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A HISTORY OF ENGLISH CRIMINAL LAW

Volume 1

THE MOVEMENT FOR REFORM

A HISTORY OF
ENGLISH CRIMINAL LAW
and its Administration
from 1750

BY

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WITH A FOREWORD BY

THE RIGHT HON. LORD MACMILLAN, G.C.V.O.

VOLUME 1

THE MOVEMENT FOR REFORM

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FOREWORD

THE studies of which Dr. Radzinowicz in this volume gives us the first fruits mark a new departure in research. Hitherto the history of our criminal law has been expounded mainly from the juristic standpoint of statutes, decided cases and text-writers; the important and copious sources of information to be found in the national collections of State Papers have not been utilised adequately or at all. The dominant purpose of the present treatise is to set out the results of the investigations which Dr. Radzinowicz has undertaken in this largely unexplored field, in order to display the gradual growth of public opinion which has led to the reforms brought about by modern criminal legislation. With the help of the material thus gathered he has been able to exhibit in the most vivid form the process of law in the making.

In an article in *The Cambridge Law Journal* in 1948 Dr. Radzinowicz explained the motives and plan of his researches. The task which he set himself was truly Herculean. For his chosen period from the middle of the eighteenth century down to the present day he tells us that he had to consult some 1,250 Reports of Commissions and Committees of Inquiry, 3,000 Accounts and Papers, 800 Annual Reports and 1,100 Volumes of Parliamentary Debates. But he has not confined himself to official sources alone; he has had recourse also to the works of British and foreign authors specifically concerned with criminology, to historical and popular literature, and to contemporary newspapers and periodicals, in order that no aspect of the subject should be overlooked. The result is much more than a law book for lawyers; it is a full and comprehensive study of the phenomena of a great social evolution, at once technically accurate and humanly interesting. The light thus shed on the process of the awakening of the public conscience is as novel as it is illuminating.

Legislation, whether good or bad, is the outward and formal expression of the mind and will of the people. Behind it lies a vast area of discussion and controversy in which the formation

of public opinion discloses itself. Every movement for reform derives its impetus from many diverse quarters and it is only after long preparation that the call for action succeeds and wrong is at last righted. Without knowledge of this background the significance of legislation cannot be fully appreciated. By an apposite coincidence it so happens that while these pages have been passing through the press Parliament has been engaged in the consideration of a Criminal Justice Bill embodying a wide range of amendments of the existing law. The discussions which have taken place in both Houses on this measure, when read along with the account given by Dr. Radzinowicz of the debates on earlier reforms, illustrate the perennial character of the controversies which always attend alterations in the criminal law. A major theme of this volume is the progressive restriction of capital punishment. In the recent debates on a clause in the Criminal Justice Bill proposing to suspend for an experimental period of five years capital punishment for murder all the old arguments on the merits and demerits of the death sentence were once more repeated and the purpose of punishment, whether as retributive, deterrent, protective or reformative, was once more debated at length. If this book had been published before the Bill was discussed in Parliament its wealth of historical and statistical information on the subject would have provided speakers with a veritable arsenal of ammunition. The question of the expediency of preserving the death sentence for murder is eminently debatable. It raises ethical, social and administrative as well as legal problems. For murder there is only one sentence, although the degrees of criminality in murder may vary widely. Ought not the law to take cognisance of this and as in the case of other crimes to permit the sentence to fit the gravity of the particular case? To leave it to the royal prerogative to exercise this discretion is to require the judge to pronounce sentence of death in cases where he knows it will not be carried out and thus to derogate from the solemnity of the gravest of all sentences. Points such as these will be found in this volume to have been over and over again discussed in the past and doubtless they will continue to be discussed in the future, as they have been discussed in the present year.

The wide and systematic survey of the movements of public opinion and sentiment which Dr. Radzinowicz provides prompts reflections on the changing emphasis which at different periods is placed on various aspects of criminal law. The pioneers of nineteenth century reform were concerned chiefly with the barbarity of the law and the inefficacy and injustice of the penalties which it prescribed. It may be that future reformers will be concerned with problems of another nature. The conception of crime which the ordinary citizen entertains involves the commission of some act which transgresses not merely the law but morality. Murder, robbery, arson, perjury and the like all offend the natural instincts of the good citizen and their repression commands his assent. But in recent times the criminal law has invaded almost every department of daily life with countless restrictions to the contravention of which penal consequences are attached. People may now be arraigned for acts which are in no sense intrinsically wicked but are merely made crimes by Act of Parliament in pursuance either of economic exigencies or political theories. 'The more laws there are the more crimes there will be', said the founder of Taoism about the sixth century B.C. As the Lord Chancellor in a recent speech well said—'The respect which the people of this country show to law and order is our greatest guarantee of getting through difficult times and it is incumbent upon the legislator to remember that when he piles one law upon another he may endanger that respect'. So it may be the task of future reformers of the law to agitate for the elimination from our criminal code of many of the innumerable offences which involve only what Dr. Radzinowicz terms 'administrative criminality' and evoke no moral reprobation except in so far as any breach of the existing law is reprehensible.

But the writer of a foreword, like the chairman at a meeting, should confine himself to commending the merits of the author or speaker whom he is privileged to introduce, and ought not to take the opportunity of parading his own views. Nevertheless it is one of the merits of this book that it is so provocative of thought and comment.

The title page bears that the work is published under the auspices of the Pilgrim Trust in kindly recognition of the aid

which the Trust has given to the prosecution of these studies. It might at first sight seem as if such an enterprise as this lay somewhat outside the activities of a Trust best known for its interest in the preservation of our national heritage of things historical and beautiful. But the Trustees have always recognised that the promotion of social investigations is well within their sphere and they have helped in the past various studies of national significance.

In Lecky's great work on *Democracy and Liberty* he quotes (vol. 1, p. 271) a saying of Grattan that 'the best husbandry is the husbandry of the human creature' and then adds: 'To distinguish between crime that springs from strongly marked criminal tendency and crime that is due to mere unfavourable circumstances or transient passion or weakness of will; to distinguish among genuine criminal tendencies between those which are still incipient and curable and those which have acquired the force of an inveterate disease, is the basis of all sound criminal reform. It cannot be carried out without much careful classification and many lines of separate treatment. The agencies for reclaiming and employing juvenile criminals; the separate treatment of intoxication; the broad distinction drawn between a first offender and an habitual criminal; the prison regulations that check the contagion of vice, have all had a good effect in reducing the amount of crime. Most of these things cost much, but they produce a speedy and ample return. Money is seldom better or more economically spent than in diminishing the sum of human crime and raising the standard of human character'.

It is because this work contributes so notably to the understanding of one of the most persistent of social problems and because by its record of progress it throws a ray of hope across the present scene of a world racked with crime and lawlessness and proves that in this country at least the effort to do justice has always survived, that the Pilgrim Trust, as its chairman may be permitted to say, welcomed with no sense of incongruity the privilege of lending its aid.

MACMILLAN.

PREFACE

LORD MACAULAY'S generalisation that the history of England is the history of progress is as true of the criminal law of this country as of the other social institutions of which it is a part. Child of the Common Law, nourished and moulded by Statute, the criminal law of England has always been sensitive to the needs and aspirations of the English people, and it has continuously changed under the impact of the predominant opinion of the day. Yet while it has never been static, its rate of growth has been uneven, and the main features which it presents today were built up from the movement for reform which began in the middle of the eighteenth century. To that development the forces of morality, of philosophical thought and of social consciousness all made their contribution.

Criminal law, political life and economic development are closely intertwined in the pattern of social history. It is because the history of the first of these strands has been less intensively studied than that of the other two, that there is, it seems to me, need for a more detailed examination of it than has yet been made.

In my work I have been fortunate to have had the benefit of advice from many quarters. It is my pleasant duty to acknowledge the debt of gratitude which I owe to Viscount Maugham, who from the beginning has shown an active interest in my research; the observations which he has made from time to time have been of immense value to me in helping to give final shape to the material which I have collected. Since 1944 my investigations have been conducted under the auspices of the Pilgrim Trust, and I regard it as a high honour that the Trustees have felt that this research falls within their sphere of interest and that they have found it proper to share the financial burden which a work of this nature necessarily entails.

Lord Macmillan's consent to contribute a Foreword has been a further encouragement to me to pursue my studies and to bring them to completion. My grateful thanks are also due to the Advisory Committee set up on the suggestion of the Trustees under the chairmanship of Viscount Maugham, the other members being Lord Wright, Lord Simonds, Sir Arnold D. McNair, Professor P. H. Winfield, Professor H. A. Hollond and Mr. J. W. C. Turner. To the latter, my colleague in the Cambridge University Department of Criminal Science and my collaborator in that field, in close friendship, since 1936, I owe constant support.

My friends know that throughout the studies of which this volume is the first fruit I have worked in close intellectual partnership with my wife. They know how great is my debt to her and how handicapped I would have been without her acute feeling for the idiom of our adopted language and her unselfish shouldering of much of the drudgery of research.

L. R.

August, 1948.

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CORRIGENDA

Page 21, line 3: One of the results *should read* Among the results

Page 105, note 81, line 1: Implementing *should read* Supplementing

Page 109, line 10: Stronger lots *should read* Larger lots

Page 133, line 36: More disabused *should read* More abused

Page 151, line 4: Two were of misprision *should read* Two of misprision.

Page 151, line 9: Sixty-three for offences *should read* Sixty-three were for offences

Page 275, line 7: They implement *should read* They supplement

Page 280, line 5: But far and above *should read* But far above

Page 325, lines 31 and 32: Was somewhat misleading. It was computed *should read* Were somewhat misleading. They were computed

Page 333, line 33: And were quoting *should read* And quoting

Page 356, note 2, fourth paragraph, line 1: Implement *should read* Supplement

Page 428, note 6, line 16: Wilke's affair *should read* Wilkes' affair

Page 452, note 6, line 1: Wilke notes *should read* Wilkes notes

Page 486, line 5: Significant for *should read* Significant of

PART I

CAPITAL PUNISHMENT IN THE EIGHTEENTH CENTURY CRIMINAL LAW

CHAPTER 1

EXTENSION OF CAPITAL PUNISHMENT

§ 1. THE SCOPE ASSIGNED TO CAPITAL PUNISHMENT

The process of growth

IN 1810 Sir Samuel Romilly said ' there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England '.[1] Owing to the extremely confusing state of eighteenth century English criminal law the exact number of statutes imposing capital punishment without benefit of clergy cannot be given.[2] Various authoritative attempts to assess it have been made in the past. According to Blackstone the number of capital statutes then in force was 160.[3] The first edition of his *Commentaries* had been published in 1765–69; in 1786 Sir Samuel Romilly observed that ' their number had been considerably increased since that author (Blackstone)

[1] *Parl. Deb.* (1810), Vol. 15, col. 366.

[2] Statutes imposing capital punishment will hereafter be referred to as ' capital statutes '.

' Originally, Benefit of Clergy meant that an ordained clerk charged with felony could be tried only in the ecclesiastical courts. But in course of time it entirely changed its nature. It became a complicated set of rules, exempting from capital punishment certain persons found guilty of certain felonies, which were not abolished till 1827; Holdsworth, *H.E.L.*, Vol. 1, pp. 615–616. Thus when a statute imposed capital punishment without benefit of clergy an offender found guilty of the relevant offence had to be sentenced to death. A remarkably lucid survey of this institution is given by Blackstone, 4 Comm. 365–374. For a modern account see Pollock and Maitland, *History of English Law* (2nd ed., 1911), Vol. 1, pp. 441–457, and Holdsworth, *H.E.L.*, Vol. 3, pp. 294–302. On the origin of the institution of benefit of clergy, its evolution and the unintended function it performed at some stages of English legal history, see also the valuable monograph of L. C. Gabel, ' Benefit of Clergy in England in Later Middle Ages ', *14 Smith College Studies in History* (Oct. 1928–July 1929), Vol. 14, Nos. 1–4.

[3] ' Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death '; 4 Comm. 18.

wrote '.[4] In 1819 Sir Thomas Fowell Buxton put the number of capital offences at 223[5]; while in 1823 Sir James Mackintosh assessed it at 200.[6] With such discrepancies these figures can only be regarded as approximations. Thus it would seem that even the best known and most authoritative of them took account of only a few of the many capital provisions embodied in the Waltham Black Act.[7]

The great majority of capital statutes which were in force about 1820 had been enacted during the eighteenth century. A detailed analysis of this process—which was gathering momentum towards the close of the century—would be out of place here, but it may be useful to indicate its main stages.[8]

At Common Law capital punishment was imposed for a few very serious offences such as treason, murder, rape, and burning a dwelling-house. Even as late as 1688, despite the exceptionally rigorous laws which had been enacted during the reigns of the Tudors and Stuarts, no more than about fifty offences carried the death penalty.

In the eighteenth century, however, their number began spectacularly to increase. Thirty-three capital offences were created in George II's reign—about one for every year—and a further sixty-three were added during the first fifty years of the reign of George III (1760–1810). Broadly speaking, in the course of the hundred and sixty years from the Restoration to the death of George III, the number of capital offences had increased by about one hundred and ninety. The extraordinary character of this trend may be judged from the fact that during the hundred and fifty years from the accession of Edward III to the death of Henry VII only six capital statutes were enacted; during the next century and a half, from the accession of Henry VIII to Charles II, a further thirty were passed; while the period from the accession of Charles II to 1819 saw the passing of no less than one hundred and eighty-

[4] *Observations on a Late Publication Entitled 'Thoughts on Executive Justice'* (1786), note 9, at p. 16; see also P. Colquhoun, *Treatise on the Police of the Metropolis* (4th ed., 1797), p. 5. The first edition of this book was published in 1795.

[5] *Parl. Deb.* (1819), Vol. 39, col. 808.

[6] *Parl. Deb.* (1823), N.S. Vol. 9, col. 405.

[7] On this Act see below, pp. 49–79.

[8] For a survey of capital statutes in force about 1820 see below, Appendix 1, p. 611 *et seq.*

seven new capital statutes.[9] It was this process which caused Sir Thomas Fowell Buxton to exclaim in the course of his great speech in the House of Commons on the law of forgery: 'Men there are living, at whose birth our code contained less than seventy capital offences; and we have seen that number more than trebled. It is a fact that there stand upon our code one hundred and fifty offences, made capital during the last century. It is a fact that six hundred men were condemned to death last year[10] upon statutes passed within that century. And it is also a fact, that a great proportion of those who were executed, were executed on statutes thus comparatively recent'.[11]

The number of capital statutes not equivalent to the number of cases in which the death penalty could be inflicted

It would be wrong to identify the number of capital statutes with the number of cases in which capital punishment could be inflicted. First, it is necessary to bear in mind the composite character of these enactments, each of which was so broadly framed as to allow for the infliction of the death penalty for a considerable number of variations of the same offence. In the ensuing survey of capital statutes[12] some of their sections are quoted almost *in extenso* in order to show that one provision often covered many capital cases.[13] The actual scope of the death penalty was therefore often as much as three or four times as extensive as the number of capital provisions would seem to indicate. It is obvious that these sections could have been considerably shortened by substituting more generic terms for the detailed descriptions of

[9] *Parl. Hist.* (1777–1778), Vol. 19, cols. 237 and 239; *Parl. Deb.* (1819), Vol. 39, cols. 808–809; *Parl. Deb.* (1821), N.S., Vol. 5, col. 900 *et seq.*; *Parl. Deb.* (1823), N.S. Vol. 9, cols. 404–405; see further Lord Grenville's *Speech in the House of Lords, April* 2, 1813 (Pamphlet 2, published in 1831 by the 'Society for the Diffusion of Information on the Subject of Capital Punishments'), p. 15. See also a highly instructive synoptical 'Table of Criminal Law' (25 Edw. 3 to 59 Geo. 3) in the 'Report on Criminal Laws' (1819), 585, Appendix No. 26, pp. 263–270; *Parl. Papers* (Reports, 1819), Vol. 8.

[10] He was speaking in 1821.

[11] *Parl. Deb.* (1821), N.S. Vol. 5, col. 926.

[12] Below, Appendix 1, p. 611 *et seq.*

[13] In some cases even an attempt to commit certain crimes or being in possession of certain instruments or tools was made a capital offence; see below, Appendix 1, pp. 620, 653, 653–654 and 656.

each object or kind of property.[14] But although most desirable, such digestion would not necessarily have reduced the scope of capital punishment.

Secondly, the number of capital cases was further considerably increased because many capital statutes were made applicable to accessories before and after the fact.[15] 'For centuries', writes Professor Plucknett, 'the law relating to accessories, was one of the most intricate chapters in criminal

[14] An excellent illustration of this point is given by Stephen, *H.C.L.*, Vol. 2, p. 292. Stephen quotes the Riot Act—1 Geo. 1, st. 2, c. 5 (1714)—which was re-enacted by 7 & 8 Geo. 4, c. 30, s. 8, which in its turn was repealed and re-enacted by 24 & 25 Vict. c. 97, s. 11. Following Stephen's method a part of the last-named Act is quoted below with the words derived from the original Riot Act in capitals, those of 7 & 8 Geo. 4, c. 30, s. 8 in ordinary type, and those introduced by 24 & 25 Vict. c. 97, s. 11 in italics:

'CHURCH, CHAPEL, MEETING-HOUSE, OR OTHER PLACE OF DIVINE WORSHIP, dwelling-HOUSE, STABLE, coach-house, OUT-HOUSE, warehouse, office, shop, mill, malt-house, hop-oast, BARN, granary, *shed, hovel, or fold*, or any building or erection used *in farming land or* in carrying on any trade or manufacture, or any manner thereof, *or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution*, or any machinery whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, *ventilating* or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or tank for conveying minerals from any mine'.

Stephen thus comments on this 'amended' statute: 'The act would not be materially altered by substituting for all this verbiage "any building whatever, or any machinery whatever, or any erection, structure or work used in or in connection with any mine"; but there are differences of style in acts of parliament as in all other kinds of literary composition'. From the point of view of legislative technique Stephen is undoubtedly right, but the proposed abridgment would in no way have affected the scope of the death penalty appointed by this Act. On the connection between the strict interpretation of capital statutes by the courts and their verbose framing see below, pp. 90–91.

[15] As the law then stood, a principal in the first degree was held to be 'the actor, or absolute perpetrator of the crime'. A principal in the second degree was a person 'who is present, aiding, and abetting the fact to be done'; this presence did not need to amount to 'an actual immediate standing by, within sight and hearing of the fact'; but it could also be a constructive presence 'as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance'. An accessory was 'he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either *before* or *after* the fact committed'. An accessory before the fact was he 'who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime'. An accessory after the fact—a person 'who knowing a felony to have been committed, receives, relieves, comforts or assists the felon'. In treason—as in trespass—there were no accessories, but all were principals; Blackstone, 4 Comm. 34, 35, 36 and 37.

law; post-medieval legislation and the desire of the courts to mitigate its severity were responsible for much complexity.'[16] This observation also applies to the period now under consideration, and an attempt has been made elsewhere[17] to examine this aspect of eighteenth century criminal law in the light of certain leading judicial decisions.

Another difficulty in appraising the exact scope of the death penalty by reference to the number of capital statutes is that these statutes could be expanded by judicial interpretation. One example is provided by the interpretation of 25 Edw. 3, st. 5, c. 2, and notably of the provision relating to the killing of a master by his servant, which was broadened so as to include the killing of a mistress,[18] and of that by which it was high treason to 'compass, or imagine the Death of . . . the King, . . . the Queen, or of their eldest Son and Heir'; and to 'levy War against . . . the King in his Realm'.[19] A series of judicial decisions similarly broadened 1 Edw. 6, c. 12, relating to burglary. While the Act declared breaking and entering to be two basic elements of this offence, it was held in several cases that a constructive breaking and a constructive entry were sufficient to constitute burglary. A fraudulent entry was held to amount to breaking and entering, and the putting of a hand or of an instrument through a window was declared to

[16] 'A Commentary on the Indictments', in the *Proceedings before the Justices of the Peace in the XIVth and XVth centuries* (ed. by B. H. Putnam, 1938), p. cliii.

[17] Below, pp. 52–57, 71–72, 437–438 and Appendix 2, pp. 681–682 and 697–698. For the abolition of capital punishment for certain classes of accessories see below, pp. 580 and 605–606.

[18] East 1 P.C. 336, § 99. In a pamphlet published in 1577 under the title *A Treatise Concerning Statutes, or Acts of Parliament and the Exposition thereof*, it is noted that 'the Statute that maketh it Treason for the Servant that killeth his Master, toucheth him as grievously that killeth his Mistress, making that word to serve both Sexes'; p. 73. The author notes, however, that statutes 'that inflict most grievous Punishments . . . are never extended by severity further than their words in some sense may bear'; *ibid.* This pamphlet is attributed to Sir Christopher Hatton, who enjoyed great personal favour with Queen Elizabeth and became Lord Chancellor. According to *D.N.B.*, IX, 162, there is no evidence by which the authenticity of the work can be determined. Though the *Dictionary* is undoubtedly right in describing the *Treatise* as a very slight production, it nevertheless contains some useful information on the subject of judicial practice as it then was.

[19] See for a number of such strained constructions Eden (first Lord Auckland), *Principles of Penal Law* (2nd ed., 1771), pp. 133–134. For Hale's comment see 1 P.C. 132. This subject was examined by Alexander Luders in a valuable essay 'On Constructive Treason', *Tracts on Various Subjects in the Law and History* (1810), p. 3 *et seq.*

amount to an actual entry. A broadening construction was also put on the word 'intimidation' which was an essential element in robbery.[20] These instances must, however, be regarded as exceptions from the dominant tendency of the courts, which was to restrict rather than to extend the scope of capital punishment.[21]

§ 2. UNIFORMITY OF PUNISHMENT

The indiscriminate imposition of capital punishment for numerous widely differing offences is incompatible with the principle which requires that—as far as possible—a certain balance should be maintained between the gravity of the offence and the severity of the corresponding penalty. If an inordinate number of statutes impose capital punishment, the differences which exist between various kinds of the same offence, and even those between broad groups of offences, are largely neutralised by the levelling effect of a uniformly severe punishment.

The same punishment appointed for different kinds of the same offence

The state of the law of arson may conveniently be quoted as an example of the utter confusion to which the distortion of the scale of punishments inevitably leads. Pollock and Maitland observe that the crime of arson 'is of some interest as being one of the first in which the psychical element, the intention, becomes prominent. At a very early time men must distinguish between fires that are and fires that are not intended'.[22] This remark was inspired by the double principle of Common Law, (1) that the offence is constituted only if an actual burning has taken place and that neither an intention nor an attempt to burn, for instance, a house suffices if no part of it has actually been burned[23]; and (2) that the starting of a fire by mischance or negligence does not amount to a felony.[24] The first of these enlightened tenets had in time become largely submerged by subsequent statutory provisions. By a number of broadly framed statutes a threat to burn a

[20] For some early proposals to readjust punishment to the various kinds of robbery and burglary see below, pp. 308 and 479.

[21] See on this below, pp. 83–84.

[22] *History of English Law* (2nd ed., 1911), Vol. 2, p. 492.

[23] Coke, 3 Inst. 66.

[24] *Ibid.*

barn, or stack of corn, grain, hay or straw, conveyed by an anonymous letter, was to be punished in the same manner as the actual burning of a house.[25] While by other statutes the setting on fire of a great variety of objects was made liable to the same punishment, despite the fundamental differences in the extent of material damage caused and in the degree of social danger presented by these acts. The burning of a row of houses or of a ship was thus put on the same level as the burning of a hovel, cock, mow or stack of hay.

