, c.9.
[46] 3&4 Edward VI, c. 5.
[47] 8 Henry VI, c. 6. There were also individual acts of attainder against particular offenders that made a similar distinction. See, for example, the 1487 attainder of John Spynell and his accomplices for conspiring to kill royal councillors: the act ordered the death of a felon but the forfeiture of a traitor: 3 Henry VII, c. 27.
[48] It also prevented the offender from escaping by claiming benefit of clergy. The draft of the poisoning act referred to the offence merely as a felony; it was later relabelled a treason in order to ensure that offenders not be able to claim benefit of clergy, but the forfeiture specified to be that of a felon to ensure the lord lost nothing. On the Poisoning Act, see K.J. Kesselring, 'A Draft of the 1531 "Acte for Poysoning"' *English Historical Review* 116 (2001), 894-899.
[49] For this point, see Jonathan K. van Patten, 'Magic, Prophecy, and the Law of Treason in Reformation England', *American Journal of Legal History* 27 (1983), 4; Pollock and Maitland, *History of English Law*, II, 465, 500, 501, 508. Maitland also offers the intriguing speculation that the rule giving a felon's land to his lord was the result of an earlier struggle or compromise: lords lost power with the growth of the king's jurisdiction over felony, and the transfer of more offences to the king's courts rather than the lords, but gained in wealth. See, too, Milsom's suggestion that the kind's year, day and waste resulted from a compromise between kings and lords: 'The king's right on this view would be to the ancient forfeiture, and the lord's to an escheat for the feudal felony of endangering the fee by attracting that forfeiture. [*Historical Foundations*, 406.]

bypassed such difficulties. Thus, forfeiture became separable from the felony label in a number of sixteenth and seventeenth-century statutes, in ways that afforded lawmakers more flexibility in their efforts to define and punish criminality.

An even more striking set of changes began in the first parliament of Edward VI, giving protections to the widows and heirs of felons. The backdrop for these protections, though, consisted of a set of legislative efforts under Henry VIII intended to secure more forfeitures for the crown. Henry VII pursued a number of administrative changes to increase the revenue from forfeitures, most notably with the short-lived office of Surveyor of the King's Prerogative.[50] Like his immediate predecessors, Henry VII also showed concern for the ways in which uses in particular ate into his feudal revenues, but it was under Henry VIII that substantive legislative action took place. Statutes passed in 1484 and 1490 dabbled with solutions to the problems uses posed, introducing the notion that a person who held land to his use (the 'cestuy que use') could be treated as if he had seisin, or ownership, in certain circumstances.[51] Henry VIII, however, offered a frontal attack. From 1526, the king's council made a determined effort to increase feudal revenues.[52]

Included among Thomas Cromwell's papers was a proposal to reform the worst abuses of uses, amongst which was their ability to protect the land enjoyed by felons and traitors from forfeiture, 'to the great boldness of evil persons'.[53] The crown and leading magnates worked out an agreement in 1529, essentially restoring feudal incidents to one-

[50] See, for example, W.C. Richardson, 'The Surveyor of the King's Prerogative', *English Historical Review* 56 (1941), 52-75.
[51] 1 Richard III, c. 1; 4 Henry VII, c. 17.
[52] Bean, *Decline of Feudalism*, 237; John Baker, *The Oxford History of the Laws of England*, vol. 6: 1483-1558 (Oxford, 2003), 664.
[53] PRO, SP 1/101, fol. 282, printed in W.S. Holdsworth, *A History of English Law*, 17 vols., London, 1922-1952, IV, App. III(i), 579. See also SP 1/101, fol. 286, printed in Holdsworth, *English Law*, IV, 580.

third of an individual's land held in use. Unsurprisingly, the Commons soundly rejected this or a similar proposal when put before them, not keen to reimpose upon themselves the full weight of feudal dues that uses allowed them to evade. The king brought heavy judicial pressure to bear. In 1535, he secured a decision from the judges sitting on the disputed will of Lord Dacre of the South that, as John Baker explains, 'did not merely deprive landowners of their power of testation for the future, but unleashed the devastating legal conclusion that no will made in the past could have been valid'.[54] With no real choice, then, parliament passed the Statute of Uses, which made individuals accountable as the legal owners of land held to their use. Wardship and other such lucrative feudal incidents undoubtedly proved most tantalizing for the crown, but as the text of the statute makes clear, the drafters of the act had felony forfeitures in mind as well.[55] Before long, however, lawyers found new ways to help landowners do what they wanted to do; the crown yielded to reality by introducing to parliament a set of modifications encapsulated in the Statute of Wills (1540).[56] Over these years, the king and his advisors tried to bar the effects of entails and uses in all forfeitures, but ultimately settled for securing the bar only in cases of treason.[57]

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[54] Baker, *Oxford History*, 672. On the Statute of Uses, see also: Baker, *Oxford History*, 653-686; A.R. Buck, 'The Politics of Land Law in Tudor England', *Journal of Legal History* 11 (1990), 200-217; E.W. Ives, 'The Genesis of the Statute of Uses', *English Historical Review* 82 (1967), 673-697; Bean, *Decline of English Feudalism*, 258-301; A.W.B. Simpson, *An Introduction to the History of the Land Law* (Oxford, 1961), 163-194.

[55] 27 Henry VIII, c. 10.

[56] 32 Henry VIII, c. 1. For the situation after the Statute of Wills, see N.G. Jones, 'The Influence of Revenue Considerations upon the Remedial Practice of Chancery in Trust Cases, 1536-1660', in C. Brooks and M. Labban, eds., *Communities and Courts in Britain, 1150-1900*, London, 1997, 99-113; 'The Trust Beneficiary's Interest before R. c. Holland,'in A.Lewis, P. Brand, and P. Mitchell, eds., *Law in the City*, Dublin, 2007, 97-98; and 'Trusts in England after the Statute of Uses: A View from the 16th Century', in R. Helmholz and R. Zimmerman, eds., *Itinera Fiduciae*, Berlin, 1998, 173-203, as well as J.H. Baker, 'The Use upon a Use in Equity, 1558-1625', *Law Quarterly Review* 93 (1977), 33-38.