Arson is a crime of great complexity both as regards the damage it may produce and the motives which may actuate the offender. Though the immediate aim of the offender is to destroy property, he may also cause severe injuries to, and even the death of men and animals. The majority of economic offences cause the affected property to change hands, but arson threatens it with total destruction. Few other offences induce the same degree of public alarm. The commission of arson is comparatively easy but the detection of the offender often most difficult. Even in modern times, despite an efficient police system and notably improved methods of detecting crime, the chances of impunity are still higher in arson than in many other offences. While all these factors combine to make arson a very serious offence calling for stern punishment, in no other crime is it more important to take into account the personality and motives of the offender, as well as the gravity of the offence. The main motive behind arson may equally well be a desire to attain material gains, vengeance, or even—particularly among agricultural wage-earners—the expression of social unrest; arson may also be due to drunkenness, or be the symptom of a morbid personality. If, therefore, the courts were to award just and effective penalties for this crime, they clearly needed wide discretionary powers to select an appropriate punishment in each case. This possibility was lacking in the eighteenth century law of arson. All these acts of arson, irrespective of the mischief produced and the degree of malicious intent inherent in them, invariably carried the penalty of death without benefit of clergy.[26]

[25] See for instance 9 Geo. 1, c. 22, s. 1, and 23 Hen. 8, c. 1, s. 3; see also below, Appendix 1, p. 654.

[26] A striking exception to this rigid system existed in 22 & 23 Car. 2, c. 7 (1670). The malicious, unlawful and wilful burning at night of ' any Ricks or Stacks

Some contemporary writers were struck by the irrationality of this system, but their warnings remained unheeded. Thus Eden, after quoting a section of the Waltham Black Act (9 Geo. 1, c. 22) relating to arson, observes: 'I have given a literal transcript of this clause as a strong instance of the vague, unfeeling, undistinguishing carelessness with which penal laws are composed, even in the most polished times. . . . every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small heap of dried grass'.[27]

The same punishment appointed for basically different offences

The confusion caused by the indiscriminate appointment of capital punishment was not confined to any one offence, but affected the whole body of laws. The extent to which the distinction between broad classes of offences became effaced can be seen from the following juxtapositions of offences of greatly differing gravity, all of which carried the death penalty: (1) murdering the king or levying war against the king in his realm, and marking the edges of any current coin of the kingdom[28]; (2) murder, and maliciously cutting any hop-binds growing on poles in any plantation of hops[29]; (3) riotously assembling and demolishing a church or chapel, and the wandering about of soldiers or mariners without a pass[30]; (4) maiming or wounding officers going on board ship

of Corn, Hay, or Grain, Barns or other Houses or Buildings, or Kilns', is made a felony by s. 2, but s. 4 enacts that any offender convicted of these acts may avoid the penalty of death if he 'shall make his Election to be transported'. This statute is also interesting inasmuch as it makes the offence dependent on its being committed at night. This timid attempt at differentiating between the various kinds of arson was not taken up in subsequent capital statutes; see below, Appendix 1, pp. 654–655.

[27] *Principles of Penal Law* (2nd ed., 1771), pp. 271–272. On Eden's outstanding contribution to the movement for the reform of criminal law see below, pp. 301–311. For a similar remark see also Dagge, *Considerations on Criminal Law* (1st ed., 1772), p. 417. The second enlarged edition of this book (in 3 volumes) appeared in 1774.

[28] 25 Edw. 3, st. 5, c. 2, and 8 & 9 Will. 3, c. 26, s. 3; for these statutes see below, Appendix 1, p. 611 and p. 653.

[29] 1 Edw. 6, c. 12, ss. 10 and 13, and 6 Geo. 2, c. 37, s. 6; below, Appendix 1, p. 629 and p. 656.

[30] 1 Geo. 1, st. 2, c. 5, s. 4, and 39 Eliz. c. 17, s. 2; below, Appendix 1, p. 620 and p. 621.

in execution of their excise duties, and pocket-picking to the amount of twelve pence and over [31]; (5) rape, and destroying the heads of fish-ponds [32]; (6) serious forgery on the Bank of England, and being in the company of gypsies.[33]

This uniformity of punishment in face of a diversity of offences reveals the existence of a dangerous confusion regarding the degree of culpability involved in particular criminal acts. Since eighteenth century criminal law bore little evidence of any attempt at the moral evaluation of offences, it may be asked whether and to what extent it was in agreement with the moral standards of the community.

'It is', writes Lecky,[34] 'impossible to examine penal systems without perceiving that they can only be efficient during a long period of time, when they accord substantially with the popular estimate of the enormity of guilt. Every system, by admitting extenuating circumstances and graduated punishments, implies this, and every judgment that is passed by the public is virtually an appeal to an ideal standard. When a punishment is pronounced excessive, it is meant that it is greater than was deserved. When it is pronounced inadequate, it is meant that it is less than was deserved. Even regarding the law simply as a preventive measure, it is necessary that it should thus reflect the prevailing estimate of guilt, for otherwise it would come into collision with that public opinion which is essential to its operation.'

Little discrimination on the ground of age

Capital laws applied to men and women equally,[35] and there was very little discrimination on the ground of age. Adolescents as well as children could be—and actually were—sentenced to death and even executed. The law on this

[31] 19 Geo. 2, c. 34, s. 1, and 8 Eliz. c. 4; see below, Appendix 1, pp. 626–627 and pp. 636–637.

[32] 18 Eliz. c. 7, and 9 Geo. 1, c. 22, s. 1; see below, Appendix 1, p. 631 and p. 60.

[33] See for instance 15 Geo. 2, c. 13, s. 11, and 1 & 2 Ph. & M. c. 4 and 5 Eliz. c. 20. Thus, to be found in the company of gypsies and to kill a gypsy were punishable in the same way.

[34] *Rationalism in Europe* (1882), Vol. 1, pp. 333–334.

[35] Cases are recorded of women having been put to death not only for very serious offences but even for theft unaccompanied by any aggravating circumstances. One particularly tragic case was mentioned in the House of Commons in 1777

subject was broadly as follows: No child under seven could be punished for any capital offence, but children of fourteen years and over were by law presumed to possess complete capacity of discerning between good and evil, and could consequently be subjected to capital punishment. However, even children between seven and fourteen years of age could also be sentenced to death; for although in principle they were *doli incapax*, it was held that strong evidence of malice might 'supply age'.[36] In 1748 at Bury Summer Assizes, William York, a ten-year-old boy, was convicted before Willes, C.J., of the murder of a five-year-old girl and was sentenced to death. York had taken the girl out of her bed, carried her to the dung-heap, there stabbed her to death with a knife and buried her. He had then washed himself as best he could. First denying that he had committed the murder, he later confessed to it. Willes, C.J., respited the execution in order to sound the opinion of the rest of the judges as to whether it was proper to put York to death. It was determined that[37]: 'supposing the boy to have been guilty of this fact, there are so many circumstances stated in the report, which are undoubtedly tokens of what my Lord Chief Justice Hale somewhere calleth a *mischievous discretion*, that he is certainly a proper subject for capital punishment, and ought to suffer; for it would be a

by Sir William Meredith; *Parl. Hist.* (1777–1778), Vol. 19, cols. 237–238; also below, note 5 at pp. 474–475.

However, only very few women were executed. Thus it can be seen from the Table reproduced by John Howard, *The State of the Prisons* (3rd ed., 1784), p. 484, that out of 467 offenders executed in London and Middlesex during the years 1771–1783 only seventeen were women.

Executions of women in a state of pregnancy were suspended until they delivered the child. Misson, in his *Travels over England* (written in 1698; transl. from the French by Ozell, 1719), p. 330, writes: 'The Women or Wenches that are condemn'd to Death, never fail to plead they are with Child, (if they are old enough) in order to stop Execution till they are delivered. Upon this they are order'd to be visited by Matrons; if the Matrons do not find them Quick, they are sure to swing next Execution-Day; but very often they declare that they are with Child, and often too the poor Criminals are so indeed; for tho' they came never so good Virgins into the Prison, they are a Sett of Wags there that take Care of these Matters. No Doubt they are diligent to inform them the very Moment they come in, that if they are not with Child already, they must go to work immediately to be so; that in case they have the Misfortune to be condemn'd, they may get Time, and so perhaps save their Lives. Who would not hearken to such wholesome Advice?'

[36] Hale 1 P.C. 25, 27, 28; Blackstone, 4 Comm. 23; Russell, *On Crimes* (1819), Vol. 1, pp. 3–4.

[37] Foster, *Crown Law* (3rd ed., 1792), p. 72.

very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity. There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptation to commit; and therefore, though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing of this boy, *merely on account of his age*, will probably have a quite contrary tendency, in justice to the publick, the law ought to take its course; unless there remaineth any doubt touching his guilt'. Foster states that 'in this general principle all the judges concurred'.[38] Another example is provided by the death sentence passed in 1800 on a ten-year-old boy for secreting notes at the Chelmsford Post Office. Hotham, B., wrote concerning this case to Lord Auckland:—

> 'All the circumstances attending the transaction manifested art and contrivance beyond his years, and I therefore refused the application of his Counsel to respite the Judgment on the ground of his tender years, being satisfied that he knew perfectly what he was doing. But still, he is an absolute Child, now only between ten and eleven, and wearing a bib, or what your old Nurse (my friend) will know better by the name of a Pinafore. The scene was dreadful, on passing sentence, and to pacify the feelings of a most crowded court, who all expressed their horror of such a Child being hanged, by their looks and manners, after stating the necessity of the prosecution and the infinite danger of its going abroad into the world that a Child might commit such a crime with impunity, when it was clear that he knew what he was doing, I hinted something slightly of its still being in the Power of the Crown to interpose in every case that was open to Clemency.'[39]

[38] *Ibid.*

[39] Quoted from the Home Office papers by J. L. Hammond and B. Hammond, *The Town Labourer* (1941), p. 75.

The execution of William York was postponed four times and the boy was ultimately pardoned on condition he entered the sea-service. He was under sentence of death for nine years, having been tried in 1748 and only pardoned in 1757. In the case tried by Hotham, B., the sentence was commuted and the boy sent to Grenada for fourteen years, under a private arrangement with a member of the grand jury who had estates there. In 1775 a boy and a girl neither of whom was over fifteen years of age, were

In 1785, Sir Archibald Macdonald, then Solicitor-General in Pitt's government, stated in the House of Commons that out of every twenty offenders executed in London, eighteen were under the age of twenty-one.[40]

Absence of any alternative to the death penalty

The other main characteristic of this system was its rigidity. Practically no capital statute provided any alternative to the death penalty,[41] **which thus had to be pronounced irrespective of the special circumstances of particular cases. This method disregarded the fundamental principle which is essential to any effective system of crime-prevention and which has been aptly defined by Raymond Saleilles as *le principe de l'individualisation de la peine.***[42]

It is most essential in a constitutional State that a subject should know what acts amount to an offence and what punishment each offence carries. No subject should be convicted of

sentenced to death for stealing a sheep, and Ashhurst, J., asked one of Suffolk's Under-Secretaries to secure a pardon for them; see M. A. Thomson, *The Secretaries of State* (1932), p. 110. On February 16, 1814, five children, the youngest eight and the oldest twelve years of age, were sentenced to death at the Old Bailey; *Philanthropist* (1814), Vol. 4, p. 190. On a number of cases where death sentences were passed on boys of nine and thirteen see 'Report from the Committee on the State of the Police of the Metropolis' (1816), 510, Minutes of Evidence, p. 231, in *Parl. Papers* (Reports, 1816), Vol. 5.

In 1833 a nine-year-old boy was sentenced to death for pushing a stick through a cracked window and pulling out some printers' colours the value of which was twopence; *Parl. Deb.* (1833), 3rd Ser., Vol. 20, col. 278.

In some instances sentences of death passed on children were actually executed; thus in 1814 a boy of fourteen was hanged at Newport for stealing. The methods of punishing children and young persons in the period 1760–1832 will be the subject of a separate inquiry in a subsequent volume of this *History*.

[40] *Parl. Hist.* (1785–86), Vol. 25, col. 889.

Horace Walpole writes that after the Gordon Riots '. . . of the several persons, male and female, executed on account of the late riots, seventeen of them have been under 18 years of age, and three not quite 15'; *The Last Journals* (ed. by A. F. Steuart, 1910), Vol. 2, p. 327.

[41] For some statutes which provided an alternative penalty see below, Appendix 1, note 11 at pp. 633–634 and p. 654.

[42] Saleilles' book *L'Individualisation de la Peine* (1898) exercised a deep influence on the modern French school of criminal law. An English translation of this book was published in 1911. As Saleilles himself acknowledges, this formula was first used by Professor W. E. Wahlberg in his remarkable essay *Das Princip der Individualisierung in der Strafrechtspflege* (Wien, 1869). It is difficult to render it into English; Kenny uses the expression 'the necessity of individualising'; see his article 'The Italian Theory of Crime: Cesare Lombroso', reproduced in *Modern Approach to Criminal Law* (ed. by L. Radzinowicz and J. W. C. Turner, 1945), p. 11.

an act unknown to law or subjected to any punishment other than that laid down by that law for the given act.[43] These were the considerations which actuated Hale when he stressed the ' determinate ' character of English penal laws,[44] and Blackstone, when he praised the system by which ' an established penalty is annexed to crimes ' as ' one of the glories of our English law '.[45] But ' determinate ' laws need not necessarily be rigid. Within the framework of ' determinate ' legal provisions a certain discretionary power may be vested with the courts, which will enhance the effectiveness of the law without in any way endangering its constitutional basis. The unwieldy mass of absolute capital statutes was not an appropriate instrument to give effect to this principle.[46]

§ 3. EMERGENCY LAWS

Emergency laws, which were very numerous, were usually passed as a reaction against certain wrongful acts previously outside the scope of the law, or against the alarming spread of a crime for which some less severe punishment had already been provided. In either of these contingencies the Legislature, stimulated by the pressure of public opinion, would feel

[43] Professor Franz von Liszt, the founder of the modern German school of criminal law writes: ' Nach meiner Meinung ist, so paradox es klingen mag, das Strafgesetzbuch die magna charta des Verbrechers . . . Ich habe seit Jahren das Strafrecht gekennzeichnet als die rechtlich begrenzte Strafgewalt des Staates '; *Strafrechtliche Aufsätze und Vorträge* (Berlin, 1905), Vol. 2, p. 80.

[44] 1 P.C. 13.

[45] 4 Comm. 377–378.

[46] Although in Stephen's time the death penalty was appointed for only four offences, he believed that ' in regard to capital cases the judge should have a discretion analogous to that which he has in cases not capital '. In support of this opinion he writes: ' It must be remembered that it is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary. There must therefore be a discretion in all cases as to the punishment to be inflicted '. And further on: ' The fact that the punishment of death is not inflicted in every case in which sentence of death is passed proves nothing more than that murder, as well as other crimes, has its degrees, and that the extreme punishment which the law awards ought not to be carried in all cases '; *H.C.L.*, Vol. 2, pp. 87 and 89.

For Stephen's views on the death penalty see his articles ' Capital Punishments ', in *Fraser's Magazine* (June, 1864), Vol. 69, pp. 753–772, and ' Report of the Capital Punishment Commission ', *ibid.* (Feb., 1866), Vol. 73, pp. 232–256.

compelled to take swift action. But the alarm naturally engendered by the perception of public danger may tempt the legislator to take an exaggerated view of the existing emergency and to frame unnecessarily severe laws. Significant in this respect are Lord Holland's remarks made in 1800 in the House of Lords during the debate on the prolongation for another seven years of 37 Geo. 3, c. 70, known as the 'Army and Navy Seduction Act'[47] which, like the Waltham Black Act, had been passed to meet an emergency[48]:

> 'The original bill was passed in a moment of danger and of alarm, at a moment when the legislature thought it necessary to impress persons in an actual state of mutiny, and those who, by such proceedings, might be agitated with various and uncertain feelings and apprehensions, with a conviction of their firmness and determination . . . I do not censure them for want of accurate investigation of the true principles of penal laws at that moment, though I certainly cannot pay them the compliment of pretending to have found, in this offspring of momentary passions, those traces of deliberative wisdom which would alone justify its becoming a permanent law; . . . These laws . . . made on the spur of the occasion, are generally to be attributed to the want of deliberation, to the want of a serious attention to the fundamental principles on which all punishments ought to be established. It is said, good laws have been made on the spur of the occasion. I believe there may have been some, perhaps many; but of penal laws, I believe, very few. I felt almost disposed to say none. But this I know, that almost all bad, wicked, and cruel penal laws have been made on that pretence, and hurried on with a precipitation utterly incompatible with prudence, moderation, or justice. Of all laws, they are those which should be most scrupulously cut down and squared to the rule of uniform and invariable principle. They are those where a deviation from principle leads to the most pernicious consequences, and tends to the defeat of their own object with the most certainty.'

The leading characteristics of emergency laws may be summed up as follows: The circumstances which bring such laws into being also cause them to be exceptionally comprehensive. Thus acts remote from and preparatory to an offence

[47] On this statute, brought in by Pitt, and the very interesting debate upon it, see below, pp. 487–493.

[48] *Parl. Hist.* (1800–1801), Vol. 35, cols. 770, 771 and 773.

often become punishable in the same way as the offence itself, and delinquents are often penalised not because they have committed an offence, but because of the social danger they present. Emergency laws are almost always excessively severe, a characteristic which again devolves from the peculiar circumstances of their enactment. According to Dagge the great severity of penal laws [49] ' has been in some degree owing to their having been made *flagrante ira*, on some sudden occasion, when a combination of atrocious circumstances, attending some particular offence, inflamed the legislature. Men in the warmth of resentment, naturally endeavour to inflict those penalties on delinquents which are most terrible to their own imaginations; and as nothing is more terrible than death to those who possess ease and affluence, they therefore deem Capital Punishments to be universally the strongest objects of terror '. These remarks are particularly true of the emergency laws.

Although regarded as temporary and provisional at the time of their enactment, statutes of this type soon came to be looked upon as essential bulwarks of public order, the very fact of their being capital helping to consolidate the belief that they were indispensable.[50] For if the offences covered by any one of such Acts were decreasing in number, there was an inclination to attribute this to the death penalty having been appointed in time; while if they were becoming more numerous, any proposal to relax the law was inevitably denounced as weakness and a fresh incentive to crime. Hardly a single provisional capital statute was repealed at the end of its test period, almost all being made permanent after one or more extensions. The history of the Waltham Black Act well illustrates this point. Enacted in 1722 for three years only, it was prolonged several times [51] and was ultimately made permanent in 1757,[52] thirty-five years after its original enactment. This could only mean that the Legislature

[49] *Considerations on Criminal Law* (1772), p. 224.

[50] ' Among the several cloudy appellatives ', writes Bentham, ' which have been commonly employed as cloaks for misgovernment, there is none more conspicuous in this atmosphere of illusion than the word *Order* '; ' The Book of Fallacies,' *Works* (Bowring, 1843), Vol. 2, p. 441.

[51] First in 1725 by 12 Geo. 1, c. 30.

[52] 31 Geo. 2, c. 42.

deemed experience to have proved it necessary that the Black Act should become an integral part of the criminal law. It is significant that some of the leading judicial authorities reached the same conclusion much earlier. Thus in 1735, Lord Hardwicke mentioned various new Acts such as the Black Act and certain statutes relating to forgery, assault and robbery, smuggling and the destruction of turnpikes, and declared not only that the laws however good and wisely enacted could avail nothing, unless properly and rigorously executed, but also that ' the degeneracy of the present times, fruitful in the inventions of wickedness, hath produced many new laws necessary for the present state and condition of things '.[53] Thus an Act passed as an exceptional and temporary means of dealing with a sudden local emergency, was regarded only about thirteen years later by the then Lord Chief Justice as an essential instrument for preserving peace and preventing crime. The successive prolongations of emergency Acts and their ultimate transformation into permanent laws were usually effected by Parliament as a matter of course, with little or no discussion regarding their indispensability.

The excessive severity of emergency laws tended—in the long run—to affect the general scale of punishments. Parliament, when seeking appropriate penalties for other offences, naturally looks upon leading current statutes as valid precedents, so that the enhanced punishments of existing statutes inflate those appointed under later ones. In this manner the emergency laws exercised a decisive influence; they had set up an enhanced standard of punishment and often acted as a point of departure and a breeding-ground for new capital laws.[54] The history of eighteenth century criminal legislation strikingly

[53] P. C. Yorke, *Life and Correspondence of Philip Yorke, Earl of Hardwicke* (1913), Vol. 1, p. 135.

[54] For instance, s. 6 of 6 Geo. 2, c. 37 stipulated that during the validity of the Waltham Black Act any one guilty of maliciously cutting any hop-binds growing on poles in any plantation of hops should suffer death as a felon, without benefit of clergy; see on this statute, below, p. 656. But this was only one of the many new, capital, non-clergyable offences which the Black Act created; its sections, concerned respectively with the offences of setting on fire, below, pp. 68–69, and sending threatening letters, below, pp. 73–75, led, in their turn, to a further extension of capital punishment. See in particular 27 Geo. 2, c. 15, below, p. 641; 10 Geo. 2, c. 32, s. 6, below, p. 655; 9 Geo. 3, c. 29, s. 2, below, p. 655; 12 Geo. 3, c. 24, s. 1, below, p. 655; and 33 Geo. 3, c. 67, s. 5, below, p. 655.

confirms Dicey's remark that 'it is far, indeed, from being true that laws passed to meet a particular emergency, or to satisfy a particular demand, do not affect public opinion; the assertion is at least plausible, and possibly well founded, that such laws of emergency produce, in the long run, more effect on legislative opinion than a law which openly embodies a wide principle. Laws of emergency often surreptitiously introduce or re-introduce into legislation, ideas which would not be accepted if brought before the attention of Parliament or of the nation . . . A principle carelessly introduced into an Act of Parliament intended to have a limited effect may gradually so affect legislative opinion that it comes to pervade a whole field of law'.[55]

Emergency laws often defeated the very object for which they had been enacted. Each emergency law usually described in the most minute details the circumstances attending the particular offence as a reaction against which it had originally been conceived.[56] The incidental effect of this technique was to narrow its scope, for, whenever a very similar but not identical offence was afterwards committed, it was doubted whether it could be included within the law. Many offences thus remained unpunished merely because they differed in some secondary detail from the one described in the statute. Such deficiencies were too glaring to remain uncorrected; hence the multiplicity of supplementary statutes. The combination of emergency and supplementary Acts was not necessarily an effective instrument of crime-prevention.[57]

§ 4. FREQUENT CHANGES AND INEQUALITY OF PUNISHMENT

When a new kind of offence had been committed or a sudden emergency had arisen an appropriate Bill was brought forward,

[55] *Law and Public Opinion in England* (repr. of 1930), pp. 45–46.

[56] 22 & 23 Car. 2, c. 1, known as the Coventry Act, may be quoted as an example; below, Appendix 1, pp. 630–631.

[57] These observations should not, of course, be interpreted as meaning that the State should never have recourse to emergency penal laws. Experience shows that situations do occur when there is an almost absolute need for extraordinary measures; but in this matter—as in so many other spheres of criminal legislation and policy—the sense of proportion and the degree of emphasis are of decisive importance.

usually by a private Member. Many of these sponsors lacked both legal education and the necessary experience. They concentrated on their particular measure only, paying little or no heed to the general state of criminal law. The relation between the new Act and the body of laws was rarely examined, while inadequate acquaintance with legal language caused many such measures to be confused and often inaccurate. Such Acts were continually being added to a Statute Book already overloaded with unrepealed statutes passed under the pressure of circumstances which had long ceased to prevail.[58] Many new Acts designed to meet what had appeared to be a special contingency were in fact unnecessary, since that contingency could have been adequately dealt with under the Common Law or some statutes already in existence.[59]

Apart from being ill co-ordinated, inconsistent and overlong, many statutes were further obscured by carelessly drawn preambles. If properly worded, the preamble could have clarified the purpose and exact scope of the Acts. Usually, however, they were an incongruous mixture of explanations of the circumstances leading to the drafting of a statute and of some of its enacting provisions. It might often be framed either in terms broader than the law itself, which meant that it contained certain important elements (factual, legal, or both) not embodied in that law; or else in terms the narrowness of which contradicted the sweeping provisions of the ensuing sections.[60] In consequence the true meaning of a statute was very difficult to assess and depended ultimately on the degree

[58] For some contemporary criticisms see Lord Hardwicke's speech in 1756; *Parl. Hist.* (1753–1765), Vol. 15, cols. 724 *et seq.* See also P. C. Yorke, *Life of Hardwicke* (1913), Vol. 3, pp. 12 and 13; 'Report from the Committee to Examine Temporary and Expiring Laws', *Reports from Committees of the House of Commons* (1793–1802), Vol. 14, pp. 34–35.

[59] Commenting upon an emergency statute known as the Stabbing Act—Foster rightly observes 'that if the outrages at which the statute was levelled had been prosecuted with due vigour and proper severity upon the foot of common-law, I doubt not an end would soon have been put to them, without incumbering our books with a special act for that purpose, and a variety of questions touching the true extent of it. This observation will hold with regard to many of our penal statutes, made upon special and pressing occasions, and savouring rankly of the times'; *Crown Law* (3rd ed., 1792), pp. 299–300. On this Act see below, Appendix 1, pp. 630 and 695–698.

[60] See on this Sir Fortunatus Dwarris, *Treatise on Statutes etc.* (2nd ed., 1848), pp. 503–508, 659–660 and 664. See also below, pp. 64–66 and 439.

of importance that a court attached to the preamble in relation to the body of the law.[61]

One of the results of this confusion[62] were frequent and unjustified changes in the punishments appointed for certain offences. For instance, under 12 Geo. 2, c. 26, s. 8, forgery of assay marks on gold and silver plate was punished by a fine. But by the subsequent Act of 31 Geo. 2, c. 32, s. 15, it became a capital offence. Not many years later 18 Geo. 3, c. 59, s. 1, substituted transportation for capital punishment, only to have the latter restored by 24 Geo. 3, sess. 2, c. 53, s. 16. Finally, by 38 Geo. 3, c. 69, forgery of the assay marks on *gold* plate was made liable to transportation for seven years, although by the earlier statute, which remained in force (24 Geo. 3, sess. 2, c. 53, s. 16), forgery of the assay mark on *gold* and *silver* plate continued to be punished by death. Such frequent changes caused a thorough and cautious commentator to remark: 'Let laws affecting trades and revenue vary, as they necessarily must, with the variable fluctuations of exchange and commerce; but those, which define and punish crime,—those, which form the broad barrier between right and wrong,—after being once enacted with due wisdom and deliberation, ought to be held sacred from the attacks of busy and capricious innovators. England is, surely, at this time of day, sufficiently advanced in the principles of jurisprudence, and in the knowledge of good and evil, to have a fixed and stable criminal code for the government of her inhabitants; without being doomed to that wretched condition of society so well described in the maxim of Lord Coke,—which

[61] On a number of cases tried under capital statutes where this difficulty had arisen see below, pp. 64–65 and 73–74.

[62] In his Diary for March 31, 1796, Lord Colchester records the following incident: 'A curious circumstance occurred to me to-day, demonstrating the absolute necessity of a complete register of expiring laws. Shelton, Clerk of Arraigns at the Old Bailey, a very correct and intelligent officer, to whom I had written for information on the subject, mentioned the instance of the Act 25 Geo. III, cap. 46, for removing offenders in Scotland to places of temporary confinement, which was suffered to expire in 1788, when the Act 24 Geo. III, cap. 56, for the removal of offenders in England, was continued by Stat. 28 Geo. III, cap. 24; and this accidental expiration of the Scotch Act was so much unnoticed that Muir and Palmer were actually removed from Scotland and transported to Botany Bay, though there was no statute then in force to warrant it'; *The Diary and Correspondence of Charles Abbot, Lord Colchester* (ed. by Charles, Lord Colchester, 1861), Vol. 1, p. 50.

equally applies to a shifting and changing state of law,— " *misera est servitus ubi jus est vagum aut incognitum* " '.[63]

Another illustration is provided by the state of law relating to the protection of trees and shrubs against wilful destruction. By a section of the Waltham Black Act this offence was to be punished by death.[64] In 1766, however, two statutes were passed which not only contradicted the Black Act but were also in opposition to one another. By 6 Geo. 3, c. 36, a similar offence was declared to be a simple felony, punishable by transportation for seven years. By 6 Geo. 3, c. 48, it was to be punished by a fine not exceeding £20 for the first offence and not exceeding £30 for the second offence; upon a third conviction, the offender was to be transported for seven years.[65]

While a great many widely differing offences carried the death penalty, some no less serious crimes carried totally inadequate penalties and still others could be committed with impunity. This further inconsistency arising largely from the defective method of drafting statutes is well illustrated by the law of arson. Despite the indiscriminate appointment of capital punishment for various forms of arson, to set fire for instance to a field of ripe standing corn, ' an act *which strikes at the very being of society* ',[66] remained a private injury only. Similarly the Common Law principle that to constitute arson there must be a burning of the house of *another* remained unaltered. As a result the serious offence of setting fire to one's own house with a view to defrauding the insurance companies carried a totally inadequate penalty,[67] while several less dangerous kinds of arson were punishable by death under the Waltham Black Act. A similar inconsistency is revealed when the offence of pocket-picking, which carried the death penalty, is compared with that of child-stealing, for which no appropriate law existed, despite its high incidence.[68] Furthermore, a theft committed in a furnished house which had been

[63] E. E. Deacon, *Digest of the Criminal Law of England* (1836), Vol. 1, p. vi.

[64] See on this below, pp. 61–66.

[65] On these statutes see below, pp. 63–64 *et seq.*; see also *R.* v. *Taylor* (1818), Russ. & Ry. 373 below, pp. 65–66.

[66] Blackstone, 4 Comm. 6, note 4.

[67] See on this below, Appendix 2, pp. 688–691.

[68] By 54 Geo. 3, c. 101, passed in 1814, to take away any child under ten years of age or to receive and harbour any such child was to be punished as grand larceny.

let as a whole could be committed with impunity, this type of lodgings being outside the scope of 8 W. & M. c. 9, s. 5. Thus in *R.* v. *Palmer* (1795), Macdonald, C.B., ordered the offender to be discharged and stated: 'I am sorry that the laws of England have not provided for your case, for I have no doubt whatever of your guilt'.[69] Manslaughter, however serious, remained a clergyable offence until 1822,[70] and up to 1803 attempted murder was no more than a Common Law high misdemeanour.[71] Also inadequate were the provisions for the punishment of receivers of stolen property and of those guilty of perjury.[72] Similarly, while the death penalty was appointed even for trivial coinage offences,[73] the laws on this subject were ill-adjusted to meet new methods employed by coiners, thus making it comparatively easy for many such offenders to evade justice.[74]

§ 5. CONDITIONS WHICH FAVOURED THE EXTENSION

Writing about eighteenth century criminal law one is naturally inclined to pass a severe judgment upon it, for in the light of

[69] 2 Leach 692.

[70] Except for one kind of manslaughter falling under the Act of 1604, known as the Stabbing Act (1 Jac. 1, c. 8). 'When all persons were entitled to benefit of clergy for every kind of manslaughter', observes Stephen, 'the utmost punishment that could be inflicted on a man who, upon receiving a blow with a fist, laid his assailant dead with a pistol, was a year's imprisonment and branding on the brawn of the thumb'; *H.C.L.*, Vol. 3, p. 46.

[71] East 1 P.C. 411, § 5; unless the injured party was maimed under circumstances laid down by the Coventry Act (22 & 23 Car. 2, c. 1).

[72] In some particularly revolting cases the indignant populace—considering the punishment to be too lenient—took justice into its own hands. Thus in 1754 Egan, Salmon and some others had instigated the commission of a robbery in order to obtain a reward appointed for the apprehension of highwaymen. They were acquitted of being accessories before the fact in robbery but were convicted of conspiracy. According to the *Celebrated Trials* 'Egan, or Gahagan, and Salmon, stood in the pillory, in the middle of Smithfield rounds; they were instantly assaulted with showers of oyster-shells, stones, etc. and had not stood above half an hour, before Gahagan was struck dead; and Salmon was so dangerously wounded in the head, that it was thought impossible he could recover. Thus, though the law could not find a punishment adequate to the horrid nature of their crimes, yet they met with their deserts from the rage of the people'; (1825), Vol. 4, pp. 242–243.

Pillory was partially abolished in 1816 by 56 Geo. 3, c. 138.

[73] For these statutes see below, Appendix 1, pp. 652–654.

[74] P. Colquhoun compiled an impressive list of defects affecting this branch of law; see *Treatise on the Police of the Metropolis* (4th ed., 1797), pp. 123–128.

For some other striking instances see Sir Robert Peel, *Substance of the Speech in the House of Commons on March* 9, 1826 (1826), pp. 20–22; see also below, note 26, p. 575.

modern penal standards, those evolved in the eighteenth century appear singularly crude and inhuman.[75] While its great severity and irrational structure cannot be denied, one should yet guard against pronouncing a too general and sweeping verdict upon it. Whether severe or lenient, rational or ineffective, the criminal law at any period of any country's development is the outcome of the interplay of many complex factors. Any judgment passed upon it which does not take fully into account the nature and effect of these factors must necessarily be both misleading and inaccurate. Sir Erskine May's statement that in England 'the lives of men were sacrificed with a reckless barbarity, worthier of an Eastern despot, or African chief, than of a Christian state',[76] conveys the impression that criminal laws in this country were both cruel, and arbitrarily administered, without affording adequate guarantees to the essential rights of the subject. This, however, was not the case. It is a truism, which yet tends to be overlooked, that criminal law is but one element in any system of criminal justice. Its growth, character and indeed its ultimate effect are largely determined by the character and degree of development of other component parts, notably criminal procedure, the police system and the state of secondary punishments.

[75] Thus Stephen—no advocate of a lenient penal system—states: 'However, after making all deductions on these grounds [he was referring mainly to the mitigatory effect of benefit of clergy] there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system'; *H.C.L.*, Vol. 1, p. 471. On this subject Stephen also makes many penetrating remarks in an article 'The Punishment of Convicts', *Cornhill Magazine* (January, 1863), Vol. 7, pp. 189–202. The article is not signed, but according to Leslie Stephen it came from his brother's pen; *The Life of Sir James Fitzjames Stephen* (1895), p. 485. In this article Sir James Stephen writes: 'In the latter part of the seventeenth and throughout the whole of the eighteenth, and even in the beginning of the nineteenth century, this barbarous system, which, amongst other defects, had that of being so meagre that it left many most serious crimes unpunished, and so technical that it constantly allowed criminals to escape through the most ridiculous quibbles, was adapted to the altered circumstances of society by some of the clumsiest, most reckless, and most cruel legislations that ever disgraced a civilised country. . . . If this blood thirsty and irrational code had been consistently carried out, it would have produced a reign of terror quite as cruel as that of the French Revolution, and not half so excusable. It owed its existence to the fact that its administration was as capricious as its provisions were bloody'; p. 192.

[76] *The Constitutional History of England* (11th ed., 1896), Vol. 3, p. 393.

The liberal character of criminal procedure

England had excessively severe criminal laws but she also had an extremely liberal form of criminal procedure. The *Magna Carta* of 1215, the *Petition of Right* of 1628 and the *Bill of Rights* of 1689 had all considerably accelerated the consolidation of a political structure which—in Holdsworth's words—consisted in the basing of the authority of the State upon the rule of law.[77] The principles which they laid down bore on criminal law and procedure. The Common Law was more than ever looked upon as a bulwark of individual freedom and a guarantee against encroachments by the executive.[78] Measures were being evolved whereby the broad principles embodied in these great constitutional documents could be enforced in practice.[79] In the gradual process of building up the rights of the subject a most potent influence was exercised by the jury. According to Holdsworth the legal and political import of the jury system has been greater even than that of the writ of *Habeas Corpus*.[80] Its bearing on English law, public and private, and on English life has been so extensive ' that it is not going too far to say that there are large parts of English legal and constitutional history, which cannot be rightly

[77] *H.E.L.*, Vol. 10, p. 647. On this see also the short but illuminating chapter in Professor Lévy-Ullmann's *The English Legal Tradition* (1935), pp. 224–229. On the main stages of this struggle see Sir Frederick Pollock's paper ' The History of English Law as a Branch of Politics ', *Essays in Jurisprudence and Ethics* (1882), p. 202 *et seq.*

Very important too were the complaints and resolutions made by the Commons at certain stages of their struggle against royal absolutism and arbitrariness. See for instance the ' Petition of Grievances ' addressed in 1610 to James I; 2 St.Tr. 524. See also the remarkable Resolutions passed by the Commons in 1628; 3 St.Tr. 82.

[78] ' Let us confess the truth; the English are the freest people of Europe. Whence does this arise? From that portion of the constitution called the common law, which recognises three grand popular prerogatives, the right of *personal* liberty, the right of *personal* security, and the right of *private* property. . . . The common law is founded in equality, its chief excellence '; William Austin, *Letters from London written during the Years 1802–1803* (Boston, 1804), pp. 191–192 and 192.

[79] An outstanding example is provided by the writ of *Habeas Corpus*, which Selden described in 1628 as ' the highest remedy in law, for any man that is imprisoned '; 3 St.Tr. 95. It is in Hale's words—' a writ of a high nature, for if persons be wrongfully committed, they are to be discharged upon this writ returned; or if bailable, they are to be baild; if not bailable, they are to be committed '; 2 P.C. 143; while according to Vaughan, C.J., it ' is now the most usual remedy by which a man is restored again to his liberty, if he has been against law deprived of it '; *Bushell's Case* (1670), Vaugh. 136.

[80] *Some Lessons from our Legal History* (1928), p. 75.

understood without some knowledge of the history of the Jury '.[81] It was largely instrumental in evolving and helping to consolidate the accusatory principle in criminal procedure, which affords considerable advantages to persons accused and under trial. Torture as a legalised method of extracting confessions and collecting evidence was unknown in this country.[82]

> 'Everywhere upon the Continent', notes Professor Esmein, 'in France and elsewhere, the inquisitorial procedure, secret and written, was now established, a product of the Roman and the Canon law, with their defects more or less accentuated according to the country. One European nation, however, had resisted and escaped the contagion, and was destined later to serve, to a large extent, as a model for the legislation of the French Revolution. This was England. By utilising and developing those elements which had to the same extent existed upon the continent, but had there become sterile, it had constructed a criminal procedure of its own, which, though it was not exempt from defects, was oral and public, and offered material safeguards to the defence.'[83]

It may well be contended that the aspect of eighteenth century English criminal justice which attracted the keenest interest among contemporary foreign visitors was criminal procedure. Their diaries, letters and recorded impressions of travels contain much information on the English mode of prosecution and trial.[84] The tone of these documents is invariably one of genuine admiration, not unmingled with

[81] *Ibid.*, p. 76.

[82] Up to 1772, however, a certain mode of torture was permitted in England in the form of *peine forte et dure*. A prisoner who upon arraignment 'stood mute', which meant that he refused to plead so as to evade conviction, might be laid naked on his back in a dark room, while weights of stone or iron were put on his chest. If he continued to maintain silence he was pressed until he died. This punishment was inflicted in 1721 and again in 1735; A. Andrews, *The Eighteenth Century* (1856), pp. 285–286; see also the *Annual Register* (1770), Vol. 13, pp. 163–165. In the *Present State of England etc.* (18th ed., 1694), p. 472 Edward Chamberlayne states: 'But tho' the Law continues, yet we so abhor cruelty, that of late they are suffered to be so over charged with Weight laid upon them that they expire presently'.

[83] A. Esmein, *History of Continental Criminal Procedure* (1914), pp. 322–323. A vivid perception of how a trial on a capital charge was conducted in France may be gained from Lord Maugham's book *The Case of Jean Calais* (1928). In France until the Revolution Lord Maugham states '. . . there was, indeed, no trial as we understand the word at all'; and further: 'English lawyers, cannot fail to be interested in a trial and a judicial system so foreign to English "ideas"'; *op. cit.*, pp. 88 and 8.

[84] These views are surveyed at greater length below, Appendix 3, p. 699 *et seq.*

wonder at how such a system could be reconciled with the exigencies of an effective defence against crime. According to English standards eighteenth century English criminal procedure was still in some respects deficient [85]; but it was none the less definitely superior to any system then in force in any other leading European State.[86] There was thus some foundation for the opinion that the unparalleled liberality of English criminal procedure warranted the imposition of a very severe system of criminal law. The basic argument of the exponents of this view, which often influenced the Legislature to pass capital statutes, was that countries in which prosecutions and trials are ruthlessly and often unscrupulously conducted may afford to have a rather lenient penal code, but that where, as in England, the rights of the accused are so well safeguarded, the punishment of those found guilty should be exemplary.[87] G. T. Wilkinson, the editor of *The Newgate Calendar*, thus

[85] On some of these deficiencies see Sir F. D. MacKinnon, 'The Law and the Lawyers'; *Johnson's England* (ed. by A. S. Turberville, 1933), Vol. 2, pp. 301, 302 and 307. But as a very distinguished criminal lawyer of the last century aptly remarks, 'Lorsque la rivière n'est pas empoisonnée à sa source, l'eau se purifie en suivant son cours régulier et paisible.—Sur le Continent, au contraire, c'est le principe lui-même qui était complètement vicié'; Pelegrino Rossi, 'Bentham's Traité des preuves judiciaires', *Thèmis* (1825), Vol. 7, p. 166.

[86] As Voltaire puts it, the French system 'seems planned to ruin citizens, (the English) to be their safeguard'; Professor Paul Viollet, 'French Law in the age of the Revolution', *Cambridge Modern History* (1907), Vol. 8, p. 744. 'The English superiority', writes Lord Acton, 'proclaimed first by Voltaire, was further demonstrated by Montesquieu'; *Lectures on the French Revolution* (1910), pp. 6–7. To these two Cesare Beccaria may be added.

[87] Referring to the English system De la Rive writes: 'Nous avons à parler actuellement d'un système de procédure criminelle, dans lequel nous trouvons plus de garanties données à l'innocence, mais en même temps, il est vrai, plus de chances d'impunité données au coupable'; *Sur L'interrogation et l'Aveu en Matière Criminelle* (Genève, 1827), p. 35. On the high coefficient of bills thrown out and of acquittals see below, pp. 92 and 93–94.

This aspect of English criminal procedure caused some anxiety. Thus Sir John Hawkins states: '. . . in courts of justice, the regard shown to offenders falls little short of respect. . . . Those whose duty it is to conduct the evidence, fearing the censure that others have incurred by a contrary treatment of prisoners, are restrained from enforcing it; and, as it is an exercise of compassion that costs nothing, and is sure to gain the applause of vulgar hearers, every one interests himself on the side of the prisoner, and hopes, by his zeal in his behalf, to be distinguished as a man of more than ordinary humanity. The tenderness of our courts of justice, in prosecutions that affect the life or liberty of the offender, is acknowledged and celebrated by all writers on the subjects of jurisprudence and internal policy; but, beside this, the chances of eluding conviction, or, if not that, of punishment, are so many, that they deter many injured persons from the prosecution of great criminals'. He then singles out fifteen factors which all worked in favour of the guilty

aptly expresses the attitude of a wide and influential section of contemporary opinion: 'The criminal jurisprudence of England may farther be defended from the imputation of cruelty, by considering that though it be strict in its enactments, and visits many minor offences with death, yet in its administration, *jealousy of the criminating evidence*, and *compassion for the offender*, temper its firmness, and soften the rigour of its decisions. It requires no one to criminate himself, and in dubious cases *leans invariably to the side of mercy*; . . .'.[88]

General sense of insecurity

Another factor was the lack of an effective police force. This was due in part to the general backwardness of the administrative machinery of the State, but in the main to the widely shared suspicion that a regular police force, once established, would be used by the government to curtail political liberty.[89]

How disquieting was the position, even in London, may be judged from contemporary evidence. 'One is forced to travel, even at noon, as if one was going to battle',[90] wrote Horace Walpole in 1752, while Smollett says of the conditions prevailing about 1730:—

> 'England was at this period infested with robbers, assassins, and incendiaries, the natural consequences of degeneracy, corruption, and the want of police in the interior government of the kingdom. This defect, in a great measure, arose from an absurd notion, that laws necessary to prevent those acts of cruelty, violence and rapine, would be incompatible with the liberty of British subjects; . . . Thieves and robbers were now become more desperate and savage than ever they had appeared

and increased his chances of impunity; *Life of Dr. Samuel Johnson* (1787), pp. 521–523.

Sir John Hawkins was appointed a magistrate for Middlesex in 1761. Four years later he was elected chairman of Quarter Sessions.

[88] G. T. Wilkinson, *The Newgate Calendar* (no date), Vol. 1, pp. iii–iv; this *Calendar* was most probably published in 1816.

[89] 'They have an admirable police at Paris', wrote John William Ward, 'but they pay for it dear enough. I had rather half-a-dozen people's throats should be cut in Ratcliffe Highway every three or four years than be subject to domiciliary visits, spies, and all the rest of Fouché's contrivances'; 'Letters to Ivy' (Dec. 27, 1811), p. 146, quoted by Elie Halévy, *A History of the English People in 1815* (1924), Vol. 1, note 4 at p. 39.

[90] *Letters of Horace Walpole to Sir Horace Mann* (2nd ed. by Lord Dover, 1833), Vol. 3, p. 9.

since mankind was civilised. In the exercise of their rapine, they wounded, maimed, and even murdered the unhappy sufferers, through a wantonness of barbarity. They circulated letters demanding sums of money from certain individuals, on pain of reducing their houses to ashes, and their families to ruin; and even set fire to the house of a rich merchant in Bristol, who had refused to comply with their demand. The same species of villany was practised in different parts of the kingdom; . . .'[91]

The sense of insecurity was further increased by the rapid accumulation of wealth in dwelling-houses and shops—a strong temptation to the commission of offences, particularly in view of the manifest inadequacy of preventive measures. The primitive state of transport throughout the country is also relevant. Crimes against property were steadily increasing in number; and although there is much to be said in support of the view that this increase would have appeared less substantial had it been measured in relation to the growing population, the intensity of trade, the accumulation of wealth and the density of urban agglomerations,[92] yet it could not fail to cause apprehension. One ingenious writer contended that the very wealth of the country militated in favour of milder punishments for offences against property; as he puts it, 'the richer a country is, any given sum, and of course whatever it represents, sinks in its relative value; and therefore the evil committed by robbing to that amount is less in a rich than in a poor one, and the punishment consequently should be proportionably less'.[93] Obviously this reasoning could not carry much weight. Even so enlightened an author as Barrington did not disavow the many capital statutes dealing with larceny in shops and dwelling-houses. Any comparison between English laws and those of other countries is—he contends—misleading, unless 'a country can be found which

[91] *The History of England* (1848), Vol. 2, pp. 279–280. Very valuable contemporary information is given by Henry Fielding in his *Enquiry into the Causes of the late Increase of Robbers* (1751), as well as in the pamphlets by Sir John Fielding, who was Henry's half brother and who followed him in the office of a London magistrate; see *Plan for preventing Robberies within twenty miles of London* (1755), and *An Account of the Origin and Effects of a Police set on foot in 1753* (1758).

[92] On some pertinent remarks on this subject made by foreign observers and notably by d'Archenholz, below, Appendix 3, pp. 709–712.