[57] A situation recognized by 33 Henry VIII, c. 20, and later affirmed in 5&6 Edward VI, c. 11. Sufficient doubts remained, however, that important forfeitures of traitors' estates were done with parliamentary

The contests around uses presumably sharpened men's thinking about the nature and security of their own property, particularly as these contests occurred in the midst of the dissolution of the monasteries – the biggest land grab since the Norman Conquest.[58] So, too, might the numerous attainders of men of their own ilk – for both treason and felony – have encouraged the men who sat in parliament to see themselves and their families as potential victims of forfeiture. In 1541, for example, Lord Dacre of the South and the well born members of his poaching party were, unusually for men of their status, executed for murder after killing a gamekeeper. Dacre's widow, also unusually for a woman of her status, had no jointure, and thus the forfeiture of her husband's estates threatened to leave her dowerless and penniless, until the king stepped in with a special act of grace.[59]

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attainders. On this, see also D.E.C. Yale, ed., *Lord Nottingham's Chancery Cases*, vol. 2 (Selden Society, 79), London, 1961, 99-100.

[58] The dissolution, too, drew upon the provisions for forfeiture for treason. A list of bills proposed for parliament in 1534 included a measure that any bishop, abbot, abbess or other head of a corporation convicted of treason would forfeit all lands they held in right of their houses to the king. While this measure disappeared, its spirit lived in 26 Henry VIII, c. 13 and 33 Henry VIII, c. 20, which were thought to make heads of corporations forfeit all by the addition of the word 'successors' to the usual 'heirs'. See R.W. Hoyle, 'The Origins of the Dissolution of the Monasteries', *Historical Journal* 38 (1995), 290-291, and Hale, *Placitorum Coronae*, I, 251. See PRO SP 5/5, no. 27, a list of seven houses in the government's hands by attainder of the head.

[59] This was the grandson of the same Lord Dacre of the South whose will constituted the centrepiece of the uses debate. Similar closed door meetings of judges and councillors attended the disposition of this Dacre's estates. The judges decided that the entails set up by Dacre's grandfather meant that the relevant portions of his estate could not forfeit, but since much of this land was held of men other than the king, this suited Henry fine: since Dacre's heir was underage, the king would benefit from the wardship of the estates, and thus had an interest in ensuring that the entailed lands *not* forfeit. See: PRO, SP 1/166, fols. 73-4, 109, 126-7, 132d-33. For the provisions made for Lady Dacre, see *Proceedings and Ordinances of the Privy Council*, ed. Harris Nichols, vol. VII, 207 and the act 33 Henry VIII, c. 44 [Parliamentary Archives (PA), HL/PO/PB/1541/33H8n44]. Lady Dacre fought doggedly on behalf of her son Gregory to get the effects of the attainder reversed: see 1 Elizabeth I, cc. 38, 42. The matter did not end there, however. After Gregory's death without children, the question arose whether the act restoring him in blood covered his sister as well: see Essex Record Office (ERO), D/DL/F26/2 and D/DL/F35. As an interesting aside, see also the dorse of the family copy of the act granting Lady Dacre her dower, on which her son-in-law scribbled a note maintaining Lord Dacre's innocence of the murder and that 'by the Tyranny of the time he was cast away through two privy counsellors that gaped after his living, which yet they had not be reason of an entail'. ERO, D/DL/L11.

Such was the immediate backdrop for a marked change in direction under King Edward VI. In an effort to mark a clean break from the tumultuous reign of Henry VIII, Edward's councillors introduced a bill with dramatic consequences to his first parliament in 1547. It sought to repeal all the treasons and felonies created under Henry VIII, reserving only a select few for re-enactment. Unsurprisingly, a bill with effects of this magnitude had a convoluted journey through parliament, being sent to committee, redrawn, and reintroduced. Insufficient records obscure when bits of it were added and by whom, but by the time it passed, it included a striking proviso: that the wife of any man convicted of any act of treason or any felony whatsoever would henceforth be entitled to her dower.[60] The offender's goods would still be forfeit, as would 2/3 of his fee simple lands, but the wife would now be able to enjoy that 1/3 of the land that commonly served as support for widows. Such a change could deprive a king or lords of potentially valuable estates. It might also weaken what had come to be the chief justification for forfeiture: in the face of the new criticisms of forfeiture, legal writers now defended it as a valuable deterrent, arguing that men not worried about their own fates might forbear from crime out of concern for 'those persons who in nature and affection are nearest and dearest to them and most to be beloved'.[61] But now, with one simple little proviso, the widows of felons and traitors were assured this essential support. The measure thus put dower on par with the increasingly common jointure. Only a few short years later, members of another of Edward's parliaments thought better of

[60] 1 Edward VI, c. 12.
[61] T.E., *The Lawes Resolutions of Womens Rights* (London, 1632), fol. 194. W.R. Prest has demonstrated that the bulk of this work was probably composed in the late sixteenth century. See Prest, 'Law and Women's Rights in Early Modern England', *The Seventeenth Century* 6 (1991), 174-175.

preserving the dower of traitors' wives.[62] Nonetheless, for the wives of felons, this protection remained. The loss of the family's goods and chattels could still effect a devastating blow, but at least dower in land was secured.

Members of Edward's parliaments did not just concern themselves with the wives of felons: they looked to the rights of heirs as well. For every new felony that they created, they stipulated that there would be no corruption of blood.[63] While all personal possessions remained permanently forfeited to the crown, lands would forfeit only during the offender's life, and unless the offender received a pardon, that was likely to be for a short time indeed. King Edward's MPs did not apply this protection of the heir's blood to all existing felonies, as they did with the provision regarding the wife's dower, but they did so for the new felonies they created. From the offender's point of view, this change had more limited value than that relating to dower: in not applying to the traditional felonies, it did not apply to the felonies for which most offenders were convicted. As no such savings clauses can be found in any previous legislation, however, it constituted a marked change. Its novelty to the lawmakers themselves is further suggested by examining the original texts of the acts kept in the Parliamentary Archives: the first few such provisos protecting the blood or inheritance of heirs appeared on separate slips of parchment, sewn on to the main document as a subsequent addition.[64] And the inclusion of such provisos became a pattern for future parliaments. There were a few exceptions under Mary and Elizabeth, whose parliaments created a handful of new felonies with no

[62] 5&6 Edward VI, c. 11.
[63] 2&3 Edward VI, c. 29; 3&4 Edward VI, c. 17; 7 Edward VI, c. 11. See also 3&4 Edward VI, c. 5.
[64] PA, HL/PO/PU/1/1548/2&3E6n27, HL/PO/PU/1549/3&4E6n15, HL/PO/PU/1/1553/7E6n11. These additional schedules originated in the Commons.

such savings clauses included, but it clearly became the norm.[65] For most every new felony, no corruption of blood applied.

Thus, beginning in the sixteenth century legislators passed a number of statutes that ordered forfeiture for a first offence but only labelled the offence a felony and mandated a felon's death for a second or subsequent offence. They passed a couple that deemed an offence a felony but stipulated no forfeiture whatsoever. They enacted a couple more that elevated felonies to treason, but which maintained forfeiture to the lords, as in cases of felony. They protected a wife's dower from forfeiture for all felonies, and for almost all new felonies, stipulated no corruption of blood, or loss of the heir's rights to real estate.

Such measures afforded an important degree of flexibility in an era with an ever growing list of criminal offences and ever greater efforts at enforcement. Under the Tudors, some forty-seven statutes created new felonies, a marked increase from previous years.[66] Furthermore, as J.G. Bellamy has noted, the period also witnessed a 'verdict revolution': whereas late medieval court records show a conviction rate of about 1/3, surviving sixteenth-century assize records show a rate nearer to 2/3.[67] Like sixteenth-century changes to pardons and other forms of mitigation, the graduated punishments for repeat offenders and the protections of the rights of widows and heirs presumably aided this extension and intensification of the criminal law's reach, easing both the passage and enforcement of the new laws. Such changes allowed a more flexible, less heavy handed

[65] For the exceptions, see: 1&2 Philip and Mary, c. 4; 14 Elizabeth I, cc. 1, 2; 27 Elizabeth I, c. 2. Perhaps significantly, the Elizabethan exceptions are for acts that bordered on treason by contemporary definitions, such as destroying castles, freeing people charged with treason, and for being or aiding Jesuits.
[66] For the felony statutes, see Kesselring, *Mercy and Authority*, 37-39. It should be noted that this number includes measures that were repealed then re-enacted.
[67] Bellamy, *Criminal Trial in Later Medieval England,* esp. 93-134.

response to disorder, permitting the application of lighter, more broadly acceptable penalties while making clear the perceived gravity of the offence. Alterations to the ancient forfeiture provisions were thus part of a broader range of sixteenth-century penal innovations that augmented state power.

Even as these changes passed into law, administrative developments took place as well. The collection of felons' forfeitures proved a persistent problem for the crown. Early Tudor attempts to augment revenues from felons had some success, but needed diligent supervision to secure compliance from local officials. Underreporting remained rife. The revenue commissioners of 1552 complained that 'the profits of felons' goods...is very small and belike evil answered, for the sheriffs are charged therewith upon their own confession'.[68] In the 1620s, the Clerks of the Parcels launched a protracted campaign to have escheators, sheriffs and bailiffs account properly for felons' escheats and forfeitures, claiming their negligence robbed the clerks of their fees and worked 'to the great defrauding of his Majesty'.[69] The Clerks of the Parcels were fighting a losing battle, however. By the late sixteenth and early seventeenth centuries, the crown almost entirely abandoned felony forfeiture as a source of direct revenue and embraced it rather as a source of patronage grants.

Elizabeth and even more so James I and Charles I farmed out forfeitures, giving petitioners rights to collect the goods of specified numbers of felons or all forfeitures in a given area and time in return for a set rent or a portion of the proceeds. Elizabeth, for example, gave Thomas Lord Wentworth such concealed lands as his agents could discover, up to a yearly value of £200. Among the properties found by his assigns were

[68] British Library (BL), Add MS 30198, fol. 40; see also James Alsop, 'The Revenue Commission of 1552', *Historical Journal* 22 (1979), 511-533.
[69] PRO, LR 9/103; E 215/1706; E 126/2, fol. 239; E 126/3, fols. 78d, 159.

some twenty-eight small leases forfeited by Welsh felons.[70] Similarly, she gave to one of her equerries the chattels forfeited to the crown of up to thirty felons that he should name, with one fifth of the proceeds to be rendered to the Exchequer.[71] James and Charles also used the forfeitures of individual felons as rewards for favoured courtiers and servants. Previous monarchs had done the same, but under James the practice assumed a new priority. When his councillors tried to restrain his profligate gift giving, they allowed and encouraged grants of felons' goods as a form of bounty that did no lasting damage to the crown's revenues.[72]

No lasting damage to the crown's revenues, perhaps, but such grants and farms did some damage to perceptions of royal justice and bounty. In the parliament of 1610, members identified as a grievance courtiers' habit of begging for forfeitures even before an individual was convicted.[73] Sir Edward Coke introduced to the 1628 parliament a bill to ban the practice, noting that 'this begging before either causes too slack or too violent prosecution'.[74] The bill died in both the 1628 and 1629 sessions because of the abrupt endings of each. Nor was this the only problem with forfeitures discussed in the early Stuart parliaments. Each parliament from 1610 through to 1626 debated measures to protect the creditors of felons; as the draft of one of the relevant bills argued, 'it is agreeable to justice that the fuller punishment of the nocent or guilty do not any ways

[70] *Calendar of the Patent Rolls*, V, 2724.
[71] *Calendar of the Patent Rolls*, VIII, 169. The farming out of forfeitures under Elizabeth and the early Stuarts is considered at greater length in a forthcoming paper.
[72] *A Declaration of his Majesties Royall Pleasure, in what sort He Thinketh Fit to Enlarge or Rreserve Himselfe in Matter of.Bountie* (London, 1610), 17-18; Peter Davison, 'King James's Book of Bounty: From Manuscript to Print', *The Library*, 5th ser., 28 (1973), 26-53.
[73] *Proceedings in Parliament, 1610*, 2 vols., ed. Elizabeth Read Foster (New Haven, 1966), II, 359-360, 368, 382-383.
[74] *Commons Debates 1628*, 6 vols., eds. Robert C Johnson et al (New Haven, 1977), II, 44; III, 411.

involve or draw on the overthrow or prejudice of those that be innocent and guiltless'. [75] Yet this measure, too, failed to pass; problems arose in part because the king was not the only one who received such forfeitures, but again, the main problem proved to be the abrupt dissolution of the parliamentary sessions.

The farming of forfeitures and their milking as a source of patronage may have accelerated and intensified the shift from medieval complaints about abuses to complaints about forfeiture itself. Arguably, too, the timing and nature of some of the sixteenth-century statutory changes to forfeiture – and the early Stuart attempts at a measure protecting creditors - reveal emerging notions of the sanctity of private property that also contributed to the changing nature of the complaints.