[93] George Ensor, *Defects of English Laws and Tribunals* (1812), p. 151.

contains equal property and riches'.[94] The influential *Quarterly Review* was undoubtedly expressing what was then a widely shared opinion in the words:—

> 'Commerce itself, however, is the fruitful mother of the crimes of theft in all their varieties; not more from the habits it bestows than the opportunity it affords to that offence. It pours in wealth in a shape the most convenient for plunder. The rural opulence of our forefathers was not completely safe; still, their oaken tables and their wheat ricks could not be carried off without some trouble, and men were honest because property was immovable . . . In Newgate biography, perhaps, examples might be found of a man's setting out perfectly honest at the one end of Cheapside and becoming fit for a prison before he reached the other. The circulating force which keeps property constantly afloat, and ready to fly at a touch, places it equally in the way of traffic and of pillage. To be ready to be sold, it must be ready to be stolen. To protect all this plenty, and especially in its less divisions, the law is called upon to exert its power. The small proprietor, indeed, could hardly be called the owner of what he enjoys, but for the strong hand of the law.'[95]

Despite the conspicuous inadequacy of the police force, and although robberies as well as burglaries were very frequent, the more serious crimes against the person were of rare occurrence.[96] The value of human life was none the less relatively small, manners still rather crude[97] and lawlessness and riots very frequent.[1] Certainly it can be stated that the preservation of life and property and the suppression of disorder among

[94] *Observations on the more Ancient Statutes* (3rd ed., 1769), p. 434.

[95] *Quarterly Review* (1812), Vol. 7, p. 179.

[96] Of the leading European countries, England had the lowest coefficient of murder. This fact attracted the attention of foreign observers who found it most surprising; see below, Appendix 3, pp. 708–709.

[97] The manners of the period are indirectly laid bare by a series of judicial decisions regarding what was to be considered sufficient provocation in the crime of murder or serious manslaughter and what reaction to such provocation was justified. See on this Dr. C. K. Allen's stimulating study 'The Phlegmatic Englishman in the Common Law', *Legal Duties and other Essays in Jurisprudence* (1931), pp. 81–86.

[1] Ample illustration is provided by the history of the Strand Riots (1749), Spitalfields Weavers' Riots (1765), Food and Militia Riots in the Provinces (1767), Weavers' Riots (1767–8), Middlesex Election Riots (1768), Green Riot (1768), St. George's Fields Riot (1768), Weavers' Riots (1769), Brass Crosby Riot (1771), Gordon Riots (1780), Hunger Riots (1798–1800), Birmingham Riots (1791), Mobbing of King's Carriage (1795).

Sometimes the mob would take justice into its own hands. The *Gentleman's Magazine* of September, 1735, relates that when a mariner James Newth

the populace were among the most urgent tasks that confronted Hanoverian statesmen.[2] Without an effective police force, these tasks could not be adequately performed,[3] and the consequent widespread sense of insecurity prompted the Legislature to pass very severe laws. These considerations are well expressed by Colonel Frankland, one of Romilly's chief opponents in Parliament, who declared in the House of Commons that since ' in this country, there is little preventive justice there must be much penal '.[4]

Unsatisfactory state of secondary punishments

The two most obvious penalties alternative to capital punishment were transportation and imprisonment.[5] When in 1810 Lord Ellenborough declared in the House of Lords that he would oppose any proposal to revise the criminal law, he also said that in his view transportation was no more than ' a summer's excursion, in an easy migration, to a happier and better climate '.[6] This remark has often been quoted as a proof of Ellenborough's tendency to favour harsh penalties.[7] But although transportation was often accompanied by circumstances of appalling horror,[8] many besides Ellenborough

poisoned himself after having been found guilty of murdering his wife, ' the people about *Bristol* were so incensed at his harden'd Wickedness, that they dug up his Body, after it had been burried in a Cross Road near that City, dragg'd his Guts about the Highway, poked his Eyes out, and broke almost all his Bones '; Vol. 5, p. 558. In 1771 a London crowd of two thousand stoned to death a man believed to have been an informer; though this action lasted three hours the authorities were unable to put a stop to it; *Annual Register* (1771), Vol. 14, (Chronicle), p. 96.

[2] P. C. Yorke, *The Life of Hardwicke* (1913), Vol. 1, p. 133.

[3] The police force was not only ineffective but often also corrupt. This may have been partly due to the fact that watchmen were under-paid, and partly to the legalised system of rewards for the conviction of offenders. See on this ' Report from the Committee on the State of the Police of the Metropolis ' (1816), 510, and ' Second Report from the Committee on the State of the Police of the Metropolis ' (1817), 233; *Parl. Papers*, (Reports, 1816), Vol. 5, pp. 65–68 and *ibid.* (1817), Vol. 7, pp. 322–327.

[4] *Parl. Deb.* (1811), Vol. 19, col. 631.

[5] For Sir James Mackintosh's suggestion to replace the death penalty for some offences by a combined system of imprisonment and transportation see below, note 3 at p. 593.

[6] *Parl. Deb.* (1810), Vol. 17, col. 200 *.

[7] See for instance C. G. Oakes, *Sir Samuel Romilly* (1935), p. 223.

[8] See on this the debates in the House of Commons in 1785 and Burke's remarks, *Parl. Hist.* (1785–86), Vol. 25, cols. 391–392 and 430–432; for a fuller account see also G. Ives, *History of Penal Methods* (1914), p. 120 *et seq.*

questioned its deterrent value. Among the reformers, Eden for example held that in some instances it even acted as an incentive to crime [9]; Bentham also pointed out its many limitations and its slender deterrent value, particularly in respect to young offenders who had no family ties and no regular employment.[10] On the other hand, the defenders of this penalty viewed it as an effective method of eliminating undesirable and dangerous elements.[11]

The state and efficacy of the prison system caused even greater apprehension. The grave defects of gaols and houses of correction had already been exposed in the first half of the eighteenth century.[12] These early disclosures were followed by the monumental inquiry of John Howard [13] and by the work of a group of most able prison investigators headed by James Nield, Samuel Hoare, Fowell Buxton and Elizabeth Fry.[14] It was generally admitted that prisons were centres of corruption, in need of very thorough reform. The government was thus faced with a difficult problem [15] which would have become even more acute had the criminal law been revised to the extent advocated by Romilly and his followers.

The lack of confidence in existing secondary punishments caused several authors who favoured a reform of criminal law to put forward their own suggestions for new penalties. To quote one instance only, in 1754—ten years before Beccaria's *Dei Delitti e delle Pene* and seventeen years before Eden's *Principles of Penal Law* were published—an anonymous writer urged the repeal of capital punishment for all offences except treason and murder. '. . . As moral actions are infinitely variable, on account of the difference of persons, age, and

[9] See below, p. 312.

[10] ' Principles of Penal Law ', *Works* (Bowring), Vol. 1, pp. 402 and 491 *et seq.*

[11] For a vigorous plea to extend the system of transportation see for instance an anonymous tract *An address to the Magistrates and People of Great Britain on the Punishments of Transportation and Imprisonment* (1819), by Britannicus.

[12] See on this W. L. Clay, *The Prison Chaplain: a Memoir of the Rev. John Clay* (1861), pp. 11–42.

[13] *The State of Prisons*, first published in 1777.

[14] For a fuller account of their activities see Sidney and Beatrice Webb, *English Prisons under Local Government* (1922), pp. 38–96 *passim.*

[15] On the administrative weakness of eighteenth century government see Sir William Holdsworth, *H.E.L.*, Vol. 11, pp. 582–586.

education,' he writes, 'in order to adapt penalties suitable to every offence, there ought to be in every well-govern'd state, an harmonical proportion regulated by distributive justice '.[16] The deterrent effect of the death penalty was, in his view, overrated, for the '. . . toil and labour afford a much longer and more dreadful example to deter others from committing the like offences. This would be (if I may so express myself) a living visible law . . . the punishment of death is too transitory to leave any long impression on the mind '.[17] Aware of the very unsatisfactory state of such secondary punishments as then existed, the author of this tract rejects both transportation and imprisonment as possible substitutes for the death penalty, and suggests the adoption of what he calls a system of slavery. This would consist in employing convicts on public works; for the first five years they would work in chains and without any remuneration; for the second period, the length of which would vary in accordance with the individual circumstances of each case, they would continue to work as slaves but without chains and might receive wages, though not until restitution had been made to the injured party.[18] This proposal is typical of many similar suggestions advanced in the course of the eighteenth century. They were invariably strongly opposed on constitutional grounds and as incompatible with the dignity of the English people.[19]

Other factors

Liberal criminal procedure, the lack of an adequate police force and the unsatisfactory state of secondary punishments were the most important but not the only factors which favoured the extension of capital punishment. Thus the value of criminal statistics as a scientific index of crime and an instrument in the assessment of factors determining the trends

[16] *Proposals to the Legislature, for preventing the present Executions and Exportations of Convicts, in a Letter to the Right Hon. Henry Pelham*, by a Student in Politics (1754), p. 20.

[17] *Ibid.*, p. 26. Compare with the almost identical opinion of Beccaria, below, p. 285.

[18] Those attempting to escape were to be branded on the forehead with a hot iron and detained as slaves for life; their accomplices and those who harboured them even for one night were to be punished in the same manner.

[19] See on this below, pp. 422–423.

of delinquency was then hardly recognised. Little, if anything, was known about the origins of crime, or about the psychology of groups of offenders such as recidivists, young delinquents and the mentally defective. The unscientific approach to crime and criminals created an attitude of mind propitious to the inception of a doctrine of crude intimidation, with its simplicity and strong appeal to the instinct of self-preservation.

Moreover, the programme of criminal law reformers was contrary in its implications to the current concept of the nature and functions of the State. Professor Basil Williams gives a lucid description of this doctrine, evolved by Locke and almost universally approved. Drawing attention to the leading tenet of Locke's doctrine, according to which the chief end of civil society is the preservation of property and the maintenance of municipal peace and safety, he writes [20]: 'In emphasising this merely protective duty of the state Locke was no doubt expressing the whig revulsion from the paternal interference with the lives of the people and their rights of property so dear to James I and his successors. On the other hand his teaching encouraged a whig oligarchy to regard one of the chief objects of government to be the protection of their own rights of property and to adopt an attitude of neglect or indifference to social evils affecting the lower classes of society. In fact the functional view of society, implying the duty of the State as well as of individuals to remedy such evils, which was so predominant at the close of the nineteenth century, was entirely ignored by Locke and his followers in this respect, such as Blackstone, Kames, Hutcheson, Hume, and Adam Smith. The sole object of society and civil government in their view was to preserve rights and to ignore almost entirely the functions or duties of citizens. By this theory all the stress was laid on the privileges of property-owners until it became doubtful if the really poor had any rights at all theoretically'. The predominance of this doctrine created an atmosphere unfavourable to an extensive restriction both of capital punishment and of transportation. Such a reform would entail a definite change in the policy of crime control

[20] *The Whig Supremacy* (1942), pp. 5–6 (Vol. 11 of the 'Oxford History of England', ed. by Professor G. N. Clark).

with a consequently inevitable extension of the functions of the State, which would be difficult to reconcile with the 'merely protective duty' assigned to it.[21]

Most of these factors were common to all European countries. But since England was the only country to have both a very liberal form of criminal procedure and a very weak police force, their cumulative effect was much stronger. Moreover, whereas at first the liberal character of criminal procedure and the lack of an adequate police force encouraged the growth of a severe system of criminal law, in later years this very severity tended to render criminal procedure even more liberal and, by creating an illusory sense of security, to delay the reform of the police and of secondary punishments.

§ 6. TRENDS OF PUBLIC OPINION

It is significant that practically all capital offences were created more or less as a matter of course by a placid and uninterested Parliament. In nine cases out of ten there was no debate and no opposition. This practice did not escape the attention of Edmund Burke. How strongly he felt on this subject may be inferred from the following incidents. One was related to the House of Commons in 1819 by Sir James Mackintosh:—

> '. . . on a certain occasion when he (Burke) was leaving the House, one of the messengers called him back. Mr. Burke said that he was going on urgent business. "Oh", replied the

[21] B. Kirkman Gray draws attention to certain developments indicative of the waning of the concept that the State's duty was merely protective. Thus '. . . the 31st of December, 1800, was, if little noticed, a memorable date. On that day the royal assent was given to the Act authorising the taking of the first census of the English people. When we compare the first census with the eleventh, which was taken in 1901, we are struck with its simplicity, its incompleteness, its faultiness. But we mistake its significance if we test it by the amount or the accuracy of the information it affords. This census was the first official recognition of the duty of the state to know in detail the vital, cultural, and economic condition of the whole nation. The nation had once for all assumed the responsibility of knowing. And social knowledge, which is itself a kind of social action, impels of necessity to much doing of many sorts. . . . This is the principle of *State intervention*'. The same author rightly emphasises that one of the greatest achievements of John Howard was 'that of forcing the Government to become responsible for the state of prisons . . .', and quotes a number of Acts passed in the last quarter of the eighteenth century which acknowledge the principle of State responsibility in this branch of penal administration; *A History of English Philanthropy* (1905), pp. 284, 285, and pp. 183, 184–185.

> messenger, "it will not keep you a single moment, it is only a felony without benefit of clergy!"' Burke also assured Mackintosh that '. . . although, as may be imagined, from his political career, he was not often entitled to ask favour from the ministers of the day, he was persuaded his interest was at any time good enough to obtain their assent to the creation of a felony without benefit of clergy'.[22]

The other incident was related by Sir Thomas Fowell Buxton who had heard it from Wilberforce:—

> 'Sir William Meredith happened one day to go into a committee-room, for the purpose of writing a letter; at one corner of which he observed a gentleman seated at a table, and seemingly asleep, to whom a clerk was reading a piece of parchment, which looked like an act of parliament. Sir William was continually interrupted by a kind of chorus, with which every paragraph concluded: "Shall suffer death without benefit of clergy". At length Sir William said, "What may this heinous offence be which you are visiting with so terrible a penalty?"—"Why, Sir", replied the legislator, "we country gentlemen have suffered much by depredations on our turnips, —we have at length determined to put a period to this practice; and my good friend the minister has been so obliging as to allow me to make it death without benefit of clergy".'[23]

Although the Parliament of the day was still unreformed, it is known that it was not indifferent to the pressure of public opinion[24]; it certainly afforded ample opportunity for a

[22] *Parl. Deb.* (1819), Vol. 39, col. 787.

[23] *Parl. Deb.* (1821), N.S., Vol. 5, col. 928.

In 1821 Sir Thomas Fowell Buxton said: 'Though some records are handed down to us, of the discussions during the last century in this House, upon a multitude of points of little significance, hardly a remnant remains upon the subject of criminal law—and yet during that period, our penal code has been quadrupled. Upon an average, every year of that period was marked by the enactment of a capital offence; . . . All these acts . . . passed *sub silentio*, without debate, inquiry, examination, evidence, or any general interest;' *Parl. Deb.* (1821), N.S., Vol. 5, col. 927. Similar remarks were made by Sir William Meredith, *Parl. Hist.* (1777–1778), Vol. 19, col. 237, and by Sir Samuel Romilly, *Observations on a Late Publication intituled Thoughts on Executive Justice* (1786), p. 43.

[24] According to Dicey the very reactionary Combination Act of 1800 'precisely corresponded with the predominant beliefs of the time'. According to the same author, the repressive legislation of 1819, embodied in the six well-known Acts, 'may have been unwise, but it was an attempt to meet a serious crisis and was the natural outcome of the public opinion which in 1819 and 1820 determined the action of Parliament'; *op. cit.*, pp. 99 and 103. On the influence exercised by public opinion on the unreformed House of Commons, see also E. Porritt, *The Unreformed House of Commons* (1909), Vol. 1, pp. 267–282.

searching and detailed discussion on each proposed Bill.[25] Difficult as it is to estimate how faithfully certain laws passed in a remoter historical period reflect the dominant trend of public opinion, it is nevertheless submitted that the smooth and uneventful passage through both Houses of Parliament of hundreds of capital statutes, the almost automatic prolongation of those which had at first been adopted as provisional measures only, and the lack of opposition to the continual extension of the death penalty to new offences, prove that at least until the middle of the eighteenth century a very substantial section of the community considered such legislation both justified and effective. It is true that voices of dissent had been intermittently raised. In 1751, for instance, Dr. Johnson, appealing for a drastic revision of criminal law, condemned a system by which '. . . multitudes will be suffered to advance from crime to crime, till they deserve death, because, if they had been sooner prosecuted, they would have suffered death before they deserved it'.[26] None the less public support for capital laws continued to be strong, even in the second half of the century.[27]

However, when the eighteenth century had drawn to its close, the tide began to turn.[28] The continued multiplication

[25] Professor J. Redlich repeatedly emphasises that 'the procedure of the House of Commons, its order of business, was worked out, so to speak, as the *procedure of an opposition*, and acquired once and for all its fundamental character'; *The Procedure of the House of Commons* (1908), Vol. 1, p. 57. He quotes also the information given by a Parliamentary committee that 'no less than eighteen different questions, each with its corresponding division, were required for the passage of a bill through the House, without reckoning those of the committee stage'. Redlich adds that this was the normal framework of the discussion on a Bill, irrespective of all the conceivable variations of subsidiary motions, instructions, and motions for adjournment; *ibid.*, pp. 64–65.

[26] *Rambler* (ed. of 1809), Vol. 3, p. 18. Johnson was himself aware that his plea was much in advance of his time. 'This scheme', he writes, '. . . is so remote from common practice, that I might reasonably fear to expose it to the public . . .'; *ibid.* On Johnson's views on criminal law see below, pp. 336–339, and Chapter 14, p. 456 *et seq.*

[27] One section of opinion not only opposed the revision of capital statutes but urged their more rigorous enforcement; see below, pp. 231–248.

[28] 'By the end of the (XVIIIth) century', writes Dorothy George, 'we are in a different world. If we look back to it we are conscious of its brutalities, but if we attempt to look forward from the then immediate past, we see a revolution in opinion comparable with conversion—with that change of heart which is a phenomenon of individual experience. But the barbarous laws had hardly been modified to suit a more enlightened age which had discovered that they were fit only for a nation of savages'; *London Life in the XVIIIth Century* (1925), p. 17.

of capital offences and the determined opposition of both Houses of Parliament, particularly of the House of Lords, to Romilly's moderate proposals for reform were beginning to cause concern. In the *Spirit of Laws* Montesquieu, whose authority stood high among Englishmen,[29] wrote 'that in all, or almost all the governments of Europe, penalties have increased or diminished in proportion as these governments favoured or discouraged liberty'.[30] In England, however, where so large a measure of liberty had been achieved, the criminal law remained unreformed. So flagrant a contradiction evoked this comment from a contemporary author[31]:—

> 'You will find it difficult to persuade the mass of mankind, that in planting such terrible penalties around regulations of *mere policy*, you are acting for the public weal, rather than for purposes of your own personal ambition, or your own peculiar interests. You teach common minds to confound moral rectitude with political expediency. You shock virtuous men by an appearance of *novel* and wide disproportion between the offence and the penalty. You throw an air of artifice and austerity over those restraints which the judgment of civilised men cannot approve, and you run the hazard of weakening his general respect for the authority and equitableness of the laws. It is quite safe for you to confess, that in appointing punishments you pay more regard to the efficacity of statutes required by the temporary exigencies of the state, than to the general spirit of your constitution, and the most amiable sympathies of human nature itself? May not such confession induce the offender to stand absolved in his own mind from the common laws of morality . . .?'[32]

At a time when far-reaching reforms were being brought about in many European countries, the assertion that England cannot alleviate the severity of her criminal law because of her greater wealth and her lack of an effective system of crime control, could not long remain tenable. Thus while capital punishment was still acclaimed as the best means of keeping crime within certain bounds, and while capital statutes continued to be enacted, the operation of these severe laws was

[29] See on this Leslie Stephen, *History of English Thought in the Eighteenth Century* (repr. 1927), Vol. 2, pp. 188–189.

[30] (Transl. by T. Nugent, 1823), Vol. 1, p. 79.

[31] Dr. Samuel Parr, *Characters of the Late Charles James Fox* (1809), Vol. 2, p. 473.

[32] Nearly forty years earlier Dagge had made similar remarks; *Considerations on Criminal Law* (1772), p. 240.

being greatly restricted in practice.[33] At the root of this divergence between law and practice was the ever more obvious lack of harmony between the criminal law and the moral standards of the community.[34] The development of social consciousness in the penal sphere was slow but steady and once aroused it did not allow itself to be stifled. In England, in Buckle's words, ' so soon as public opinion is formed, it can no longer be withstood '.[35] Once the many doubts concerning the state of criminal law had impressed themselves upon the public mind, its reform became a matter of national concern.

Yet progress was slow. In his *Literary and Miscellaneous Memoirs*, Joseph Cradock writes[36]: ' That some general revisal of our Criminal Code is wanted, is now admitted, and greater caution in the administration of justice has been at times wanting. That excellent man Judge Wilmot wished that some nearer proportion of punishment to crime was ascertained. Lord Chief Baron Smythe, and two other Judges, had declared to have spoken openly in favour of a revisal of a part of our Criminal Code . . . Beccaria's book " On Crimes and Punishments " begins to be already appreciated. Sir Samuel Romilly and other most learned men have since declared themselves decidedly on the side of humanity; and I have no doubt that the day is now absolutely at hand, for the revisal and mitigation of part of our Criminal Code '. These hopeful words were written in 1828, sixty years after Beccaria's book was first published in an English translation[37] and nearly ten years after Romilly's death. According to Dicey the ' unexpected slowness '[38] has always been one of the leading characteristics

[33] See on this below, pp. 151–154, and 159–161.

[34] Inevitably it also began to be suspected that the parliamentary process of law making was not free from defects. Lord Russell, for instance, wrote: '. . . a merchant or squire, goes into the House of Commons, exasperated by the loss of his broad-cloth, or the robbery of his fish, and immediately endeavours to restrain the crime, by severe penalties. Hence it is, that every man judging that to be the most deadly offence by which he is himself a sufferer, the Parliament has permitted the statute-book to be loaded with the penalty of death for upwards of two hundred offences '; *An Essay on the History of the English Government and Constitution* (1865), pp. 195–196. This book was first published in 1821.

[35] *Civilisation in England* (1908), Vol. 1, p. 503.

[36] (1828), Vol. 4, pp. 153–154. On Joseph Cradock's engaging personality see Leslie Stephen's note in *D.N.B.*, IV, 1360.

[37] Between 1767–1807 seven editions were published; below, note 60, at p. 284.

[38] *Law and Public Opinion in England* (repr. 1930), p. 28.

of English legislation. 'The opinion which changes the law', he writes, 'is in one sense the opinion of the time when the law is actually altered; in another sense it has often been in England the opinion prevalent some twenty or thirty years before that time; it has been as often as not in reality the opinion not of to-day but of yesterday'.[39] The history of the movement for the reform of criminal law strikingly confirms this view.[40]

The initial stages of the movement were marked by setbacks and disappointments. Also, the first gain was in a sense negative: it consisted not in a revision of the existing laws but in that no new capital offences were being created. In time, however, capital punishment was abolished for a number of lesser offences and once abolished has never been re-imposed. The advantages accruing from the uninterrupted continuity of progress began to outweigh the disadvantages of the initial slowness. Unhindered by regressive trends, the movement gained momentum and achieved its main objectives within the short space of about ten years from 1823–1833. Those unacquainted with its tortuous progress may tend to regard such a seemingly sudden change as revolutionary; in reality it was no more than the last stage, the crowning achievement of a process that can be traced back to the middle of the eighteenth century. 'The most common and most useful object of a history of jurisprudence', writes Bentham, 'is to exhibit the circumstances that have attended the establishment of laws actually in force. But the exposition of the dead laws which have been superseded, is inseparably interwoven with that of the living ones which have superseded them'.[41]

[39] *Ibid.*, p. 33.

[40] For certain political and social circumstances which created an atmosphere unpropitious to any reforms and thus further delayed the revision of criminal law see below, pp. 351–354.

[41] 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, p. 150.

Chapter 2

THE POLICY OF PENAL LEGISLATION AS ILLUSTRATED BY THE LAW OF LARCENY IN DWELLING-HOUSES AND SHOPS AND BY THE WALTHAM BLACK ACT

I

§ 1. Development of the law of larceny in dwelling-houses, outhouses and shops [1]

This branch of law, though very confusing, well illustrates the inevitable trend of legislation when based on capital punishment. 'Larceny from the house,' writes Eden, 'whether privily committed without violence, or openly in the day time, and therefore in neither case amounting to burglary, is nevertheless by the laws of England made capitally penal in almost every instance; and this by a multiplicity of statutes, so complicated in their limitations, and so intricate in their distinctions, that it would be painful on many accounts to attempt the detail of them. It is a melancholy truth, but it may without exaggeration be asserted, that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which on this point they are made liable'.[2]

Housebreaking by day or by night, any person being therein and put in fear (23 Hen. 8, c. 1, s. 3; 1 Edw. 6, c. 12, s. 10).

At first, by 23 Hen. 8, c. 1, s. 3 (1531), capital punishment without benefit of clergy was imposed for robbing any person in his dwelling-house or dwelling-place, the owner or dweller,

[1] Burglary and sacrilege are not included in this survey though they were both capital non-clergyable felonies.

[2] *Principles of Penal Law* (2nd ed., 1771), p. 289.

his wife, children or servants then being in the same house and being put in fear. The same provision applied to any person who should abet, procure, help, maintain, or counsel in any such offence.[3] By an Act of 1533[4] this provision was extended to any person indicted for robbery under the former Act who stood mute, or challenged peremptorily above twenty, or did not answer directly to the indictment.

23 Hen. 8, c. 1, stipulated that to constitute the offence the owner of the house, or his wife, children or servants had to be in the house at the time.[5] This part of the section was subsequently somewhat broadened by 1 Edw. 6, c. 12, s. 10 (1547), an Act almost identical with 23 Hen. 8, c. 1, except that it redrafted the definition of the offence by enacting that no person should be admitted to his benefit of clergy who ' shall be, in due Form of the Laws, attainted or convicted . . . of breaking of any House by Day or by Night; any Person being then in the same House where the same breaking . . . shall be committed, and . . . shall be thereby put in Fear or Dread '. Because this statute was broader, it was held by some writers to have repealed the Act of Henry VIII.[6] Thus by these two Acts the five constituent elements of the offence were: (a) Breaking, such as—if committed at night—would make the offence a burglary.[7] (b) Taking; under these

[3] This statute was made perpetual in 1540 by 32 Hen. 8, c. 3.

[4] 25 Hen. 8, c. 3.

[5] On certain doubts that had arisen in the interpretation of this clause see Z. Babington, *Advice to Grand Jurors in Cases of Blood* (3rd ed., 1676), p. 166.

[6] See for instance: East 2 P.C. 624, § 57. It should also be noted that under 1 Edw. 6, c. 12, *aiders and abettors at the fact* of breaking and stealing were deprived of their clergy *even if they had not entered* the house. *Accessories before* were not included in this Act, but were subsequently put in the same position by 4 & 5 Ph. & M. c. 4.

[7] 1 Edw. 6, c. 12 used the word ' breaking ', while 23 Hen. 8, c. 1 referred to ' robbing '. In *Bayne's Case*, Pop. 84, the court determined that a mere theft in the house, though unaccompanied by violence, was within the meaning of the term ' robbery ', but this broad construction was not upheld and it was settled that the word ' rob ' included the element of force and violence; Kel. 68, and below, Appendix 2, note 96 at pp. 679–680. In the case of *Trapshaw*, Gould, J., declared with respect to 3 W. & M. c. 9, s. 1, that ' the word rob, in a legal construction, always includes the idea of force and violence; and although this part of the statute does not expressly signify that breaking and entering the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other Acts of Parliament penned in the same manner, that these ingredients are *ex vi termini* included in, and implied by, the word " rob " '; *R.* v. *Trapshaw* (1786), 1 Leach 428.

statutes there was no offence if nothing had been taken[8] whereas in burglary a felonious intent was sufficient to constitute the offence. (c) The presence of some person in the house at the time of the offence.[9] (d) Putting this person in fear.[10] (e) The offence had to be committed in a dwelling-house within the meaning of the law of burglary.

These two statutes did not alter the definition of the offence, merely depriving the offender of benefit of clergy. Hence it would appear further that the value of the stolen property had to exceed twelve pence. It was not necessary for the property actually to have been removed from the house, but only from one place to another within the house.[11]

[8] The words of 1 Edw. 6 are 'break a house', which in no way imply that a larceny must be committed. But as Hammond explains in *Criminal Code* (1826), p. 112, § 48, 'the object of the enactment being, not to create a new offence, but to take clergy from one already existing (for the mode of expression is, not that such an action shall be felony, but that if such an action be done, the offender shall be deprived of his clergy; a mode of expression which naturally implies the present existence of the offence denounced), and as, neither at common law, nor under any statute, is it felony simply to break a house in the day-time, but only when followed by theft, the construction is, that as well a larceny as a breaking is essential to an offence under this enactment'.

[9] Should the person present in the house—being put in fear—throw out his property, the offence might then amount to robbery from the person, but not to housebreaking.

[10] East remarks upon this delicate point: 'But I do not find it any where settled, whether or not it be necessary to prove the actual sensation of fear felt by any person in the house; or whether if any person in the house be conscious of the fact at the time of the robbery, the fact itself raises the implication of fear, from the reasonable grounds existing for it. Coke (speaking of a similar provision in the statute 1 Edw. 6, c. 12), only says that if the party were in the house, and not put in fear, as, if he were asleep, or in another part of the house, the offender shall have his clergy. Yet, in these cases, there being no assault upon the person, as in construction of law there is in every case of a robbery from the person, there does not seem the same reason for raising such an implication. And I believe the practice is to require proof of an actual fear excited by the fact when committed out of the presence of the party, so as not to amount to robbery at common law. But certainly if the person in whose presence the thing was taken were not conscious of the fact at the time, the case would not fall within the act'; East 2 P.C. 634-635, § 71.

[11] See on this the opinion of the following authorities and the interesting cases quoted by them: Kel. 31; Hale 1 P.C. 527, and 2 P.C. 358; and Foster, *Crown Law*, p. 109. In *Simson's Case*, Kel. 31, where the thief was apprehended after he had taken goods to the value of five shillings out of a chest and had laid them on the floor, the offence was held to be within the statute as it amounted to larceny at common law (Hale, *ibid.*, and Foster, *ibid.*, quote this case as *Simpson's Case*). Although these rulings were given in cases tried under 39 Eliz. c. 15, they apply to the above quoted statutes because 39 Eliz. did not alter the nature of the offence.

The most restrictive was the provision requiring proof that the person in the house had been put in fear.[12]

Housebreaking by day (5 & 6 Edw. 6, c. 9, s. 4)

This was the provision omitted in 5 & 6 Edw. 6, c. 9, s. 4 (1552), which stipulated that if 'any Person or Persons be found guilty . . . for robbing of any Person or Persons . . . in any Part or Parcel of their Dwelling-houses or Dwelling-places, the Owner or Dweller in the same House, or his Wife, his Children or Servants, being then within the same House or Place, where it shall happen the same Robbery and Felony shall be committed and done, or in any other Place within the Precinct of the same House or Dwelling-place; that such Offenders shall in no wise be admitted to their Clergy, whether the Owner or Dweller in the same House, his Wife or Children then and there being, shall be waking or sleeping'. This Act was thus wider in scope than 1 Edw. 6, c. 12. At the same time, however, it reverted to the somewhat narrower formula of 23 Hen. 8, c. 1, that 'the Owner or Dweller in the same House, or his Wife, his Children or Servants' were to be present in the house at the time of the offence. The courts put a very strict construction on this provision and determined that the law could not be put into effect if the person in the house at the time of the offence had been a stranger or a guest.[13] The Act related to principals, aiders and abettors even if they had not actually entered the house; accessories before the fact were subsequently deprived of their clergy by 4 & 5 Ph. & M. c. 4. It did not, however, apply to offenders who stood mute or did not answer directly.

[12] In the words of Russell, 'with respect to the degree of fear which must be excited by the thief, it does not appear to have been expressly decided whether or not it be necessary to prove the actual sensation of fear felt by some person in the house, or whether fear will be implied if some person in the house were conscious of the fact at the time of robbery . . . Where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied . . .'; *On Crimes* (1819), Vol. 2, pp. 980–81. In *R.* v. *Etherington* (1795), 2 Leach 671, it was decided that the indictment was wrong, and the prisoners entitled to their clergy, because there was nothing in the indictment to indicate that the persons in the house had been put in fear.

[13] Hawkins, 1 P.C. 243, s. 8.

Robbery in a booth or tent (5 & 6 Edw. 6, c. 9, s. 5)

Section 5 of this Act still further extended the scope of the law, for it appointed capital punishment without benefit of clergy for robbing any person or persons not only in a dwelling-house, but also in 'any Booth or Tent in any Fair or Market, the Owner, his Wife, his Children or Servants, or Servant then being within the same Booth or Tent'. The elements of this offence were the same as those stated in section 4 of the Act, respecting the dwelling-house. However, since 4 & 5 Ph. & M. c. 4 specifically mentioned dwelling-houses, accessories before the fact to robbery in a booth or tent remained within benefit of clergy.[14] According to Hale, 5 & 6 Edw. 6, c. 9 was 'of great and daily use'.[15]

Housebreaking in the day-time, no person being therein (39 Eliz. c. 15, ss. 1 and 2)

One stipulation common to all the statutes so far surveyed was that the offence could only be constituted under these Acts if the owner, his family, or some other person had been in the house at the time. It has been seen that some statutes specified who had to be in the house, while others—of a broader character—spoke of some undefined person only. By 39 Eliz. c. 15, enacted in 1597, the law was made much more stringent. Section 1 of this Act recited that divers 'felonious Persons, understanding that the Penalty of the Robbing of Houses in the Day-time (no Person being in the House at the Time of the Robbery) is not so penal as to commit or do a Robbery in any House, any Person being therein at the Time of the Robbery; which hath and doth embolden divers lewd Persons to watch their Opportunity . . . to commit . . . many heinous Robberies, in breaking and entering divers honest Persons Houses, and especially of the poorer Sort of People, who . . . are not able to keep any Servant, or

[14] Blackstone observes that 'neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices, a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances'; 4 Comm. 226.

[15] 1 P.C. 520.

otherwise to leave any Body to look to their House; . . .'. Section 2 therefore enacted that from then on robbery in any dwelling-house or any outhouse, *no person being therein*, should be punished by death without benefit of clergy. The operation of the Act was confined to more serious cases of robbery, when the value of 'any Money, Goods, or Chattels' taken was not less than five shillings.

Housebreaking by day, whether or not any person is therein and is put in fear (3 W. & M. c. 9, ss. 1, 2, 3, 4)

The scope of the law was further extended by 3 W. & M. c. 9, ss. 1, 2, 3, 4 (1691). In many respects this Act may be regarded as a measure consolidating 23 Hen. 8, c. 1; 1 Edw. 6, c. 12; 5 & 6 Edw. 6, c. 9, s. 4; and 39 Eliz. c. 15. All the essential provisions of the earlier statutes were embodied in the new one, which thus related to house-breaking committed when the owner or any other person was in the house and was put in fear, or when nobody was in. But while 39 Eliz. c. 15—the broadest of the earlier Acts—related to larceny to the value of five shillings or over in any dwelling-house or houses, or any part thereof, or any outhouse or outhouses, belonging and used to and with any dwelling-house or houses, 3 W. & M. c. 9, mentioned any 'Dwelling-house, Shop, or Warehouse, thereunto belonging, or therewith used'. It therefore omitted *outhouses* but introduced *shops or warehouses*, thus further substantially extending the scope of the law.[16] Moreover, it extended to aiders and abettors,

[16] According to certain authorities there was no such difference between 39 Eliz. c. 15 and 3 W. & M. c. 9, but East seems to have been right in observing that while a shop or a warehouse belonging to and used with a dwelling-house might, under most circumstances, be supposed to fall under the description of an outhouse, the converse would not necessarily be equally general; 2 P.C. 639–640. This distinction between the two statutes had a bearing on the position of aiders and abettors *who had not actually entered* the place robbed. For if the offence had taken place in *an outhouse*, which was neither a part of a dwelling-house, nor a shop or warehouse, they could not be deprived of benefit of clergy under 3 W. & M. c. 9, since this statute did not mention such a place. 39 Eliz. c. 15 expressly mentioned outhouses belonging to and used with the dwelling-house; none the less, by the construction which was put on this Act, aiders and abettors who had not actually entered the outhouse at the time of the robbery were still admitted to their clergy. By the subsequent Act of 12 Ann. c. 7 aiders and abettors in such cases were deprived of benefit of clergy, but this law did not entirely cover the offence dealt with under 39 Eliz. c. 15 and 3 W. & M. c. 9, for it set a higher limit of forty shillings on the value of the stolen property.

accessories before and after the fact, as well as to those who being indicted 'shall stand mute, or will not directly answer to the Indictment, or shall peremptorily challenge above . . . twenty'. After the passing of this statute, 1 Edw. 6, c. 12, and 5 & 6 Edw. 6, c. 9, lost much of their practical importance.

Larceny in a dwelling-house without breaking in, any person being therein (3 W. & M. c. 9)

3 W. & M. c. 9, broadened the law in yet another respect. Under all previous Acts breaking in had constituted one of the basic elements of the offence, being held essential by construction [17] even if the relevant words were not in the statute. By section 1 of 3 W. & M. c. 9, capital punishment without benefit of clergy was appointed for an offence committed without any such force or violence. The words of this section of the Act are: every person who 'shall *feloniously take away* [our italics] any Goods, or Chattels, being in any Dwelling-house, the Owner or any other Person being therein, and put in Fear, . . . or shall comfort, aid, abet, assist, counsel, hire, or command any Person or Persons to commit any of the said Offences'.

The same Act speaks of 'breaking' in with respect to another offence. The only limits to the operation of this broad clause were the proviso regarding the presence of some one at the time of the offence, and the fact that such person had to be put in fear. In a case [18] where the presence of some one in the house had not been mentioned in the indictment, the prisoner was convicted of larceny only. The value of the stolen property not being specified, the law thus became operative if that value was found to exceed twelve pence.

Larceny in a shop, warehouse, coach-house or stable (10 & 11 Will. 3, c. 23)

This statute of 1699, known as the Shop-lifting Act, declared that the stealing by day or by night of any goods to the value of five shillings or over from shops, warehouses, coach-houses or stables, was to be a capital non-clergyable crime. It also

[17] 5 & 6 Edw. 6, c. 9 and 39 Eliz. c. 15 were so construed despite the fact that they did not include even the word 'rob'.

[18] *R.* v. *Etherington* (1795), 2 Leach 671.

applied to those who stood mute, or peremptorily challenged above twenty-three, as well as to accessories before the fact. This act again extended the scope of the law, first because it specified a number of places other than shops, secondly because it did not distinguish between offences committed by day and those committed by night, thirdly because it made no reference to the presence of any person at the time of the offence, and fourthly because by using the words 'privately steal' it eliminated the element of breaking in.[19]

Larceny without breaking in, in a dwelling-house or an outhouse thereto belonging, nobody being therein (12 Anne, st. 1, c. 7)

The subsequent statute on this subject was 12 Anne, st. 1, c. 7, passed in 1713, which by one sweeping section appointed the death penalty for feloniously stealing by day or by night 'any Money, Goods or Chattels, Wares or Merchandizes, of the Value of forty Shillings or more, being in any Dwelling-house, or Outhouse thereunto belonging, although such House or Outhouse be not actually broken by such Offender, and although the Owner of such Goods, or any other Person or Persons, be or be not in such House or Outhouse'; the clause extended to those who 'shall assist or aid any Person or Persons to commit any such Offence'.[20] One of the main objects of this Act was to protect property from larceny by servants.[21] The difference between 8 W. & M. c. 9 and 12 Anne, st. 1, c. 7, is apparent. While the earlier Act related to dwelling-houses only and required the presence and the putting in fear of some person, the later law extended to outhouses and contained no restrictive proviso regarding the presence of anyone. The only limitation put upon it concerned the value of the stolen property, which had to be forty shillings or more. This very severe law could be extensively used, particularly when it was doubtful whether there had

[19] According to Foster, 'if it shall appear on the evidence, as it often doth, that those places were broken open at the time of the larceny, the case will not, in my opinion, come within the act. For the words are, if any person shall *privately* steal, which seemeth to exclude all cases, where any degree of force is used to come at the goods'; *Crown Law* (1792), p. 79. This seems to have been the general opinion on this point.

[20] Principals outlawed and accessories before the fact were not within this statute.

[21] Below, Appendix 1, p. 637.

been sufficient breaking to bring the offence within one of the earlier Acts.[22]

The dominant trend

Thus the protection of property in dwelling-houses and other places against an offence not amounting to burglary was provided for by seven statutes: 23 Hen. 8, c. 1; 1 Edw. 6, c. 12; 5 & 6 Edw. 6, c. 9; 39 Eliz. c. 15; 8 W. & M. c. 9; 10 & 11 W. 3, c. 23; and 12 Anne, st. 1, c. 7. Jointly they covered the following acts and circumstances: breaking in accompanied by felonious taking; felonious taking effected without breaking in, both or either of these being committed in a dwelling-house; or in other places such as an outhouse, a booth, a tent, or a shop; carried out while certain persons, whether the owner, his wife, children or servants, or anyone else had been in any such place; or when nobody had been in; carried out in the presence of either of these persons; or when though not present, any such person had been put in fear by the commission of the offence; taking to the value of over twelve pence; or to the value of five, or forty shillings. It has been shown how the law was extended step by step either by the addition of new places, or by the omission of limiting clauses such as that respecting the presence of certain persons and the putting in fear, and lastly of the previously essential element of breaking. But while under each succeeding statute the definition of the offence became broader, no corresponding changes were introduced in its punishment, which was always death without benefit of clergy. Nor could it be otherwise. For once the death penalty is established as the most effective instrument of crime-prevention, there can be no valid reason for invoking it to suppress one offence and not another.[23]

II

§ 2. THE ORIGINS OF THE WALTHAM BLACK ACT

In 1722 a statute was enacted (9 Geo. 1, c. 22) bearing the title: 'An Act for the more effectual punishing wicked and

[22] See for instance *R.* v. *Hamilton and Chesser* (1784), 1 Leach 348, in which the prisoners were convicted under 12 Anne, st. 1, c. 7, because it had been doubted whether they could have been indicted under 1 Edw. 6, c. 12, s. 10.

[23] For a partial revision of this branch of law in the nineteenth century, see below, pp. 582–584, 601–604 and 605.

evil disposed Persons going armed in Disguise, and doing Injuries and Violences to the Persons and Properties of His Majesty's Subjects, and for the more speedy bringing the Offenders to Justice'. This statute is commonly known as the Waltham Black Act—a name indicative of the local circumstances which led to its being passed. According to Blackstone,[1] the statute was enacted to stop the depredations being committed near Waltham, in Hampshire, by persons in disguise or with their faces blacked; he also observes that the technique of these offenders, who operated in the forests of Waltham, seemed to have been modelled on the criminal activities of the famous band of Roberdsmen, or followers of Robert, or Robin, Hood, who committed great outrages in the reign of Richard the First on the border of England and Scotland.[2] An interesting reference to the Waltham Black Act occurs in Gilbert White's *The Natural History and Antiquities of Selborne in the County of Southampton*,[3] and it is significant that he calls

[1] 4 Comm. 245.

[2] The activities of Robert Hood and his followers gave rise to so many important penal statutes that Coke, 3 Inst. 197, devotes a short chapter to them, which he opens with the following picturesque paragraph: 'It is an English Proverbe; that many men talk of Robin Hood, that never shot in his bow: and because the statutes and records hereafter mentioned cannot well be understood, unless it be known what this Robin Hoode was that hath raised a name to these kinde of men called Roberdsmen, his followers, we will describe him'. Coke represents him as being nothing more than a brigand who lived 'in woods and deserts, by robbery, burning of houses, felony, waste and spoile, and principally by and with vagabonds, idle wanderers, night walkers, and draw-latches: . . . And albeit he lived in Yorkshire, yet men of his quality took their denomination of him and were called Roberdsmen throughout all England'. This description is somewhat misleading, for it takes no account of the social background of the crimes of Hood and his followers; see on this C. J. Ribton-Turner, *History of Vagrants and Vagrancy and Beggars and Begging* (1887), pp. 30–31.

[3] 'Though large herds of deer do much harm to the neighbourhood, yet the injury to the morals of the people is of more moment than the loss of their crops. The temptation is irresistible, for most men are sportsmen by constitution: and there is such an inherent spirit for hunting in human nature, as scarce any inhibitions can restrain. Hence, towards the beginning of this century, all this country was wild about deer-stealing. Unless he was a *hunter*, as they affected to call themselves, no young person was allowed to be possessed of manhood or gallantry. The *Waltham Blacks* at length committed such enormities, that government was forced to interfere with that severe and sanguinary Act called the *Black Act*, which now comprehends more felonies than any law that ever was framed before. And, therefore, a late bishop of *Winchester* (Dr. Hoadly) when urged to stock *Waltham Chase*, refused, from a motive worthy of a prelate, replying that "It had done mischief enough already"'; (Bell's ed., 1877), Vol. 1, pp. 19–20. An

it 'severe and sanguinary' and states that 'it comprehends more felonies than any law that ever was framed before'.[4] Actually, no other single statute passed during the eighteenth century equalled 9 Geo. 1, c. 22, in severity, and none appointed the punishment of death in so many cases. The Waltham Black Act may, in fact, be looked upon as a kind of 'ideological index' to the large body of laws based on the death penalty which were in force in England at the end of the eighteenth and the beginning of the nineteenth centuries. The main features peculiar to this Act reappear, sometimes in a modified form, in many other capital statutes of the period. Thus an accurate knowledge of the Waltham Black Act is essential if the guiding principles of penal legislation based on capital punishment are to be understood; moreover, the fact that the struggle for the repeal of this extraordinary statute was both intense and prolonged further enhances the symptomatic importance of the Act, which might otherwise seem to be but an obscure enactment designed to meet a purely local emergency.

§ 3. OFFENDERS DEALT WITH UNDER THE ACT

Its wide scope

Persons, 1, *armed and having their faces blacked;* 2, *armed and otherwise disguised; persons,* 3, *having their faces blacked;* 4, *otherwise disguised;* 5, *any other person or persons;* 6, *principals in the second degree;* 7, *accessories after the fact* (*in certain cases*).

Thus a very wide range of persons could be brought within

interesting description of a band of blacks is contained in a letter of a gentleman from Essex to his friend in London; see *Lives of the Most Remarkable Criminals* (ed. by A. L. Hayward, 1927), pp. 171–74. In a letter to the editor of the *Gentleman's Magazine* (1802), Vol. 72, Part I, p. 304, 'R. C.' writes (referring to an earlier letter to the editor from another correspondent): 'Is X. Y. p. 100, perfectly accurate in deducing "Waltham Blacks" from "Waltham Forest, in *Essex*?' They are mentioned by that very exact and interesting writer, Mr. White, in his *History of Selborne*, pp. 17, 18; and he evidently supposes 'Waltham Chase', in Hampshire, to have been principally infested by them, though Wolmer-forest, and other places in the same county, suffered not a little by their formidable depredations'. See also a letter from 'R. H.', *ibid.*, pp. 36–37, who writes: 'In the animated address of Clarissa to Lovelace, Vol. 5, letter 18, p. 175, she says: "such mean devices, such artful, *such worse than* WALTHAM *disguises*, such bold, such shocking untruths".

[4] See also Blackstone, 4 Comm. 4.

the scope of the Act. For even if none of the aggravating conditions set out under classes 1–4 obtained in a certain case, the delinquent might still be prosecuted and capitally convicted under class 5. Such a wide interpretation was unanimously adopted by the leading authorities. Hawkins, for instance, referring to the Black Act offence of wilfully and maliciously shooting at any person, states that 'this clause of the Act is entire and independent and has no relation whatever to that part of the Act relating to the offenders being armed and disguised'.[5] A similar view was taken in the well-known case of *Arnold*, who was convicted of shooting at Lord Onslow; though his face was not blacked and he was not otherwise disguised at the time of his crime, he was tried and convicted under the Black Act.[6]

Position of principals in the second degree:
(a) *The Case of Midwinter and Sims*

A principal in the second degree was at that time defined as a person who was present when the principal in the first degree perpetrated the crime, aiding and abetting its commission.[7] It was doubted, however, whether the Waltham Black Act could be made applicable to this category of offenders.