Certainly, a new type and degree of opposition appeared during the Civil Wars and Interregnum. It manifested first in the colonies: the Massachusetts Body of Liberties of 1641 included amongst its defiant provisions a ban on forfeiture, confirmed in the General Laws of 1648. They further empowered those sentenced to death to make wills or otherwise to dispose of their assets as they wished.[76] In phrasing later borrowed by Connecticut's legislators, they decreed that 'All our lands and heritages shall be free from all…year, day and waste, escheats, and forfeitures, upon the deaths of parents or ancestors, be they natural, casual or judicial'.[77] In Rhode Island, the law code of 1647 declared the colonists' intent, 'so far as in us lies, to…propagate that country proverb in Providence Plantations: "The Father to the Bough and the son to the

[75] *Lords Journal*, II, 661; *Proceedings in Parliament, 1614*, ed. Maija Jansson (Philadelphia, 1988), 51, 119, 126; *Commons Debates, 1621*, 7 vols., ed. Wallace Notestein et al (New Haven, 1935), II, 199, V, 110, VII, 129-32; *Proceedings in Parliament 1626*, 4 vols., ed. William B. Bidwell and Maija Jansson (New Haven, 1996), IV, 91; for drafts of the bills, see PA, HL/PO/JO/10/1/19 and HL/PO/JO/10/1/22.
[76] *The Laws and Liberties of Massachusetts 1641-1691*, 3 vols, comp. John D. Cushing (Wilmington, Delaware, 1976), III, 691.
[77] *Public Records of the Colony of Connecticut*, 15 vols., ed. J.H. Trumball and C.J. Hoadley (Hartford, 1850-1890), I, 536-537.

Plough"…conceiving the wives and children ought not to bear the iniquities of the Husbands and Parents'.[78] Even the proprietary colonies moved in this direction: in Maryland, a statute passed in 1642 noted that forfeiture would apply only for treason and murder, and be discretionary in all other cases, with no escheat of land. Virginian lawmakers in 1655 stopped forfeiture until further order.[79]

In England itself, the few new felonies created in these years stipulated no loss of lands or goods whatsoever; only for treason was forfeiture confirmed.[80] Even the fairly conservative Hale law reform commission recommended abolishing forfeiture for manslaughter, suicide, and accessories before the fact.[81] In their study of suicide, Michael MacDonald and Terence Murphy note that with the collapse of Star Chamber and other enforcement mechanisms, the reporting of goods to be forfeit for self-slaying stopped almost in its entirety, although it resumed once the Interregnum governments established themselves.[82] (Then, of course, the forfeitures went not to a king but 'unto the keepers of the liberties of England, to and for the use of the Commonwealth'.) In the Sussex coroners' records calendared by R.F. Hunnisett, inquest jurors had reported goods for

[78] *Records of the Colony of Rhode Island and Providence Plantations*, 10 vols., ed. John R. Bartlett (Providence, 1856-1865), I, 162.
[79] *Archives of Maryland*, 66 vols., ed. William Hand Browne (Baltimore, 1883), I, 158; see Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens, Ga., 1983), 58-59.
[80] *Acts and Ordinances of the Interregnum, 1642-1660*, 3 vols., ed. C.H. Firth and Robert S. Rait (London, 1911), I, 1133-36; II, 387-389.
[81] See *Several Draughts of Acts, heretofore prepared by Persons appointed to Consider of the Inconvenience, Delay, Charge and Irregularity in the Proceedings of the Law* (London, 1653), 88, 92. On the character of the commission, see Mary Cotterell, 'Interregnum Law Reform: The Hale Commission of 1652', *English Historical Review* 82 (1968), 689-704. See, too, G.B. Warden, 'Law Reform in England and New England, 1620-1660', *William and Mary Quarterly*, 3rd ser., 35 (1978), 668-690, which points out that the civil war movement for law reform must be seen as having had some impact if we include the colonies as well.
[82] MacDonald and Murphy, *Sleepless Souls*, 80-81.

seizure fairly frequently before the civil wars, but did so only once during the 1640s.[83] When jurors felt themselves relatively free and unsupervised, they opted not to participate in such forfeitures.

From the newly liberated press poured forth tracts advocating law reform of all sorts. A good number of these denounced forfeiture. The Levellers called for its abolition in all cases save treason.[84] A good many critics decried forfeiture for unfairly depriving wives and children, not to mention creditors, of their assets. In 1651, John March, a barrister of Grey's Inn, claimed of forfeiture that 'a more rigorous law certainly never was made'. While he knew that some justified it as a deterrent, he thought it unwarrantable to effect deterrence in such a fashion. 'There cannot be', he wrote, 'a more rigid and tyrannical law in the world, that the children should thus extremely suffer for the crime and wickedness of the father, the innocent for the nocent'.[85] William Tomlinson scornfully noted that 'It is not enough that the wife hath lost her husband and the children their father, but to increase their misery, their livelihood must go with his life'.[86] To the argument that the fear of forfeiture was a valuable deterrent, William Cole noted that it did not apply in Kent, and yet, 'in that country, is as little robbing or murdering as in other counties'. For Cole, forfeiture was part of the Norman yoke: 'It came to pass [after the Conquest] that all penal Laws were made for the benefit of the King, the lords of Manors, and other great Officers who were the King's Creatures; This was and still is the ground and reason why…the estates of Offenders were forfeited by

[83] R.F. Hunnisett, *Sussex Coroners' Inquests, 1485-1558* (Sussex Record Society, 74), Lewes, 1985, passim; *Sussex Coroners' Inquests, 1558-1603* (Kew, 1996), passim; *Sussex Coroners' Inquests, 1603-1688* (Kew, 1998), passim.
[84] *An Agreement of the Free People of England* (London, 1649), 6. See also: Donald Veall, *The Popular Movement for Law Reform, 1640-1660* (Oxford, 1970), esp. 114, 131, 235.
[85] John March, *Amicus Reipublicae, The Commonwealth's Friend, an Exact and Speedie Course to Justice and Right* (London, 1651), 109-112.
[86] William Tomlinson, *Seven Particulars* (London, 1657), esp. 18.

Law to the King, or lord of the Manor'.[87] John Milton did not denounce forfeiture as such, but found in it a justification for the republic: 'What can be more just and legal, if a subject for certain crimes be to forfeit by law from himself and posterity all his inheritance to the king, than that a king for crimes proportional should forfeit all his title and inheritance to the people?'[88]

Felony forfeiture survived into the Restoration, however, and the earlier practice of using forfeitures as a source of patronage resumed. Several men thought it worth their while to petition for farms of forfeitures, and the crown once again made individual gifts of felons' goods.[89] So much had the practice revived, indeed, that the drafters of the Bill of Rights decided to insert amongst its lists of royal failings and the people's rights a proviso that the begging of forfeitures before conviction be prohibited.[90] As with so many other matters left unsettled at the Restoration, this issue had awaited the settlement of 1689. The measure discussed so long and with such little effect in the early Stuart parliaments now found itself enshrined in the key document of the Revolution of 1689.

III. Developments after the Glorious Revolution

After the Revolution and into the eighteenth century, practices changed. Income from felony forfeitures had long since ceased to make much of an impact on crown receipts; after 1689, patronage grants of felony forfeitures ceased making much of an appearance

[87] William Cole, *A Rod for the Lawyers* (London, 1659), 6, 320.
[88] John Milton, 'The Tenure of Kings and Magistrates', *The Prose Works of John Milton*, ed. Robert Fletcher (London, 1838), 234.
[89] See, for example, PRO, SP 29/22, no. 163; SP 29/50, no. 73; SP 29/52, no. 8.
[90] See Lois Schwoerer, *The Declaration of Rights* (Baltimore, 1981), 23, 96-97; David Lewis Jones, *A Parliamentary History of the Glorious Revolution* (London, 1988), 30, 139-140.

in the records of the crown, either. The supposition has long been that felony forfeitures ceased to be collected in these years. An alternative explanation is that while the crown abandoned any real interest in forfeitures as either a source of revenue or as a source of patronage, manorial lords and others who exercised such jurisdiction continued to collect felons' goods.

Certainly, evidence of royal grants of felons' effects becomes much more difficult to find. The few grants that do appear in the records are generally gifts to relatives of the condemned.[91] The few Chancery commissions into felons' estates similarly seem to have been efforts to determine title in a messy situation, not to accrue to the crown but rather to pass assets more securely to kin of the felon. Some individuals requested such inquiries to prove the crown's title to 'their' property against claims by other lords, and then requested and obtained the property from the crown.[92] Even in the case of Laurence, Earl Ferrers, convicted of murder in 1760, the Crown's agents seemed little concerned to profit from the sizable estate but rather simply to manage its disposition. After his arrest but before conviction, Ferrers had conveyed various effects worth nearly £4500 to the benefit of his four illegitimate children and a further substantial sum for the benefit of the four children of the man he murdered. After his execution, the crown held an inquisition into its rights to his estate. The Attorney General noted that while the validity of conveyances made just prior to Ferrers's attainder might be challenged, 'yet it will be agreeable to his Majesty's equity and clemency to suffer them to prevail'. When Ferrers's

[91] The change from pre- and post-1689 is easily seen in the *Calendars of the Treasury Books*, vols. I-XXXI. For a few illustrative entries, see XVIII, 79, 434; XXVII, pt. 2, 284; XXVIII, pt. 2, 249.
[92] See the files in PRO, C 205, Petty Bag Office: Special Commissions on Forfeited Land, and a few supplementary documents in the Petty Bag Miscellanea, C 217/160.

brother petitioned for the remainder of the estate, the Attorney General recommended a positive response.[93]

The Revolution of 1689, then, seems to have killed off the crown's use of felony forfeiture as a source of patronage. Whereas the drafters of the Bill of Rights had merely complained about a dangerous abuse in the way such grants were given, the crown for the most part abandoned them; it turned its attentions instead to the potentially much more lucrative forfeitures for treason and 'superstitious uses,' those from Irish rebels, Jacobites, and Catholics more generally.[94] But the Revolution did not necessarily do away with felony forfeitures. Rather, evidence suggests that such forfeitures passed more firmly into the hands of lords of manors, liberties, and such like. The Revolution is often said to have created a golden age for the gentry, enshrining their privileges and power over local affairs.[95] To prove that this was true in respect to felons' goods would require a substantial trawl through manorial records. In the meantime, a few suggestive traces need suffice. In 1693, parliament passed a law making it easier for lords of manors to press their claims to felons' effects. Corporations, lords of manors, or others having grants of felons' goods had merely to have the same enrolled in King's Bench once, and thereafter no longer had to plead the same to any inquisition. If a clerk of the crown issued process against such a grantee, the clerk owed the grieved party a penalty. As Michael MacDonald notes, the act 'epitomized the post-Revolutionary mood. Its blatant purpose was to prevent the crown from infringing the right of landowners to the goods of

[93] PRO, SP 37/1, no. 65.
[94] The statute books are full of acts authorizing the forfeiture of such estates. See also PRO, FEC, the records of the Forfeited Estates Commission.
[95] See, for example, a classic statement of this view in William Willcox, *The Age of Aristocracy, 1688-1830* (Boston, 1966), or more recently, Julian Hoppit, *A Land of Liberty? England, 1689-1727* (Oxford, 2000), 346.

felons'.[96] Scattered evidence suggests those landowners remained interested in such revenues. The court baron of the manor of Pebmarsh, Essex, recorded the seizure of John Cooke's copyhold after his execution for murder in 1693.[97] When Christopher Clitherow claimed the purse and coin worth £37 forfeited by a felon on one of his manors in 1699, he noted that others had also tried to press their own claims, including the sheriffs of London, the Bishop of London's bailiff, and the agent of the Dean and Chapter of St. Paul's.[98] Newspaper advertisements for manor estates listed the right to collect felons' goods as a selling feature throughout the century that followed.[99]

In the nineteenth century, at least, plenty of evidence for felony forfeiture exists. The city of London's officials had neat little ledger books prepared for entering the forfeitures of felons and the revenues received from auctions of those goods.[100] One account book recorded forfeitures from some 472 Middlesex and London felons between October 1858 and September 1859.[101] An auction catalogue dated 18 June 1858 included felons' goods handed over by the sheriffs in the London area, Kent, Sussex, and Yorkshire; besides the usual watches, rings, and clothing, it also listed a pack of theatrical costumes up for sale.[102] Throughout the 1860s, the Treasury Solicitors responded to hundreds of petitions from all corners of the country for the return of felons' goods.[103]

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[96] 4 William and Mary, c. 22; Macdonald, 'Secularization of Suicide', 74. A stray volume survives from the mid-nineteenth century recording the claims of lords of liberties to felons' goods: PRO, E 165/93: 'Claims of Lords of Liberties allowed by the Queen's Remembrancer.'
[97] ERO, D/P 155/3/2.
[98] London Metropolitan Archives (LMA), ACC/1360/164.
[99] See, for instance, *Evening Post*, Saturday, 20 August 1720, advertisement for the manor of East Membury; *Public Advertiser*, Friday, 16 March 1753, for the manor of Hurdle; and the *London Evening Post*, Tuesday, 13 January 1756 for the manor of Northam.
[100] See, for example, LMA, CLA/035/02/03 (1856 Ledger Book) and CCC/RFG/24/2 (1854 Auction Catalogue).
[101] LMA, CC/RFG/2/4.
[102] LMA, CCC/RFG/24/9.
[103] PRO, T 15/12-21, recording responses upon some 659 requests between 1859 and 1869.