None of its numerous provisions refers specifically to principals in the second degree, the Act merely stipulating that 'every Person *so offending* (our italics), and being convicted, shall be adjudged guilty of Felony, and suffer Death without Benefit of Clergy'. It could be asserted, therefore, that these words were intended to relate exclusively to those who actually committed any of the numerous crimes dealt with under the Act, and that other persons, involved in their commission as aiders and abettors, were not to be deprived of the benefit of clergy and might thus escape capital punishment, even if found guilty. Those who inclined towards this view could invoke the corroborative opinion of many high authorities as well as the

[5] 1 P.C. 630, s. 4.

[6] 16 St.Tr. 744. This unique collection has not yet been fully exploited, though it is hardly possible to over-estimate its value from a historical as well as legal point of view. See on this the delightful study of Leslie Stephen, 'The State Trials', *Hours in a Library* (1892), Vol. 3, pp. 306–338.

[7] See above, note 15, at p. 6.

precedent of settled judicial practice, that capital statutes should be construed very strictly and in favour of the accused. 'Where any statute subsequent to 25 E. 3 *cap.* 4', writes Hale, 'hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes for *in favorem vitae et privilegii clericalis* such statutes are construed literally and strictly'.[8] This restrictive interpretation was also strongly supported by Foster, whom De Grey, C.J., described as 'the Magna Carta of liberty of persons as well as of fortune'.[9]

However, the opinions of these great authorities were set aside, and the provisions of the Black Act so interpreted as to cover principals in the second as well as in the first degree. This decision was first given in the case of *Midwinter and Sims*. The case was tried at the Lent Assizes for the County of Gloucester in 1749 before Foster, J., who was inclined to take an opposite view, but when the case was referred to all the judges, Foster's judgment was overruled,[10] and sentence of death was passed on Sims,[11] who was a principal in the second degree to the crime perpetrated by Midwinter.[12] Foster justified his opinion on the following ground[13]: '*Sims* was undoubtedly a felon in consideration of law: for he who takes any part in a felony, be it a felony at common law or by statute, is in construction of law a felon, according to the share

[8] 2 P.C. 335.

[9] E. Foss, *A Biographical Dictionary of the Judges of England* (1870), p. 279. In it Foss also quotes the following passage from Churchill's 'Rosciad':—

'Each judge was true and steady to his trust,
As Mansfield wise, and as old Foster just.'

[10] 1 Leach, 66–69, note (*a*). This decision was upheld by Lord Mansfield in *R.* v. *Royce* (1767), 4 Burr. 2075.

[11] Both Sims and Midwinter were afterwards reprieved.

[12] The circumstances of this case were as follows: Midwinter, Sims and Taylor felt a resentment against the prosecutor on account of a prosecution which he had initiated against them for stealing rabbits. They agreed to take revenge by killing one of the prosecutor's breeding mares. With that intent they all went at night to a close where his breeding mares were kept and then 'Midwinter, with the assistance of the other two, caught one of the mares, and buckled his own girdle about her neck, fastening a girdle of Sims' to his own, while Sims took hold of the girdle, fixed in this manner, to the mare's neck, and held it straight in order to prevent the mare getting away, or starting from the blow'. Then with a large sharp hook Midwinter inflicted on the mare a deep wound in the belly, of which she died; Foster, *Crown Law*, p. 145, and 1 Leach 66, note (*a*).

[13] *Crown Law*, p. 417.

which he takes in it; if he incites and is present, he is a principal felon, but in the second degree; if he incites and is absent, he is an accessory before the fact; if he receives and harbours the principal knowingly, he is an accessory after the fact. But though, by the common law thus operating upon the statute, *Sims* may be considered as a principal felon because in construction of law the stroke given by *Midwinter* is the stroke of *Sims*, yet still it may be very questionable whether *this legal fiction (for it is no more)* ought to have been carried so far as to oust him of his clergy; since aiders and abettors are nowhere mentioned in the act, and acts of so penal a nature ought to be construed literally and strictly'. And he expressed the hope [14] that when this point should again come in judgment 'it may deserve consideration whether, *with regard to the allowance of clergy*, the offence of a person aiding and abetting may not, in the construction of so penal a law, be severed from the offence of him who actually gave the mortal wound'.[15]

(b) *The Coal-heavers' Case*

But it was mainly owing to the *Granger's Case*—known as the *Coal-heavers' Case*—that the broad construction thus put upon

[14] *Ibid.*, pp. 416–417.

[15] According to M. Dodson, a nephew of Foster and himself a lawyer, Foster omitted this case from the first edition of his *Crown Law* at the express desire of Lord Mansfield; see *The Life of Sir Michael Foster* (1811), p. 32, where Dodson reproduces the following interesting letter which Mansfield wrote to Foster in February, 1762:

'My dear sir,

I return your papers, which I have read with great pleasure and approbation; but I very much wish, that you would not enter your protest with posterity against the unanimous opinion of the other judges in the case of Sims. If the determination was contrary to the former authorities, there is no hurt in it. Sims was in every view equally guilty, and in the very same degree. In real truth, and not by fiction of law, they both did the act. Midwinter might not have been able to maim, had not Sims holden, etc. The authorities which you cite prove strongly to the contrary; but they seem to be founded in subtle nicety, and very literal interpretation; not upon the large principles which you lay down, the doing justice to the publick, and adapting the punishment to the degree of guilt. It is impossible to say that Sims was not equally criminal; and, if his punishment was less, it could only arise from a slip in penning the act. The construction is agreeable to justice: and therefore, suppose it wrong upon artificial reasonings of law, I think it better to leave the matter where it is. It is not *dignus vindice nodus*.

I am, with great truth,
Yours most affectionate, etc.
Mansfield.'

To this edition (3rd) of Foster's treatise Dodson appended a memorandum

the Waltham Black Act became firmly established, and that it subsequently determined the ruling in a series of similar cases under the same statute.[16] The judges to whom the case was referred for consideration based their decision on the grounds that the offence ' was a *new-created felony*, and therefore it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law. The statute does not merely take away the privilege of clergy from an offence which was before known, but ordains that those *who are guilty*[17] of the thing prohibited by it shall be adjudged felons without benefit of clergy; and therefore, by a necessary implication, makes all the procurers and abettors of it principals or accessories upon the same circumstances which will make them such in a felony by the common law; and it hath been long settled that all those who are present aiding and abetting when a felony is committed are principals in the second degree '. In the *Coal-heavers' Case* sentence of death was passed on all the seven men who took part in the commission of the offence, although only four of them actually fired shots and the other three, while present, made no use of any firearms themselves. On July 26, 1768, all seven were executed.[18]

Commenting on this case, Dodson rightly observes that it ' is exactly similar to the case of *Midwinter and Sims*, and if Mr. Justice *Foster's* opinion in that case be well founded,

which Foster drafted during the trial and in which he embodied his reasons for not concurring with the other judges; see *Crown Law* (1792), pp. 415–430. This memorandum—surveying the legal position of principals in the second degree under the main statutes imposing capital punishment without benefit of clergy—constitutes a masterly exposition of this intricate branch of English criminal law up to the middle of the eighteenth century. As regards the point at issue, according to Dodson, Foster's exposition amounted ' to a demonstration, that all those learned judges have mistaken the law. *Sims* might deserve as severe a punishment as *Midwinter*; but no punishment which is not authorised by law ought to be inflicted on any man, and the point is, Whether the law in this case hath provided the same punishment for both '; *ibid.*, pp. iv–v.

[16] *Coal-heavers' Case* (1768), 1 Leach 64; on this particularly ruthless outburst of violent criminality see the account of Horace Walpole, below, note 2, at p. 425.

[17] By using the expression ' *who are guilty* '—unknown to the statute—the judges most probably intended to indicate what according to them was the actual meaning of the expression ' *every person so offending* ' occurring in the statute.

[18] The ruling given in the *Coal-heavers' Case* had also had a direct bearing on certain essential rules of criminal procedure and made the operation of the Black Act still more stringent. See, on this point, below, pp. 71–72.

namely, that the benefit of clergy is taken away only from persons *actually* committing the offence, it follows necessarily that three of these men suffered a more severe punishment than the law authoriseth '.[19]

It would seem that Foster's opinion was shared by Blackstone, who framed the following ingenious formula respecting the punishment of principals in the second degree within the absolute capital statutes: ' That when the benefit of clergy is taken away from the *offence* (as in case of murder, buggery, robbery, rape and burglary), a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, that where it is only taken away from the *person committing* the offence [20] (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally '.[21] When writing about the ancient treatises on criminal law, Stephen states that Hale's work, though an outstanding contribution to the subject, is unfortunately ' marred by the endless technicalities about principal and accessory, about benefit of clergy, about the precise interpretation of obscure phrases in statutes '.[22] Professor Winfield considers this objection ill-founded, for, as he puts it, ' this criticism hardly takes account of the importance of these topics in Hale's time '.[23] Judging from the *Coal-heavers' Case*, it can hardly be an exaggeration to assert that the very lives of offenders, even at the end of the eighteenth century, often largely depended on the way in which these ' obscure phrases in statutes ' were interpreted by the courts.

Position of accessories after the fact

The already wide range of persons who could be capitally convicted under the Black Act was still further extended by the stipulation that in certain cases even an accessory after the

[19] Preface to Foster's *Crown Law* (1792), p. vii.

[20] The expression may be considered as the equivalent of the phrase ' every person so offending ' used by the Waltham Black Act and quoted above, p. 52.

[21] 4 Comm. 373.

[22] *H.C.L.*, Vol. 2, p. 212.

[23] *The Chief Sources of English Legal History* (1925), p. 327.

fact, *i.e.* a person who knowingly receives, relieves, comforts, or assists the felon, was to suffer the death penalty.[24] Almost all the provisions of the Black Act lay down that offenders not surrendering themselves pursuant to an order of the King in Council should also be deprived of benefit of clergy together with those who 'after the times appointed as aforesaid[25] for the surrender of any person so charged upon oath with any of the offences aforesaid be expired, conceal, aid, abet, or succour such person, knowing him to have been so charged as aforesaid, and to have been required to surrender himself by such an order or orders as aforesaid, being lawfully convicted thereof'.

§ 4. OFFENCES DEALT WITH UNDER THE ACT

To appear armed and disguised in certain places

(1) *High Roads.*
(2) *Open Heaths.*
(3) *Commons.*
(4) *Downs.*
(5) (a) *Forests,*
(b) *Chases,*
(c) *Parks,*
(d) *Paddocks,*
(e) *Grounds enclosed by any wall, pale or other fence,*
where any deer have been or shall be usually kept.
(6) (a) *Warrens,*
(b) *Any other places,*
where hares or conies have been or shall be usually kept.

The simple appearance, without any other crime being committed or even attempted, by anyone with his face blacked or otherwise disguised in any of the places set out above, constituted an offence under the Waltham Black Act, for which a convicted offender was liable to be sentenced to death without benefit of clergy. Such is the actual meaning of this remarkable provision, and such is the construction which was put upon it by the highest judicial authorities.[26]

The following case—tried by Lord Hardwicke when Chief Justice—may be quoted as an example; it was brought to the

[24] See class 7 at p. 51 above.
[25] The time period specified by the statute is forty days.
[26] The several facts mentioned in the Act are not to be taken as being parts of the same offence, but are each of them a separate offence; *R.* v. *Baylis and Reynolds* (1736), Cas.T.Hard. 292. It would seem that Lord Hardwicke was wrong in interpreting this section of the Acts as if it was irrelevant whether or not the persons were armed; *ibid.*, note 1.

knowledge of an important Parliamentary Committee in 1819 by Sir Archibald Macdonald, formerly Solicitor-General and Lord Chief Baron of the Court of Exchequer.[27] The establishment of turnpikes at first provoked much resentment, and in Herefordshire a great number of persons assembled together, masked and disguised. They were opposed on the road by the magistrates, who apprehended them before they had even attempted to commit any other offence in connection with the turnpike; however, it came out in evidence that their object had been to pull down the turnpike gate. Lord Hardwicke, who tried these men under the Black Act, told the jury 'that every crime specified in that Act was a distinct and separate crime; they had no connection one with the other, but although it might be right enough to let in the evidence of the intent, yet that which the jury had to look to was *entirely independent of that circumstance* (our italics). The words of the statute were, "appearing with a black face or otherwise disguised upon the road": Did the prisoners or not so appear?' Sir Archibald Macdonald added when describing this case, that the men were convicted and ordered to be executed on that point only, but that he was not aware whether they were actually put to death. Additional information on the case is available in the detailed, though not sufficiently critical, biography of Lord Hardwicke by Philip C. Yorke, himself a member of this distinguished family. Yorke tells how the case came before Lord Hardwicke on July 5, 1736, and how two men implicated in the offence were sentenced capitally, one being later reprieved, but the other, called Reynolds, being put to death.[28]

Offences against red or fallow deer

Unlawfully (1) *hunting*, (2) *wounding*, (3) *killing*, (4) *destroying*, (5) *stealing deer*; (6) 1–5 *if committed in any places in any of the King's forests or chases, which are or shall be*

[27] 'Report from the Select Committee on Criminal Laws' (1819), 585; *Parl. Papers* (1819), Vol. 8, p. 1, at pp. 49–50.

[28] *Life of Hardwicke* (1913), Vol. 1, p. 132. On this execution see below, p. 186. See also the case of one Charles Towers, who was executed in 1725 for being disguised 'contrary to the Statute made against those called The Waltham Blacks'; *Lives of the Most Remarkable Criminals* (ed. by A. L. Hayward, 1927), p. 194 *et seq.*

inclosed with pales, rails, or other fences, or in any park, paddock, or ground inclosed, where deer have been or shall be usually kept.

The offences 1–5 were first made felonies by 1 Hen. 7, c. 1, which was afterwards superseded by the more comprehensive and much more severe provisions of the Waltham Black Act.[29] These five offences had to be committed by persons who were armed, had their faces blacked, or were otherwise disguised; but if the same offences were committed in any of the King's forests or chases (point 6) it was immaterial whether the offenders were armed and disguised or not. It should also be mentioned that according to East—and to our knowledge his opinion on this point was not contradicted—'though the statute only mentions red or fallow deer, yet the cross breeds, such as what is called a bastard menald, bred from a menald buck and a fallow doe, are within the Act'.[30] This provision of the Waltham Black Act protecting deer was virtually obviated by a liberal judicial decision. The circumstances were as follows: In 1786 a statute was passed[31] repealing a great number of previously enacted laws concerning the punishment of deer-stealers, many of which had become ineffectual. This Act also stipulated that the first offence of stealing, etc., any red or fallow deer should only be punished by a fine, but that the second offence should be considered a felony, and be punished by transportation for seven years. However, although this notable change in the scale of punishment directly affected some of the offences against deer which came under the relevant clause of the Waltham Black Act,[32] *the latter was not included in the list of statutes repealed by* 16 Geo. 8, c. 30. Nevertheless, in *R.* v. *Davis* it was held that this section of the Black Act should be considered to have been repealed, on the ground that when a statute makes an

[29] For an instructive analysis of 1 Hen. 7, c. 1, see Coke, 3 Inst. 74–77. It is also interesting to note that according to Coke this statute compares disadvantageously with what he calls the good old statutes of *carta de foresta*. He refers to 1 Hen. 7, c. 1, as 'this new and ill-penned law' and points out that it was owing to its excessive severity that the judges interpreted it 'strictly', putting upon it what he calls 'a favourable construction'. Obviously his main objections *a fortiori* may be directed against the Black Act.

[30] 2 P.C. 609–610.

[31] 16 Geo. 3, c. 30.

[32] If the offence is committed by persons unarmed.

offence a felony punishable by death without clergy, and a subsequent statute orders a less severe punishment for the same offence, the latter statute virtually repeals so much of the former as relates to the offence in question.[33]

Theft of hares, conies and fish

Robbing of (1) *hares,* (2) *conies,* (3) *any warren or place where conies or hares are usually kept;* (4) *stealing or taking away any fish out of any river or pond.*

These offences again had to be committed by persons armed, with faces blacked, or otherwise disguised, the penalty again being death without benefit of clergy. If, however, the offender was neither armed nor disguised, some of these offences, *e.g.* stealing conies or fish, were declared not to be capital felonies and were punished only by short terms of imprisonment or by fines, even if committed at night time.[34]

Destroying the heads of fishponds

Unlawfully and maliciously breaking down the mound of any fishpond whereby the fish shall be (*a*) *lost, or* (*b*) *destroyed.*

This offence could be committed by any person, not necessarily armed or disguised. The purpose of the provision was to protect the property from the malicious damage by persons whose object was not to steal it but to injure the owner by its destruction, thus satisfying their feelings of resentment or vengeance.[35]

It is hardly necessary to emphasise the extraordinary harshness of this provision of the Waltham Black Act, both in comparison with present legal standards and with the

[33] (1783), 1 Leach 271.

[34] See on this subject 3 Jac. 1, c. 13, and 22 & 23 Car. 2, c. 25, s. 7.

[35] For the very strict interpretation put upon this provision, see the case of one Thomas Ross, tried in 1800 before Chambre, J., and afterwards referred to all the judges for their consideration. In this case it was established that the object of the prisoners was to steal the fish and not to let them escape through the breach in the mound; the judges therefore concluded that the conviction was wrong, as the clause against breaking the heads, etc., of ponds did not extend to cases where the purpose of the party was to steal the fish, which were protected by another clause of the Act, and that even if the offence proved had been originally within the Black Act it was virtually taken out of it by the subsequent statute of 5 Geo. 3, c. 14; Russell, *On Crimes* (1819), Vol. 2, p. 1711.

eighteenth century English criminal law, although the latter abounded in excessive punishments. Its extreme severity is revealed still better when it is contrasted with the old law which it superseded and with some other contemporary statutes dealing with very similar offences. The Black Act superseded 37 Hen. 8, c. 6, s. 4, by which offenders might be fined, and were also liable to pay treble damages to the injured party, to be recovered by an action of trespass. The Black Act may also be compared with 5 Eliz., c. 21, which was still in force when it was enacted, and which related to the similar offence of breaking the heads or dams of ponds and stealing fish. The Act of Elizabeth provided that the offender found guilty under its provisions should suffer imprisonment for three months and pay the injured party treble damages, and also imposed on him the obligation, after the expiration of his sentence, of finding sureties for his good behaviour for another seven years, failing which he was to remain in prison until such sureties should be found. Neither 37 Hen. 8, c. 6, nor 5 Eliz. c. 21, originated in a period of English history remarkable for leniency in the administration of criminal justice, yet both were more humane than the Black Act. It is mainly owing to this provision that the Black Act has found a place in the great historical works on the eighteenth century, its section relating to breaking down the mound of a fishpond being quoted as a classical illustration of how irrational and inhuman criminal law then was.

Destroying trees

(1) *Unlawfully and maliciously to cut down*	(a) *any trees planted in any avenue, or* (b) *growing in any garden, orchard or plantation—for ornament, shelter or profit.*
(2) *or otherwise destroy*	

Though the statute uses the word ' trees ' in the plural, and other Acts relating to similar offences, such as 6 Geo. 8, c. 36, or 6 Geo. 8, c. 48, speak of ' tree or trees ', it was maintained that the expression in the Black Act might also be construed

[36] See, for instance, Lecky, *History of England in the Eighteenth Century* (1903), Vol. 7, p. 317.

singulariter. This was in accordance with the construction put on 22 & 23 Car. 2, c. 7, s. 2; although this statute made it a felony to burn any *ricks* or *stacks* of corn, etc., in the night, yet the burning of only *one rick*, etc., was held to be within its scope.[37]

The fact that this was one of the most penal sections of the Black Act most probably accounts for the tendency of the courts to have recourse to considerable subtleties to avoid putting it into operation. Thus we have it on the authority of Sir James Mackintosh that the expression 'cut down or destroy' was often interpreted in the sense that if a tree could be engrafted again it was not destroyed, but that to come within the meaning of this Act it must be utterly rooted up. He quoted the case of a man who out of resentment against his master cut down 500 trees in his nursery; the court decided that wherever the trees could be engrafted again they were not destroyed, and therefore that the offence could not be brought within the Black Act.[38] But not all the courts put so lenient a construction on this provision. Thus William Potter, a thirty-year-old agricultural labourer, married and with a family, cut down an orchard of young trees which a neighbouring miller had planted three years before and carefully cultivated. Committed by Robert Torin, the magistrate, and tried before Heath, J., in August, 1814, at the Essex County Assizes, he was indicted under the relevant section of the Waltham Black Act and sentenced to death.[39] Five years later, the committing magistrate, Robert Torin, stated before the Committee of 1819 that the sentence of death 'rather struck us all with surprise; the miller, the clergyman of the parish, and several of the inhabitants, presented a petition, and I signed my name to it'.[40] This petition failed to achieve its

[37] Russell, *On Crimes* (1819), Vol. 2, p. 1702.

[38] See 'Report from the Select Committee on Criminal Laws' (1819), 585; *Parl. Papers* (Reports, 1819), Vol. 8, p. 45.

[39] A similar decision was pronounced in *R.* v. *Taylor* (1818), Russ. & Ry. 373; see below, p. 65.

[40] *Op. cit.*, p. 87. This petition, addressed to the Secretary of State at the Home Office, Lord Sidmouth, contained the following significant paragraph which throws a vivid light on an important aspect of certain capital statutes to which no adequate attention was paid, particularly by those mainly responsible for the framing of such laws: 'I beg leave to suggest to your lordship, that I am well assured, when he committed the act for which he stands condemned (*viz.*, cutting down the trees) he was not sensible of the heinousness of the

purpose, and William Potter was executed. Commenting upon this case, the Committee states that ' Penal laws are sometimes called into activity after long disuse, and in cases where their very existence may be unknown to the best informed part of the community; malicious prosecutors set them in motion; a mistaken administration of the law may apply them to purposes for which they were not intended, and which they are calculated more to defeat than to promote '.[41]

The law concerning this offence became even more irrational and confused with the subsequent enactment of 6 Geo. 3, c. 36, and 6 Geo. 3, c. 48. It is symptomatic of the unmethodical way in which penal laws were drafted that these two statutes contain no reference to each other although both were passed during the same session of Parliament; moreover, neither of them mentions the relevant section of the Waltham Black Act, though all relate to a similar matter. The preamble to 6 Geo. 3, c. 36, states that ' divers Persons have, of late Years, wilfully and maliciously cut down, barked, or otherwise destroyed, Timber Trees, and Trees standing for, and likely to become, Timber, growing as well in the several Forests, Chases, and other open Grounds, as in the Woods, Plantations, and in closed Grounds, within this Kingdom; to the great Detriment of the Owners of such Trees, and to the Discouragement of Planting '. It refers further to the practice of plundering nursery grounds of valuable roots, shrubs and plants, enacting

offence, or aware of the punishment which awaited it; and I believe very few of the lower orders of the people are acquainted with the terms of the Black Act '; *ibid.*, p. 88.