The Reverend George Marwood, who filed his claim to the goods of felons in much of North Yorkshire in 1840, may have hoped to make some worthwhile profit from his rights;[104] the crown, however, brought in only paltry sums. A report made to parliament in 1847 noted that over the past seven years, an average of £181-3-8 worth of felons' goods was reported to the crown annually. Of course, this amount did not include the sums raised by all the other individuals with the rights to forfeitures. Nor, complained the official making the report, did it include all the sums due to his office: he maintained there was 'little doubt that considerable property is retained by the constables and others and is never accounted for to the crown'. [105] Indeed, the Treasury often heard of individual forfeitures only when it received a petition for the return of the goods in question. In 1861, for example, the Treasury solicitor wrote to the Leicester superintendent of police to ask about items one Joseph Booth said he had lost upon his arrest for felony, curious because the superintendent had made no report of the seizure.[106] Thus, even for the amply documented nineteenth century, we cannot hope to know how many offenders lost their goods. That the practice survived even up to the moment of its statutory abolition is clear, however.

The forfeiture of felons' goods survived through the eighteenth and much of the nineteenth centuries, but was also subject to an increasing number of challenges and changes. Some of the problems emerged from the blurring of the felony concept. A system in which felons were generally either executed or freed, whether through pardon or benefit of clergy, had a certain brutal simplicity. The rise of transportation as an

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[104] PRO, E 165/93.
[105] 1847-48 (52) *Abstract Return of Amount of Felons' Property Forfeited to Crown in England and Wales, 1843-48*, *House of Commons Parliamentary Papers Online* (Cambridge, 2005), 6.
[106] PRO, T 15/14, p. 25. In this same volume, covering 1861-1862, see also pp. 32, 64, 230, 279, and 458 for similar inquiries.

alternate punishment for felons complicated matters. Used initially as a condition on which pardons from death were granted, after 1718 transportation was also used as a sentence in its own right for lesser felonies; those offenders transported as a condition of pardon had been attainted, and were thus legally 'dead' and subject to forfeiture. This posed problems. Any property these transported felons had at conviction might readily be considered forfeit, but should some provision be made for offenders upon the termination of their sentences? Some of the successful petitions for the return of goods came from transported offenders hoping for some stake upon which to build a new life.[107] An even greater legal problem from a technical point of view: what of property the offenders acquired after conviction?[108] Members of parliament tried various statutory solutions. One act allowed that transported felons might acquire, hold, and sue for personal property after obtaining a ticket of leave, but no real estate until formally pardoned; the newly acquired personal property, furthermore, would be forfeit if the ticket of leave was revoked.[109] The problem bedevilled legislators, judges, and officials – and more pressingly the transported offenders themselves – until transportation's end.[110]

Transportation and, later, imprisonment allowed felons to live, thus complicating the matter of forfeiture and also obscuring the boundary marker between felony and lesser crimes. In the eighteenth and nineteenth centuries, capital punishment ceased to be the badge of all felonies: only forfeiture remained. This prompted both confusion and

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[107] See, for example, PRO, TS 5/44, pp. 3-4; T 15/13, p. 508, and TS 30/1, 3.
[108] See, for example, PRO, TS 30/1 and TS 30/3: Treasury Solicitor, Bona Vacantia, 1830-37 (volume 2 is missing). Of the 32 warrants dealing with the disposition of the goods of felons, 22 deal with legacies or property 'acquired' by a felon (or a felon's wife) after transportation.
[109] 6&7 Victoria, c. 7. See also 5 George IV, c. 84 and 2&3 William IV, c. 62 for earlier attempts to deal with the issue. A ticket of leave was essentially a form of parole; upon good behaviour, transported convicts might be allowed certain freedoms even before the expiration of their sentence.
[110] See, for example, 163 *English Reports* [CD-ROM] 1409. For a more detailed discussion of this aspect, see Bruce Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850', *Law and History Review* 21 (2003), 527-584.

complaints of injustice, however. A few individuals who petitioned the Treasury maintained that their goods had been erroneously taken, as they had been convicted for misdemeanour rather than felony.[111] In 1852, the father of one offender helped his recently released son petition for the return of the hymn book, knife, and gold chain he had lost upon his arrest; when informed that the goods had already been sold at auction, the father angrily expostulated that his son had only committed a misdemeanour. When various inquiries proved otherwise, the father was reportedly 'dispirited and seemed to regret the high ground that he had taken.' He apologized for the misunderstanding, but the problem was certainly not his alone.[112] The move toward summary procedures, in lieu of jury trials, compounded the confusion. Under the Criminal Justice Act of 1855, for example, individuals charged with larceny could choose either type of trial; those who opted for summary trial, however, faced no forfeiture, unlike someone guilty of the exact same offence who had opted for a jury.[113]

The blurring of the felony line posed problems, then. From the eighteenth century forward, changing attitudes about property and the nature of political relationships more generally also prompted challenges to the centuries old practice. Complaints that forfeiture unjustly deprived wives, children, and creditors continued, but now, arguably, with greater potency, drawing upon notions of natural rights to property. In a parliamentary debate of 1744, one member went so far as to exclaim that 'every man may

[111] For one successful petition to this effect, see PRO, T 15/16, p. 380. The problematic borderline between misdemeanour and felony was a perennial complaint of law reformers; see, for example, *Law Magazine and Quarterly Review of Jurisprudence* 30 (1843), 2 and n.s., 2 (1845), 92, 93.
[112] LMA, CCC/RFG/5/2(e) and CCC/RFG/5/1(d).
[113] 18&19 Victoria, c. 62. See PRO, T 15/13, p. 477 for an order to return the goods of one offender as she had been summarily tried. An earlier attempt to allow summary trials for minor felonies had run into problems over precisely the issue of forfeitures; see *The Times* (London), 14 May 1828, 1. For an overview of summary procedures, see Bruce P. Smith, 'The Presumption of Guilt and the English Law of Theft, 1750-1850', *Law and History Review* 23 (2005), 133-171 and Peter King, 'The Summary Courts and Social Relations in Eighteenth-Century England', *Past and Present* 183 (2004), 125-172.

learn from his own breast, that by the laws of nature, all mankind ought to succeed their ancestors; they are entitled to expect it by the order of all things'.[114] Against this, however, others argued easily that inheritance was not a natural right but merely a creation of civil society. In 1745, Charles Yorke offered an influential defence of forfeiture based on precisely this point; he focused on treason, but applied his arguments equally to all such seizures. He quoted Puffendorf, Grotius, and others, but some of his strongest arguments derived from 'common sense' observation. Since fathers could alienate land and thus deny it to their children, and since younger or illegitimate children did not inherit equally with the favoured heir, any talk of a natural right of inheritance obviously had no basis. Property rights were created by society, and society might bestow those rights upon conditions best suited to its needs.[115] Some people questioned feudal notions of the king as ultimate landowner and the possession of property as conditional upon loyalty. Against this, some defended the old point of view; others changed the focus from crown to 'the people' at large, repeating Yorke's arguments about property being the creation of civil society and thus justly liable to loss if an individual did something that society deemed dangerous.[116] The notion of rights to property being contingent existed just as readily within contract theories of government as within feudal or patrimonial theories.[117]

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[114] *The Beauties of the British Senate: Taken from the Debates of the Lord and Commons taken from the beginning of the administration of Sir Robert Walpole*, 2 vols., London, 1786, 242.
[115] Charles Yorke, *Considerations on the Law of Forfeiture, for High Treason*, 4th edn., London, 1775, 30 and passim. William Eden, for example, cited Yorke's work as a particular influence even while disagreeing with some particulars: *Principles of Penal Law*, 3rd edn., Dublin, 1772, 37. See, too, the anonymous *Thoughts on the Law of Forfeiture and Parliamentary Attainder for High Treason* (Dublin, 1798), which draws on both Yorke and Eden.
[116] See the works cited above and the anonymous exchange in *Discourse Upon Grants and Resumptions*, 2nd edn, London, 1700, and *Jus Regium, Or The King's Right to Grant Forfeitures* (London 1701).
[117] Bradley Chapin makes the same point: *The American Law of Treason, Revolutionary and Early National Origins* (Seattle, 1964), 75. See, too, G.R. Rubin and David Sugarman, who argue that the 'much

One point on which critics somewhat more readily found support was in their denunciations of corruption of blood. The great Blackstone himself, so often seen as a defender of the status quo, in this instance offered no apology. He carefully distinguished forfeiture-as-punishment from escheat as a result of failure of the inheritable blood: the first, of Saxon origin, was a prerogative vested in the crown, and 'was neither superseded nor diminished by the introduction of the Norman tenures, a fruit and consequence of which escheat must undoubtedly be reckoned'. Corruption of blood not only lost a felon his land, but also rendered him incapable of inheriting anything in the future or serving as a channel through which others might inherit from some remote ancestor. 'This corruption of blood', Blackstone wrote, '...has been long looked upon as a peculiar hardship'. This much a sixteenth-century critic might have said. The second part of the quotation could only have been written post-1660: 'because, the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences'.[118]

Despite the sentiment among some historians that not much of consequence survived the Restoration, the repudiation of feudal tenures did.[119] The post-revolutionary fondness for private property and its protection was so strong that in 1709 legislators almost abolished forfeiture of land for treason. During discussions to bring Scots treason

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vaunted rise of absolute private property' discussed by C.B. Macpherson and others coexisted with other, qualified notions of property in ways that made the conception of property more flexible, subtle and complex from the seventeenth century onward. G.R. Rubin and David Sugarman, 'Introduction: Towards a New History of Law and Material Society in England, 1750-1914', *Law, Economy and Society, 1750-1914*, ed. G.R. Rubin and David Sugarman (Abingdon, 1984), 31-41.

[118] Blackstone, *Commentaries*, II, ch. 15, 251-255. Eden and some of the others cited above also noted their distaste for corruption of blood even while defending forfeiture more generally. For the abolition of feudal tenures, see below, especially 12 Charles II, c. 24.

[119] By an ordinance in 1646, confirmed in the first protectorate parliament, and then in the first parliament of the Restoration: *Acts and Ordinances of the Interregnum*, II, 1043; 12 Charles II, c. 24. See Christopher Hill, 'Feudal Tenures', *Intellectual Origins of the English Revolution Revisited* (Oxford, 1997), 318-26 and Simpson, *Law Land*, 22-23, 187.

law into line with the English, Scottish members baulked at English forfeiture provisions. The Commons collectively agreed that the loss of estates was unjust and decided to protect the land of traitors for their heirs throughout the isles. Only a last minute proviso added by the Lords postponed the measure. They agreed that it was 'fit to be passed in good times', but amended it to take effect in England only after the death of the Pretender, Prince James. Over the years, with each new Jacobite and external threat, it was delayed again and again until finally killed off in the midst of the war against Revolutionary France.[120] The sentiment behind it survived, however, and equitable devices such as trusts and strict settlements stood in to protect estates. Over the eighteenth century the escheat of any land save copyhold estates seems to have become quite rare.[121]

Nonetheless, the pernicious effects of corruption of blood remained. Even with so prominent a critic as Blackstone, they survived without hindrance until 1814. After a failed attempt the previous year, Sir Samuel Romilly introduced a bill to abolish corruption of blood in all instances. In the course of the debate, he noted his opposition to all forfeitures, as unjust in nature and absurd in practice, but focused his efforts more narrowly. He cited Blackstone in his argument that corruption of blood was quite distinct from forfeiture, an 'accidental' but 'oppressive relict of Feudal Tenure'. Charles Yorke – son of the pro-forfeiture author mentioned earlier - offered the most heated defence of the

[120] 7 Anne, c. 21, 12 George II, c. 39, 19 George III, c. 93See: *The History and Proceedings of the House of Commons*, 14 vols., London, 1742, IV. 131-132 and *Cobbett's Parliamentary History of England*, 36 vols., London, 1810, VI, cols. 794ff.

[121] This claim is based on the observations of legal writers of the day. Blackstone, for example, noted that forfeitures 'at this day are generally forfeitures of copyhold estates': *Commentaries*, IV, ch. 7, 96; see also II, ch. 18, 284. Copyhold had long been and remained a source of confusion, in some respects treated as real estate and in others as personal property. It forfeited to the lord and not the king, as long as there was a manorial custom to that effect, but in cases where fee simple land became immune to forfeiture and escheat, copyhold remained liable to loss. See, for example, 77 *English Reports* 883; 90 *English Reports* 4; 108 *English Reports* 218; and 123 *English Reports* 106.

status quo, denouncing claims that the two practices had different origins as bad history and defending corruption of blood as a just and time-honoured deterrent. He whittled away at Romilly's bill, first securing an amendment that kept corruption of blood for treason by a vote of 47-32 and then another that kept it for murder and petty treason, which passed on the narrower margin of 41-39.[122]