[41] *Ibid.*, p. 6. Accordingly, the Committee recommended that penal laws that had not been implemented in Middlesex for more than a century, in the counties round London for sixty years, and in the extensive district of the Western circuit for fifty years, should be deemed either unsuitable or superfluous and should be expunged from the statute book; *ibid.*, p. 5. This was undoubtedly a very imaginative and arresting proposal. In England, however, according to Dr. C. K. Allen, ' Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted in our jurisprudence that a statute might become inoperative through obsolescence '; *Law in the Making* (1939), p. 393. Possibly the Committee's proposal was an offspring of the doctrine of desuetude which was accepted in some cases up to the end of the eighteenth century, and according to which ' if a statute had been in existence for any considerable period *without ever having been put into operation*, it might be treated as null '; *ibid.*, note 4, p. 394. Apparently in Scotland, Acts can go into disuse by a posterior contrary custom; Allen quotes in support of this statement the opinion of the great Scottish jurist Stair, *Inst.*, 12; and that of Erskine, *Principles of the Law of Scotland*, 6.

that any such offence, when committed at night, should amount to a simple felony and be punished by transportation for seven years. Similar penalties were appointed for *wilfully* aiding, abetting, or assisting in the commission of this offence, or for buying or receiving such roots, shrubs or plants. Under 6 Geo. 3, c. 48, the similar offences of wilfully destroying, cutting down, carrying away, etc., any timber tree, or trees likely to become timber, or any plant thereof were to be punished with fines not exceeding £20 for the first and £30 for the second offence. Only upon a third conviction was the offence to be regarded as a simple felony, to be punished with transportation for seven years. Thus, apart from contradicting each other, both these statutes were in disagreement with the relevant section of the Black Act.

To explain these and similar incongruities contemporary commentators had recourse to very subtle interpretation. Thus East writes[42]: 'The offences in the Black Act which consist in "cutting down, or otherwise destroying any *trees* planted in any *avenue* or growing in any *garden*, *orchard*, or *plantation*, for *ornament*, *shelter*, or *profit*", must be charged to be done "*unlawfully and maliciously*", in the words of the act: these words are not to be found in the enacting part of the stat. 6 Geo. 3, c. 36, which describes the acts therein prohibited to be done in general terms; but the words "*wilfully and maliciously*" are annexed to the description of the same offences described in the preamble[43]; and therefore it may be doubtful whether they do not enter into the necessary description of the offences enacted: and the word *wilfully* is expressly inserted in the enacting part of the corresponding statute of the 6 Geo. 3, c. 48; and also in that part of the stat. 6 Geo. 3, c. 36, which respects aiders and abettors. Also the Black Act has the word *trees* in the plural, whereas the latter statutes have the words "*tree or trees*". But it may be doubtful whether the former expression may not be construed *singulariter*, as other statutes in the plural have been sometimes interpreted where the sense pointed to it.[44] Besides which the Black Act extends to "*any* trees", in the places there pointed out;

[42] 2 P.C. 1061–1062.
[43] Above, p. 63.
[44] Above, pp. 61–62.

whereas the statutes of the 6th Geo. 3 are confined to *timber* trees or *trees standing for and likely to become timber*.[45] These latter, however, comprehend all such trees growing not only in open grounds but in "woods, *plantations*, and *inclosed grounds*", as stated in the preamble, which general description seems to cover the more particular description of places mentioned in the Black Act.' Having thus pointed out the close affinity between these Acts, East proceeds to explain why they appointed different punishments.[46] The most important distinction of all was, in his opinion, 'the view and intent of the Black Act contrasted with the other statutes. Supposing the words "*wilfully and maliciously*" which occur in the preamble of the stat. 6 Geo. 3, c. 36, of which the first only is used in the enacting part of the stat. 6 Geo. 3, c. 48, are a descriptive part of the offence under those statutes, yet the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shews that the word *maliciously* is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done malo animo from an unjust desire of gain, or a careless indifference of mischief. Whereas, . . . under the Black Act, the *malice* must be personal against the *owner* of the property'.[47]

While very ingenious, East's reasoning does not fully justify the widely differing punishments appointed for these offences by the relevant Acts. This point came up again for judicial consideration in *R.* v. *Taylor*.[48] The prisoner was indicted under 9 Geo. 1, c. 22, s. 1, for unlawfully, maliciously and feloniously cutting down 121 apple and pear trees valued at £20, and was tried at the Old Bailey before Wood, B. Counsel for the defence raised two objections. First, that the case was not within the Act because the trees had only been cut down, whereas the words of the statute imply that they must be actually destroyed, both branch and root.[49] Secondly,

[45] Above, p. 63.
[46] 2 P.C. 1062.
[47] And in support of this construction East quotes same clauses of the Waltham Black Act, such as that relating to the killing or wounding of cattle, in which it had been held that the malice must be directed against the owner of the cattle (see below, p. 67), and maintains that the same construction should be put on the clause relating to destruction of trees.
[48] (1818), Russ. & Ry. 373.
[49] See also above, p. 62.

that the Waltham Black Act might be considered as virtually repealed by 6 Geo. 3, c. 36, and 6 Geo. 3, c. 48. The jury found Taylor guilty, but agreed that the trees cut down were not thereby totally destroyed. The case was reserved for the consideration of the judges, who held (a) that since these fruit trees were being grown for profit, cutting them down without totally destroying them was sufficient to bring the case within the statute; and (b) that since the two Acts of George III related to cases where there was no malice against the owner, they did not repeal the Waltham Black Act.[50]

Offences against cattle

Maliciously (1) *killing*, (2) *maiming*, (3) *wounding any cattle*

The wide scope of this clause is obvious from its wording, which is characteristic of the whole statute. The three offences might be committed by any person, or persons, whether armed or disguised, or not. It should be noted that the term ' any cattle ' was to be interpreted in its most generic form so as to include all possible species of cattle. In *R.* v. *Paty* the prisoner was convicted on an indictment under this clause of killing a mare and a colt. An attempt was made to prove that the word ' cattle ' did not include horses, mares, and colts. Several statutes were quoted in support, such as 3 & 4 Edw. 6, c. 19, and 31 Geo. 2, c. 40, which specifically enumerated different sorts of animals, as well as other statutes which, like 12 Car. 2, c. 4, and 22 Car. 2, c. 13, explicitly excluded ' horses and mares ' from the word ' cattle '. But it was unanimously held that the Black Act must be considered as enlarging the description of the felony laid down by 22 & 23 Car. 2, c. 7, and it was accordingly agreed that judgment of death should be passed on the prisoner at the next assizes.[51] It is also

[50] Russ. & Ry. 375.

[51] *R.* v. *Paty* (1770), 1 Leach 72; 2 Black. 721–722. The sentence was later commuted to transportation, and upon a strong application from the county, a free pardon was ultimately granted. The courts were, however, reluctant to put a restrictive construction upon this section of the Act; thus in the case of *Robert Mott*, tried at the Old Bailey September Session in 1783 and convicted of wounding a gelding, Hotham, B., acting on the authority of *Paty's Case*, overruled an objection in arrest of judgment; 1 Leach 73, note (*a*). Similarly in *R.* v. *Whitney*, the judges to whom the case was referred for consideration determined that asses were cattle within the meaning of the Act; (1824), 1 M.C.C. 3. In *R.* v. *Chapple*, pigs were held to be cattle within the meaning of the Act; (1804), Russ. & Ry. 77.

interesting to observe that under the Act it was not necessary for the maiming or wounding to be mortal, or for the wounding to cause a permanent injury. In the case of *Haywood* the horse was rendered useless to the owner, and continued so at the time of the trial, the offender having driven a nail into the frog of the horse's foot; it was stated, however, that it would be perfectly sound again in a short time. Judgment was respited after conviction, on the doubt whether—as the horse was likely to recover and the wound was obviously not a permanent injury—the offence was within the statute. The judges held the conviction right and considered the word 'wound' to be used in contradistinction to a permanent injury, such as maiming.[52]

Finally, though the killing or injuring of the animal had to be motivated by malice towards its *owner* and not towards the animal[53] yet, in order to bring the case within the Black Act no express evidence of *previously existing malice* against the owner was necessary. If the fact was proved to have been done wilfully, thus indicating a brutal or malignant mind, it was left to the jury to ascertain the offender's real motive.[54] The proviso that the maiming of the cattle must be directed against the owner was, however, interpreted very strictly. Thus, when it appeared that a prisoner tried before Abbott, C.J.,[55] had wounded and killed a certain number of sheep and lambs belonging to the prosecutrix because he felt some resentment against her daughter, the jury found him guilty, but Abbott submitted that the case was not within the Waltham Black Act. It was then referred to the judges, who held that since the daughter of the prosecutrix could in no

[52] East 2 P.C. 1076–77, § 20.

[53] See *R.* v. *Pearce* (1789), 1 Leach 527. The facts of this case were that the prisoner had attempted to commit bestiality with a cow and because she would not stand quiet, he had run a sharp-pointed stick through her body. At his examination before the magistrate he admitted the fact, and declared that he would not have hurt the cow had she permitted him to accomplish his desires. Heath, J., declared that since the act had been done out of anger and passion towards the beast itself and without any intention of injuring the owner, the case was not within the statute. The prisoner was accordingly acquitted of the original charge and tried for assault with intent to commit an unnatural crime—a misdemeanour; he was convicted and sentenced to two years' imprisonment. See also *R.* v. *Shepherd* (1790), 1 Leach 539.

[54] East 2 P.C. 1074, § 16; and Russell, *On Crimes* (1819), Vol. 2, pp. 1687–88.

[55] *R.* v. *Austen* (1822), Russ. & Ry. 490.

respect be deemed the owner of the animals, the conviction was wrong. Great importance was attached also to the technical correctness of the indictment, the conviction in *Chalkley's Case*[56] being held wrong because 'the animal proved by the evidence to have been killed, being a colt generally, without specifying its sex, was not sufficient to support the charge of killing, etc., a mare'.

Setting on fire

Setting fire by any person or persons to any (1) *house*, (2) *barn*, (3) *out-house*, (4) *hovel*, (5) *cock*, (6) *mow*, (7) *stack of* (*a*) *corn*, (*b*) *straw*, (*c*) *hay*, (*d*) *wood*.

1. A delinquent might be convicted under this provision even though, when setting fire, he was neither armed nor disguised. 2. The time of the commission of any of these offences not being specified, they might take place in the daytime or during the night and yet be punished in the same way, though one would have expected a gradation of punishment according to the time when the offence was perpetrated. 3. Further, it was not necessary for any of the above-specified property to be actually burned out, the mere setting of it on fire being sufficient to constitute the offence. In *R.* v. *Salmon*,[57] counsel for the defence submitted that it was not averred in the indictment that 'by reason of setting on fire, the stack of hay was burnt and consumed'. This argument was refuted by the judges to whom the case had been referred, on the ground that the words of the Act were 'set fire to'. 4. It was not necessary to prove that the offender had acted from a malicious motive against the owner of the property. This was held in the same case of *Salmon*, where the prosecutor himself stated that he had known the prisoner nine or ten years and that she had no spite or malice whatever against him, but appeared to have had a grievance against the person who had sold him the stack of hay.[58] 5. The scope of this clause was further broadened by the detailed specification of the possible objects which might thus be criminally set on fire. An older statute,[59] which made

[56] *R.* v. *Chalkley* (1813), Russ. & Ry. 259.
[57] (1802), Russ. & Ry. 26.
[58] *Ibid.*, 27.
[59] 22 & 23 Car. 2, c. 7, s. 2.

it a felony to burn any ricks or stacks of corn, etc., at night, had been interpreted as applying to the burning of even *one*, as well as several ricks.[60] No such doubt could arise in the case of the Black Act, which clearly makes both the main perpetrator of the offence and any principal in the second degree liable to be punished by death without benefit of clergy for setting fire to one stack of corn during the daytime.[61] Moreover, this section makes it as serious an offence to burn a heap of straw during the daytime, as to burn a house at night.[62]

Offences against the person

Wilfully and maliciously shooting at any person* (1) *in any dwelling-house*, (2) *in any other place.

It should first be stated that for this offence to come within the statute it had to be proved that the shooting was malicious, and therefore such as would have amounted to murder, if death

[60] See above, p. 62.

[61] It would seem that setting fire to a parcel of unthreshed wheat was not within the Waltham Black Act. In the case of *R.* v. *Judd* (1788), 1 Leach 484, 485–486, Ashhurst, J., stated: '. . . Now the statute has only made it felony to set fire to a cock, mow, or stack of corn, and the defendant is not charged with either of these. We must suppose that the Legislature well knew the meaning of the words they have used; and if a justice of the peace use the same words, we are bound to suppose that he intended them in the same sense; but if he make use of other words, he must be more precise. Now, here, a parcel of unthreshed wheat is too loose a description. It does not come within the description of the Act. We cannot say how much is meant by the word parcel. Twenty ears of wheat may be called a parcel, but can never be construed either a cock, mow, or stack. . . .' And Grose, J., declared at p. 486: '. . . . if in the act of removing a stack of corn from a farmer's yard to his barn, a small parcel dropped by accident, the setting fire to that parcel would not be an offence within the Act of Parliament'. In *R.* v. *Donnavan* (1770), 1 Leach 69, a prison or common gaol was declared to be a house within the meaning of 9 Geo. 1, c. 22, and in *R.* v. *Winter* (1815), Russ. & Ry. 295, a building within the curtilage (used as a schoolroom) was held to be an 'out-house' within the Black Act, although it did not fall within the usual description of out-houses. In this case the out-house was separated from the dwelling-house by a narrow passage about a yard wide; it had a separate roof, but the roof of the house, which was covered with tiles (that of the school-room being thatched with straw), reached over part of the school-room, and both, together with some other buildings, were enclosed by the same court. On the same point see also the case of *Minton* (1786), East 2 P.C. 1021.

[62] It should be noted that as regards the essential part of the offence in question, *i.e.*, the 'setting fire to', the Black Act did not go beyond the rules laid down by the Common Law. This meant that there must be an actual burning, neither an intention, nor even an attempt to burn a house by setting it on fire being an offence within the Act, unless a part of it was

had ensued.[63] It was not necessary for any evil consequence to follow, but the shooting had to be with a gun or other instrument so loaded as to create danger to the party aimed at, the probable consequence of which would be to kill or maim; it also had to be levelled *at* him.[64] Eden thus refers to this offence: 'The crime of wilfully and maliciously shooting at a person is also made capital, though neither death nor maim should ensue. It is of dangerous consequence to make the attempt to commit a crime, and the actual perpetration of it, equally penal. An assault in any other manner, with intent either to maim or murder, is considered only a misdemeanour'.[65] But neither an accidental shooting, nor a shooting effected—to quote East's words—'in the intemperance of passion' upon such provocation as would in law reduce the homicide to manslaughter, came within this provision of the Black Act.[66] The offence might be committed by any person or persons.

burned; however, it was not necessary that any part of the house should be wholly consumed by fire, the offence being complete even if the fire was put out, or went out by itself. Also, the burning had to be malicious and wilful, failing which it was only a trespass. On the other hand, it was not necessary for the extent of the malicious and wilful burning to correspond exactly with what the party had intended and set out to accomplish; see Coke 3 Inst. 66; Hale 1 P.C. 566, 568, 569; Hawkins 1 P.C. 298; East 2 P.C. 1019 and 1020. The importance of the Waltham Black Act consists in its explicit withdrawal of benefit of clergy from the *principal* in arson, whereas no such direct provision had existed before, for a principal perpetrator in arson could only be deprived of his clergy by indirect inference from 4 & 5 Ph. & M. c. 4, which deprived of clergy *accessories* to this offence; see, for instance, the well-known case of *Powlter*, below, pp. 691–694.

[63] See *R.* v. *Gastineaux* (1786), 1 Leach 417.

[64] See *R.* v. *Empson* (1781), 1 Leach 224; see also *R.* v. *Weston* (1782), 1 Leach 247. Empson was found not guilty only because 'it appeared most clearly that the gun was not pointed towards the place where the prosecutor then was; for that to constitute the offence created by this branch of the Black Act, there must be a shooting at the person, of which fact there was not sufficient evidence in the present case'; 1 Leach 225–226. An interesting case tried under this section of the Waltham Black Act was that of Dr. Elliot (1787). He fired at the defendant from two pistols loaded with powder and wadding only. According to his own words his aim was to kill her. During the trial it appeared that Elliot was insane; he was acquitted, not however because of his mental state, but because none of the pistols had been loaded with a ball. Elliot was then to be tried for assault but he died at Newgate, having refused to take any food or drink; P. Burke, *The Romance of the Forum* (2nd ed., no date), pp. 126–130.

[65] *Principles of Penal Law* (2nd ed., 1771), p. 255.

[66] '. . . neither an accidental shooting, nor a shooting in the transport of passion, excited by such a degree of provocation as will reduce homicide to

It has already been noted [67] that this provision of the Black Act was held to apply to principals in the second degree who were liable to the same punishment as principals in the first degree, *i.e.*, capital punishment without benefit of clergy. This decision also had a bearing upon certain rules of criminal procedure. In 1785, at the Surrey Lent Assizes for Kingston, Gibson, Mutton and Wiggs were tried before Perryn, B.,[68] the case being afterwards referred to all the judges for their consideration. An objection was put forward on behalf of one of the prisoners by W. Garrow, one of the most successful advocates of his day. He claimed that, as this indictment charged the three prisoners *jointly* with the same act of shooting the pistol, and two had been acquitted, *one* only could be convicted of the charge, if the indictment contained separate charges against each of the prisoners, in distinct counts. However, as the prisoner had been convicted of another capital offence at the same time, the judges gave no explicit ruling on this objection, though it seems that they did not consider it well founded.[69]

A year later this point came up again in the case of *Wells*, tried at the Kent Spring Assizes in 1786 before Ashhurst, J.[70] There the indictment stated that the prisoner, and other persons unknown, shot at the prosecutor and, in the second count, that a person unknown shot at the prosecutor and that the prisoner was present aiding, etc. It appeared that the shot was probably *not fired by the prisoner*, but nevertheless Ashhurst, J., told the jury that if they were of the opinion that the prisoner and the other unknown persons acted in confederacy in attacking the prosecutor's house, and that in

the offence of manslaughter, are within the meaning of the statute; for from both of these cases the law excludes every idea of malice'; Serjeant Adair in *R.* v. *Gastineaux* (1786), 1 Leach 417, 418.

[67] See above, *Coal-heavers' Case*, pp. 54–56.

[68] *R.* v. *Gibson, Mutton and Wiggs* (1785), 1 Leach 357.

[69] At the conference Gould, J., mentioned the *Coal-heavers' Case*, and Eyre, B., said that several might be guilty of the same act of shooting 'as if a string were tied to the trigger, and they all pulled it'; see 1 Leach 359, note (*a*). When afterwards, in the case of *R.* v. *Young and Others* (1789), 3 T.R. 105, Buller, J., said: 'Three persons were indicted on the Black Act, for shooting at the prosecutor: they were all charged with the single act; and the indictment was held by all the judges of England to be sufficient', he was most probably referring to the conference held on the case of *Gibson, Mutton and Wiggs*, above.

[70] East 1 P.C. 414, § 7.

furtherance of this design the prisoner or *any of his associates* shot at the prosecutor, they should find the prisoner guilty. The jury acted upon this recommendation, and when the case came up for the consideration of the judges they unanimously held that the direction was right, and the conviction proper, because the *Coal-heavers' Case* was good law. In this way the *Coal-heavers' Case* greatly helped to put the Black Act fully into effect in the case of several offenders acting in association, some of whom remained unknown, while even those brought to trial could not be proved to have been the principal perpetrators. It must, however, be observed that this extensive construction put on the Black Act in respect to aiders and abettors was rather exceptional, for as a rule capital statutes were, on this point, interpreted in favour of the accused, even when such an interpretation was at variance with the principles of Common Law.[71]

No restrictive interpretation was put on the words of the statute 'if any person or persons shall wilfully and maliciously shoot at any person in any dwelling-house or other place, every person so offending shall be guilty of felony, etc.'. In the case of *Harris*,[72] where the prisoner was indicted for wilfully shooting at a bailiff, the defence's contention that the case was not within the Act because the shooting had taken place in the *prisoner's own house* was not accepted by the court. Great importance was, however, attached to the manner of framing the indictment. Thus when in *R.* v. *Durore*,[73] tried before Hotham, B., for maliciously shooting at another in the dwelling-house of *James* Brewer and *John* Sandy, it appeared

[71] Thus in the case of *Page and Harwood* tried under 1 Jac. 1, c. 8, which enacted that 'every person which shall stag or thrust', etc., shall suffer death without benefit of clergy, two persons were present aiding and abetting a third person who made the thrust. These two persons 'though agreed to have been principals in manslaughter at common law, were admitted to their clergy. For, . . . though in judgment of law every one present and aiding is a principal, yet in the construction of this statute which is so penal, it shall be extended only to such as *really and actually made the thrust; not to those who in construction of law only may be said to make it*'; Foster, *Crown Law*, pp. 355–356. See also the case of *Evans and Finch*, tried under 39 Eliz., c. 15, for robbery in a dwelling-house; *ibid.*, pp. 356–357. For a detailed examination of these important cases see below, Appendix 2, pp. 681–682 and 697–698.

[72] *R.* v. *Harris* (1801), 2 Leach 929.

[73] (1784), 1 Leach 351.

that the dwelling-house belonged to *John* Brewer and *James* Sandy, the jury found the verdict of not guilty. This decision is particularly significant since the words of the statute are ' who shall maliciously shoot at any person in *any* (our italics) dwelling-house, or other place ', and the court agreed that this assertion was not necessary to the validity of the indictment. But, it was stated, ' having averred that it was in the House of James Brewer and John Sandy, he (the prosecutor) is bound to prove it as it is laid : now the evidence is, that Mr. Brewer's christian name is not James but John; and that Mr. Sandy's christian name is not John but James; and when a man is charged with a capital offence of so serious a kind as the present, every strictness which the law requires must be attended to '.[74]

Extortion

Knowingly sending any letter demanding money, a remission, or any other valuable thing (1) *without any name subscribed thereto,* (2) *signed with a fictitious name.*

The essential part of the offence was the demand embodied in any such letter of extortion, on the construction of which the operation of the whole section depended. However, in a leading case on the subject,[75] it was ruled that although a mere request, such as asking for charity, without imposing any conditions, was not within the meaning of the word ' demand ', yet the demand need not be made in a peremptory manner, or be accompanied with a threat of bodily harm; as the law did not stipulate the form in which such a demand had to be made in order to bring the case within the statute, it was decided that the courts should determine the matter themselves on the facts of each case. The judges also overruled the objection raised by counsel for the defence, who submitted that the case under trial was outside the scope of the law because the definition of the offence in the statute was at variance with that

[74] As to how procedural technicalities were made use of in order to restrict the operation of capital statutes see below, pp. 98–101.

[75] *R.* v. *Robinson* (1796), 2 Leach 749. The case was tried by Lawrence, J., and afterwards referred to all the judges for their consideration, their opinion being delivered by Buller, J. The prisoner was very ably defended by his counsel, Randall Jackson; *ibid.*, pp. 756–764.

in the preamble.[76] The most striking passage concerning this point of Buller, J.'s exposition of the opinion of the twelve judges runs as follows: ' Where the enacting clause of a statute refers to such offences *only* (our italics) as are contained in the preamble, it may be restrained by the preamble, but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief as the cause of making it, *and yet for the enacting part to embrace more general objects* (our italics) and extend to other cases which the legislature thought within the mischief '.[77]

In addition to putting this construction upon the meaning of the word ' demand ' and so deciding that the definition of the offence given in the preamble was not relevant, it was also held, first, that to send a letter signed with *initials* only, constituted an offence of sending a letter *without a name*, within the meaning of the Black Act; secondly, it was questioned whether a *bank-note* asked for by the prisoner was a *valuable thing* within the meaning of the Black Act, on the grounds that when the Act was passed a bank-note might not have been considered a valuable thing as it was not then an object of larceny.[78] It was resolved, however, that it was sufficient if the thing demanded was valuable at the time when the demand was made, even if it had not existed, or the value of it had not been known, when the statute was passed.

[76] Whereas *the section* described the offence ' that if any person or persons (whether armed or disguised or not), shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, ransom, or other valuable thing ', *the preamble* of the statute reads: ' several ill-designing and disorderly persons have of late associated themselves under the name of *Blacks*, . . . and have likewise solicited several of His Majesty's subjects, with promises of money, or other rewards, to join with them, and have sent letters in fictitious names, to several persons, demanding venison and money, *and threatening some great violence* (our italics), if such, their unlawful demands, should be refused, or if they should be interrupted in, or prosecuted for such, their wicked practices, and have actually done great damage to several persons, who have either refused to comply with such demands, or have endeavoured to bring them to justice, to the great terror of His Majesty's peaceable subjects '.