Yorke, like his father, had insisted that 'property is the creature of society, and society may impose its own conditions'. He joined other defenders of the status quo in citing a respect for traditions tested by time. Some others expressed concerns for infringing upon royal prerogative or the property rights of lords of liberties and manors. Others yet reiterated the importance of forfeiture's effects on family members as a valuable deterrent. A few simply thought that any restriction of forfeiture should await a thorough revision and codification of the criminal law.[123] Arguments such as Yorke's had long held out against critics of the practice, but they came under increasing strain over the nineteenth century. MPs made at least four serious attempts over coming years to do away with forfeiture *in toto*.[124] Supporters of these bills vilified forfeiture as the 'last barbarous relic of a barbarous age'. Benthamites argued it was an 'unmitigated mischief'

[122] *The Speeches of Sir Samuel Romilly in the House of Commons*, 2 vols., London, 1820, I. 434, II. 3-17. For Yorke's arguments, see *The Debate in the House of Commons, April 25, 1814, Upon Corruption of Blood* (London, 1814). For the final act, see 54 George III, c. 145. An act passed in 1833 tidied loose ends: 3&4 William IV, c. 145.
[123] *The Times* (London), 27 February 1834, 2; 1 July 1859, 6; 21 July 1859, 6; 16 June 1864, 8.
[124] 1834, 1864, 1865, 1866, and then finally in 1870. See the draft bills accessible through *House of Commons Parliamentary Papers Online* (Cambridge, 2005): 1834 (124) *Bill to Amend Law of Forfeiture as Regards Goods and Property of Persons Convicted of Felony*; 1864 (21) *Bill to Abolish Forfeiture of Lands and Goods on Convictions of Felony*; 1865 (134) *Bill to Abolish Forfeiture for Treason and Felony*; 1866 (105) *Bill to Abolish Forfeiture for Treason and Felony*; 1870 (9) *Bill to Abolish Forfeiture of Lands and Goods on Convictions of Felony*; 1870 (103) *Bill to Abolish Forfeiture of Lands and Goods on Convictions of Felony, as amended by select committee*; 1870 (183) *Select Committee on Felony Bill, Report, Proceedings*.

that ‘produced pain without any corresponding advantage’.[125] In addition to the longstanding complaints that the punishment unfairly came down on the innocent, critics more frequently questioned whether it served as a deterrence at all. They also highlighted its inconsistencies and irregularities. Some people complained that the penalty applied unevenly to different offenders, being graduated not according to the gravity of an offence but by the size of an estate. They cited, too, the disparities between felonies and misdemeanours, noting that the penalty applied haphazardly to offences that might be deemed equal in other contexts. Furthermore, critics said, some avoided the penalty altogether by transferring their assets before conviction, whereas others confident of their innocence or simply not knowing any better, lost every thing.[126]

A particularly strong factor favouring change was the shifting balance between real and personal property. Among those coming to demand uniformity, certainty, and ‘rationality’ in their legal system, the different treatment accorded different types of property proved especially galling. Over the preceding centuries, families generously endowed with land had found ways to protect it, through strict settlements and a variety of other equitable devices. Most new felonies created since the sixteenth century did not incur forfeiture of land beyond the offender’s own life time. Romilly’s act protected all estates save copyhold from forfeiture for anything other than treason and murder. But personal property remained prone to seizure, and as personal property came to acquire greater significance for more significant components of the population, calls to do away

[125] *The Times* (London), 16 June 1864, 8.For Bentham’s own denunciation of forfeiture, see ‘An Introduction to the Principles of Morals and Legislation’, *The Works of Jeremy Bentham*, ed. John Bowring (11 vols., Edinburgh, 1843), I, 479-483.
[126] See, for instance, ibid., and *The Times* (London), 1 July 1859, 6; 31 March 1870, 6. See also the comments included in 1845 (656), *Eighth Report of Her Majesty’s Commissioners on Criminal Law*, Appendix A, 211-338.

with its forfeiture grew louder. Already in the mid-1700s, Theodore Barlow observed that a variety of protections existed for the real estate of felons' families, but regrettably, none for the personal estate. In the past, he wrote, the value of personal property was 'inconsiderable', but 'in the present state of the realm…there are many worthy families of very great fortunes consisting wholly or for the most part of personal estates, and it may be too severe to strip them of all'.[127] This was even more true of the nineteenth century. Critics contemplated with growing horror the supposed iniquity of a wealthy family losing vast bank deposits.[128] With the increasing importance of wages, bonds, insurance, annuities, and other such intangible assets to increasingly large and important segments of the population, the merits of forfeiture as a legitimate deterrence came under increasing fire.[129]

Finally, in 1870, the balance tipped. The Forfeiture Act of that year stipulated that convicts could still be forced to pay compensation to victims or to cover the costs of prosecution, and it did not apply to outlaws. Otherwise, though, it abolished this centuries old practice.[130] For all the practical problems and varied criticisms over its history, felony forfeiture had been remarkably resilient. Like the felony concept, it had proven itself adaptable to different contexts and needs. It showed signs of surviving even the shift between vastly different systems of criminal law, from one premised on death, display,

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[127] Theodore Barlow, *The Justice of the Peace* (London, 1745), 215.
[128] See, for example, *The Times*, 7 February 1844, 2; 31 March 1870, 6. Perhaps it helped, too, that some of these newer types of wealth did not go to lords of manors but only to the crown, which had successfully asserted its rights to 'chattels incorporeal' as distinct from 'goods and chattels' more generally. The Corporation of London and the Treasury were still arguing the point when forfeitures were abolished. See 146 *English Reports* 587 for a case in 1817, and PRO, T 15/22, p. 245.
[129] On the importance of the shift towards personal property in the contemporaneous married women's property debates, see Holcombe, *Wives & Property*, 34ff. For an overview of the shifts in property, property relations, and property law over this period, see Rubin and Sugarman, 'Towards a New History of Law and Material Society in England, 1750-1914', 23-42. The reasons for the demise of forfeiture will be explored at greater length in a future study.
[130] 33&34 Victoria, c. 23.

and deterrence to one claiming rationality, uniformity, and certainty. In the end, however, it buckled under the weight of its inconsistencies of application when those inconsistencies were compounded by a shift in the nature of the nation's wealth. Changing notions of property rights – from conditional to absolute – played a part, too, but despite the rhetoric of sovereign, inherent rights to property, some conditions remained tolerable in the abstract, at least if they applied equally to all. The reweighing of the balance between real and personal forms of wealth and the unequal weight of protections afforded one but not the other helped tip the scale. With that rebalancing, forfeiture – the original, defining legal effect of felony – disappeared.