[77] 2 Leach 765. On the difficulties of ascertaining the import of statutes in the light of their preambles during that period see Sir Fortunatus Dwarris, *A General Treatise on Statutes, etc.* (2nd ed., 1848), pp. 503–508, 659–660 and 664.

[78] This was subsequently altered by 2 Geo. 2, c. 25.

Finally, it was also ruled that it was immaterial whether the letter was sent direct to the prosecutor or not, and that it was sufficient to state in the indictment that the prisoner had sent a letter directed to the prosecutor, without expressly alleging that he had sent it direct *to* the prosecutor.[79] Extorting money by sending threatening letters was a common offence in the eighteenth century, and it was probably partly for this reason that the courts put a liberal construction on the relevant section of the Black Act.[80]

Rescuing any person being in custody under this Act

(1) *Forcibly rescuing any person being lawfully in the custody of any officer or other person for any such offence.* (2) *Procuring by gift or promise of money or other reward any of His Majesty's subjects to join him or them in any such unlawful act.*

These two provisions related to all offences under the Waltham Black Act; they invariably imposed capital punishment without benefit of clergy.

§ 5. PROVISIONS CONCERNING THE CONDUCT OF PROSECUTIONS

It should finally be noted that the Black Act also contains two general provisions relating to the conduct of prosecutions and trial, which were incorporated in this statute with a view to making its administration more stringent. The first stipulates that all Black Act offences may be 'tried and determined in any county in England, in such manner and

[79] See the cases of *Jepson and Springett* (1798); of *Heming* and of *Lloyd* (1767); East 2 P.C. 1115, § 2; 1116; and 1122–23, § 5, respectively.

[80] It should, however, be noted that great care was also taken not to extend the operation of this section of the Waltham Black Act.

The following are the salient points of this restraining trend: first, it was determined that this section of the Act might only be put into effect if an *actual demand* were made, and not when letters had been sent *with a view* or *intent* to extort money but without directly demanding it. Secondly, a distinction was established between a letter and 'writing', the latter being held outside the scope of the Black Act. Thirdly, no case was to be considered to be within the statute if the writer made himself known in the letter, even though he did not append his name. Fourthly, it was also settled that the act of *delivering* a threatening letter was outside the scope of the Act, even were the letter delivered by the husband of the writer.

form as if the fact had been therein committed'. Moreover, it was ruled in connection with such trials that a private prosecutor might initiate his prosecution in whatever county of England appeared to him to be the most conducive to the ends of justice.[81]

The second general provision, contained in section 18 of the Act, which states that the shortness of the time within which prosecutions for offences against the statute of 3 W. & M. c. 10 (an Act for the more effectual Discovery and Punishment of Deer-stealers) had to be commenced, has been an encouragement to offenders; it accordingly enacted that any prosecution for any offence against the said statute, shall or may be commenced *within three years from the time of the offence committed.* This was more severe than many other enactments of the period, which in similar cases specified much shorter time limits.

§ 6. THE SIGNIFICANCE OF THE ACT

Thus the analysis of this remarkable statute shows its provisions to have been so numerous and sweeping that an accurate estimate of the number of offences for which it provided capital punishment without benefit of clergy is impossible. The foregoing paragraph indicates that this number must have been more than fifty; since, however, any of these offences might be committed by one of the seven groups of offenders set out in the first table, the fifty or more capital offences must be multiplied by seven. This would bring the approximate number of cases in which the punishment of death could be ordered under the Waltham Black Act close to over three hundred and fifty. But even if it were maintained that the statute was unlikely to be applied equally to all the seven groups of offenders and that, say, four or five ought therefore to be the figure adopted for multiplication—even then, the final figure would still be over two hundred. It is very doubtful whether any other country possessed a criminal code with anything like so many capital provisions as there were in this

[81] Blackstone, 4 Comm. 304. But it was expressly laid down by the judges that he could not exercise this right for the purposes of injustice and oppression, for the words of the statute are '. . . and for the *better and more impartial trial* of any indictment or information . . .;' *R.* v. *Mortis* (1771), 1 Leach 73.

single statute. No doubt some of the offences embodied in the Black Act called for a severe penalty [82]; but the Act provided the same capital punishment for, say, setting fire to houses and for the more serious cases of bodily assault, as for minor types of larceny. There is hardly a criminal act which did not come within the provisions of the Black Act; offences against public order, against the administration of criminal justice, against property, against the person, malicious injuries to property of varying degree—all came under this statute and all were punishable by death. Thus the Act constituted in itself a complete and extremely severe criminal code which indiscriminately punished with death a great many different offences, without taking into account either the personality of the offender or the particular circumstances of each offence.

Enacted in 1722 for three years only, it was prolonged several times [83] and was ultimately made permanent in 1758.[84] It is interesting to note that Lord Hardwicke included the Waltham Black Act in a reference he made in 1785 to the major penal statutes of that period. Together with several other laws relating to forgery, assault and robbery he regarded it as indispensable in view of 'the degeneracy of the present times, fruitful in the inventions of wickedness'.[85] Since no trace of any parliamentary debate on this subject can be found, it would appear that the successive prolongations of the Black Act were decided upon as a matter of course. The immediate cause of its transformation into a permanent law was a case which came for trial in 1758. A young man, William Barnard, had sent a threatening letter signed with a fictitious name to the Duke of Marlborough, in which he asked for money.[86]

[82] See, for instance, the *Coal-heavers' Case*, above, pp. 53–56, and below, note 2 at p. 425. See also the case of Frankland, who on learning that his servant had been committed to Newgate, went to the office where the justices were sitting and fired one of his pistols, severely wounding a clerk; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, p. 329. On the other hand, in the case of Parvin and others, convicted under this Act of murder and deer-stealing and executed in 1723, the offence of some of the associates—all of whom were executed—had not been equally serious to that of Parvin, and one of them—Edward Elliot—was a youth only about seventeen years old; *Lives of the Most Remarkable Criminals* (ed. by A. L. Hayward, 1927), p. 167.

[83] First in 1726 by 12 Geo. 1, c. 30.

[84] 31 Geo. 2, c. 42.

[85] See above, p. 18.

[86] The letter was signed with the name Felton, the man who had stabbed the Duke of Buckingham at Portsmouth.

Undoubtedly the author of the letter, Barnard was nevertheless acquitted [87]; but the case excited great public interest and stimulated the Legislature to make the Waltham Black Act a permanent measure.[88]

Attention has been drawn already to the great influence this remarkable statute had on subsequent legislation and to how it was directly responsible for the enactment of a number of capital laws.[89] The long struggle for its abrogation, in itself an important chapter in the history of the movement for the reform of criminal law, will be surveyed at greater length elsewhere.[90] It may be relevant at this juncture to mention that the Waltham Black Act remained in force for a whole century, despite frequent attempts to abrogate it. A comprehensive proposal to this effect was made in 1819 by a Parliamentary Committee on Criminal Laws,[91] but Sir James Mackintosh's motion based on it was rejected by the House of Lords.[92] Even as late as 1821, its retention on the Statute Book was strongly urged by the highly influential *Quarterly Review*.[93] Two years later, however, it was virtually

[87] *R.* v. *Barnard* (1758), 19 St.Tr. 815. Counsel for the prosecution himself was not particularly anxious to get a conviction, which could only be the death penalty since Barnard was indicted under the section of the Waltham Black Act relating to sending threatening letters (see above, pp. 73–75); this may be seen from the following passage from his speech: 'Might it not happen, that a man betwixt twenty and thirty years of age, dependent in some measure on his father, might have a secret call for money, which he would wish his father, and those friends that are fond of lending him money, not to be acquainted with? We know very well, there are certain circumstances, some in this capital city of London, where a man might be very hard driven for the want of money, which he would chuse to hide from his friends'. He added that 'with regard to the duke, his grace has discharged his duty which he owed to the public, which he will at all times do, and is perfectly indifferent about the issue of it'; *ibid.*, at pp. 845–846. For the case of a man put to death under this section of the Act see the trial of Bryan Smith in *Most Remarkable Criminals* (ed. by A. L. Hayward, 1927), pp. 221–22.

[88] *Parl. Deb.* (1823), N.S. Vol. 9, cols. 409–410.

[89] Above, note 54 at p. 18.

[90] Below, pp. 548–549, 552, and 580–581.

[91] 'Report from the Select Committee on Criminal Laws' (1819), 585; in *Parl. Papers* (Reports), Vol. 8, p. 1.

[92] Were there many persons called Blacks from whom any danger was to be apprehended at the present time? And if not, what did the existence of such a statute prove, but the unfortunate pertinacity with which bad laws when once adopted were adhered to?' Sir James Mackintosh in the House of Commons; *Parl. Deb.* (1823), N.S., Vol. 9, cols. 409–410.

[93] (1821), Vol. 24, p. 199. According to Professor Elie Halévy the combined circulation of the *Edinburgh Review* and of the *Quarterly Review* in 1814 was 20,000 copies; *History of the English People* (1924), Vol. 1, p. 443.

abrogated by Sir Robert Peel. One of his Bills, which became law on July 8, 1828,[94] repealed all the provisions of the Black Act except those relating to setting fire to property and to maliciously shooting at a person, which remained capital offences. The passing of the Black Act coincided with the ascendancy of the doctrine of undifferentiated and crude retribution; its abrogation was the sign of a new approach to the problems of crime and punishment.

[94] 4 Geo. 4, c. 54; on this Act see below, p. 581.

PART II

ADMINISTRATION OF STATUTES IMPOSING CAPITAL PUNISHMENT DURING THE EIGHTEENTH CENTURY

CHAPTER 3

APPLICATION OF CAPITAL STATUTES BY THE COURTS [1]

IT has already been indicated that at the close of the eighteenth and the beginning of the nineteenth centuries the considerable volume of capital statutes was an expression of the deliberate policy of the Legislature.[2] On the other hand, a survey of the dominant trends of contemporary thought on penal matters shows that this policy was opposed by an advanced section of public opinion.[3] As between these two currents what was then the attitude of the courts? Were they in agreement with the predominant opinion of the day, of which the impressive number of capital offences was a true reflection, or was their action determined by what Dicey calls 'a peculiar cross-current of opinion', the effect of which was to modify the character of parliamentary legislation?

§ 1. INTERPRETATION OF CAPITAL STATUTES

Constructions more restrictive than the rules of strict interpretation would seem to warrant

The dominant tendency in the judicial interpretation of statutes, and particularly of those imposing capital punishment, was to construe them strictly and in cases of doubt to the advantage of the offender.[4] But strict interpretation does

[1] As explained above, p. 3, note 2, the expression 'capital statutes' is herein used to indicate statutes imposing capital punishment.

[2] Above, pp. 35–37 and Chapter 2, p. 41 *et seq.*

[3] Above, pp. 37–38 and below, pp. 336–350.

[4] Thus Bacon, for instance, writes: '. . . if the law be, that for such an offence a man shall lose his right hand, and the offender hath had his right hand cut off in the wars before, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended'; *Works* (ed. by Spedding, Ellis and Heath, 1877–1879), Vol. 7, pp. 360–361; see also *ibid.* Reg. 7 and 8, at pp. 347 and 348; and *ibid.*, Vol. 5, Aph. 8, at p. 90. Similarly Blackstone who writes: 'The freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise

not imply that the statute is to be in effect obviated, or its scope or severity restricted, by having recourse to subtle devices. It means no more than that the scope of a statute should not be enlarged and that it should be administered strictly in accordance with its legal content, as inferred from a logical and literal exposition. A particularly illuminating

than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be restrained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon'; 1 Comm. 92; see also *ibid.* 88 (note 20). Hawkins stresses that it is 'a settled rule, that all statutes are to be construed strictly in favour of life, and that no parallel case, which comes within the same mischief, shall be construed to be within the purview of it, unless it can be brought within the meaning of the words'. He makes a more specific statement elsewhere, declaring 'that all statutes which take away clergy, are to be construed strictly *in favorem vitae*'; 3 P.C. 248, s. 16, and 4 P. C. 261, s. 43. See further Viner, *Abridgment of Law and Equity* (2nd ed., 1793), Vol. 19, p. 520, § 95; and M. Bacon, *A new Abridgment of the Law*, (7th ed., 1832), Vol. 7, pp. 462–463. For some examples of judicial interpretation of the capital statutes before the eighteenth century, see Appendix 2, below, pp. 681–682, 691–694 and 695–698.

The principle of strict interpretation was not extended to the so-called remedial statutes; on these statutes see Blackstone, 1 Comm. 88, note (20), and Viner, *op. cit.*, Vol. 19, p. 520, § 95. For some examples of the liberal interpretation of such statutes see *Platt* v. *The Sheriffs of London* (1550), 1 Pl. 35; *Hammond* v. *Webb* (1715), 10 Mod. 281. Blackstone notes that if a statute can be used both as a remedial and a penal measure, its words may be construed differently, according to the nature of the suit or prosecution instituted under it. 9 Ann. c. 14, s. 2, for instance, (an Act against gaming) provided that if any person should lose £10 *at any time or sitting* and pay it to the winner, he might recover it within three months; if the loser did not sue for it within this time, any other person might 'sue for it and treble the value besides'. In a case in which an action was brought to recover fourteen guineas which had been won at a game, the continuity of which had been *interrupted during dinner*, it was held that since the statute was remedial, as it prevented the effects of gaming without inflicting a penalty, it could be interpreted liberally. Consequently, though the play had been interrupted for dinner, it was considered to have taken place at one time or sitting as required by the statute. It is interesting to note, however, that the court stated that had the action been brought by a common informer for the penalty, a possibility foreseen by the same statute, the latter would then be a penal measure. It would then have been interpreted strictly in favour of the defendant, the money would have been held to have been lost at *two sittings* and the case thus declared to be outside 9 Ann. c. 14, s. 2; 1 Comm. 88, note (21).

On the difficulty of distinguishing between penal and remedial statutes see 'Report on the Consolidation of Statute Law' (1835), 123; *Parl. Papers* (Reports, 1835), Vol. 35, p. 1 at p. 17.

As illustrations of the liberal interpretation of penal statutes touching relatively light offences see the following interesting cases: *R.* v. *Whistler* (1703), 7 Mod. 129; 11 Mod. 25; and Holt 215. *R.* v. *Gage* (1723), 8 Mod. 63. *R.* v. *Simpson* (1714), Gilb.Cas 282. *R.* v. *Hodnett* (1786), 1 T.R. 96.

reference to this important point was made by Lord Mansfield.[5] 'Tenderness', he declared, 'ought always to prevail in criminal cases; so far, at least, as to take care that a man may not suffer otherwise than by due course of law; nor have any hardship done him, or severity exercised upon him, where the construction may admit of a reasonable doubt or difficulty. But tenderness does not require such a construction of words (perhaps not absolutely and perfectly clear and express) as would tend to render the law nugatory and ineffectual, and destroy or evade the very end and intention of it: nor does it require of us that we should give in to such nice and strained critical objections as are contrary to the true meaning and spirit of it'. Buller, J., similarly said[6]: 'It is not true that the courts in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and where they are plain, we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter; but at all events it is only a secondary rule'. It is beyond doubt that if interpreted in accordance with the principles enunciated in these statements, the majority of capital statutes would have been implemented. But the constructions put by the courts on a number of such statutes were much more restrictive than the established rules of strict interpretation would seem to warrant. In following this course the courts must have been actuated by a conviction that for many offences the death sentence was too severe a punishment and that the extreme severity of capital laws should be relaxed.[7]

Referring to a number of cases tried under capital statutes at the close of the eighteenth and beginning of the nineteenth centuries, Professor Jerome Hall describes the process of interpretation then adopted by the judges as 'a long series of

[5] *R.* v. *Royce* (1767), 4 Burr. 2073, 2082.

[6] *R.* v. *Hodnett* (1786), 1 T.R. 96.

[7] 'The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis'; O. W. Holmes, jr., *The Common Law* (1887), pp. 35–36.

technicalities in which they have effectively submerged statutory provisions of capital penalisation '. He states further that they ' went to invent technicalities in order to avoid infliction of the capital penalty ', and that the rules evolved in the course of this process ' were clearly outside the contemplation of the legislature, and sometimes directly opposed to the known legislative intent '.[8] Leading judicial decisions of the period clearly bear out Professor Hall's statement. In one of the appendices to this book[9] these decisions are examined for the light they shed on the dominant trends of judicial interpretation, especially in respect to those capital statutes the revision of which was debated at such great length in Parliament, on the initiative first of Romilly, and later of Mackintosh, Fowell Buxton and Peel. During that period the reformers were concerned primarily with the revision of capital statutes relating to numerous offences against property. Hence the great preponderance of cases of economic criminality in the ensuing survey.

Some early instances of this tendency are provided by the highly restrictive interpretation of 1 Jac. 1, c. 8, known as the Stabbing Statute,[10] of 21 Jac. 1, c. 27—' An Act to prevent the Destroying and Murthering of Bastard Children ',[11] and by the decision given in 1637 in the case of *Evans and Finch*.[12] Before the eighteenth century drew to its close the cumulative effect of a series of constructions had been in effect to obviate certain statutes and to narrow the scope of many others, particularly those relating to offences against property.[13] Sometimes, writes Dr. C. K. Allen, ' a Court will stretch interpretation to its farthest limit in order to effect the " policy " of a Statute '; but at other times, he adds, ' it will prostrate itself before the " foot of the letter " when, to ordinary opinion, it would seem quite easy and reasonable to walk hand in hand with the spirit '.[14] The analysis of the

[8] *Theft, Law and Society* (Boston, 1935), pp. 87, 92 and 95.
[9] Below, p. 660 *et seq.*
[10] Below, pp. 695–698.
[11] Below, pp. 433–434.
[12] (1637), Cro.Car. 474; below, Appendix 2, p. 681. For *Powlter's Case*, usually quoted as an example of a liberal interpretation of a capital statute, see below, pp. 691–694.
[13] Below, p. 660 *et seq.*
[14] *Law in the Making* (3rd ed., 1939), p. 433.

constructions put on many capital statutes in the eighteenth century shows that this had in fact then taken place.

The effects of the restrictive interpretation: (a) Lack of homogeneity

The constructions which the courts often put on statutes may be said to have been 'merciful', or 'equitable', or 'tender', or *in favorem vitae*. But since they were also uneven and unpredictable they did not constitute what in law is understood as a system of interpretation. Some of the basic elements of strict interpretation, the formal and literal approach, for instance, were over-emphasised and made use of in cases which were logically beyond any doubt. Of the numerous cases bearing out this point, one may usefully be quoted here. In the case of *Cook*,[15] tried in 1774 under 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34, for stealing a cow worth £5, it was held that since the stolen animal was only two and a half years old and had never had a calf, it was not a cow but a heifer. And because the relevant Acts mentioned both cow and heifer, it was held further that 'the one must have been used in contradiction to the other; and therefore that the evidence did not support the indictment, and the prisoner was entitled to his acquittal'. The scope of even such important statutes as 10 & 11 Will. 3, c. 23,[16] 4 Geo. 1, c. 12,[17] 7 Geo. 2, c. 22 [18] and 24 Geo. 2, c. 45 [19] was materially restricted by the very strict interpretation of the words 'warehouse',[20] 'destroying or casting away' a ship,[21] 'warrant or order for payment of money',[22] and 'navigable river, port, wharf or quey'.[23]

Recourse to such rigid interpretation was of common occurrence. When in a case tried under a capital statute the court felt that it would be unjust to inflict the appointed penalty, it applied any technique by which it could be evaded.

[15] 1 Leach 105; see also below, Appendix 2, p. 678.
[16] Larceny in a shop, warehouse, etc.; passed in 1699.
[17] Burning or destruction of ships with intent to defraud insurance companies; passed in 1717, supplemented by 11 Geo. 1, c. 29 (1724).
[18] Forgery of warrants or orders for payment of money or delivery of goods; passed in 1734.
[19] Larceny to the value of forty shillings in a ship, etc.; passed in 1751.
[20] See below, Appendix 2, p. 668.
[21] *Ibid.*, p. 687.
[22] *Ibid.*, p. 685.
[23] *Ibid.*, pp. 672–673.

If a liberal interpretation would best serve this purpose, use was made of it.[24] Similarly, if a statute was declaratory of Common Law, that law was invoked and applied.[25] If other statutes imposed less severe punishments for the same or very similar offences, efforts would be made to prove that the capital statute under which a given case was tried had been superseded by one or other of these enactments.[26] Again, when the scope of the enacting section of an Act was somewhat broader than that of the preamble, the latter was held to be decisive.[27] Lastly, if it was felt that a capital Act could be evaded by proving that the mischief committed by the offender under trial differed in some minor point from the mischief intended to be suppressed, his offence was brought into relation to that legislative intent, in accordance with the established rules of liberal construction.[28] Objections to the indictment were admitted at any time before verdict, indeed they were sometimes raised by the prosecution.[29] All these devices were freely used, but, as stated already, the mitigation of the severity of criminal law was achieved mainly by over-emphasising some of the basic elements of strict interpretation.

(*b*) *Weakening the determinate character of penal laws*

Whatever the disadvantages of strict interpretation, its cardinal virtue is that it helps to ensure a uniform and certain system of criminal justice.[30] But the unpredictable interpretative technique described above seriously jeopardised the cardinal prerequisite of a well-balanced system of criminal justice—the 'determinate' character of penal laws.[31] The

[24] Below, Appendix 2, *R.* v. *Kennedy*, p. 665.
[25] Below, p. 697.
[26] Above, pp. 59–60.
[27] Below, pp. 439–441, and case of *Reading and Jones*, p. 663.
[28] See *R.* v. *Lee* (1763), 1 Leach 51, tried under 22 & 23 Car. 2, c. 1, known as the Coventry Act.
[29] See *R.* v. *Dixon* (1803), Russ. & Ry. 53, and below, Appendix 2, pp. 674–675.
[30] 'In the opinion of the present writer', states Dr. W. T. S. Stallybrass, 'there is no branch of the law of which it can be claimed with such assured conviction that it should be certain and knowable as criminal law. It is notoriously contrary to fact that every man knows the law, even the criminal law, but it is very important that he should be able to ascertain it'; 'Public Mischief', in *Modern Approach to Criminal Law* (ed. by L. Radzinowicz and J. W. C. Turner, 1945), pp. 66–67.
[31] On Hale and Blackstone on 'determinate' character of penal laws see above, p. 15.

resultant uncertainty as to the meaning and scope of so many capital statutes was particularly serious in view of the extreme penalty which they carried. And, moreover, since they could never be abrogated by judicial interpretation, but only considerably narrowed in their operation, the death penalty continued to be imposed and carried out in some cases, while in many others it was evaded. The administration of this vital branch of criminal justice thus became not only indeterminate but also uneven. In a well-known passage of his *Commentaries*, Blackstone states that it is ' one of the glories of our English law that the species, though not always the quantity or degree of punishment, is ascertained for every offence, and that it is not left in the breast of any judge, or even of a jury, to alter that judgment which the law has beforehand ordained for every subject alike without respect of persons '.[32] Yet Romilly doubted whether it could be said ' that the species of punishment is ascertained for every offence, when in so great a number of felonies it remains in practice with the judge to say whether the criminal shall suffer death, transportation or imprisonment '. He condemns the practice of selecting offenders to be executed instead of those to be recommended for mercy, adding that since the aggravating circumstances on the strength of which the judges based their decision were necessarily variable and unpredictable, the operation of capital statutes was thus made even more indeterminate and their deterrent value more doubtful.[33]

This practice also had an unsettling effect on the established system of trial. If the circumstances of aggravation had been laid down in the law they would have been made the subject of a formal charge in the indictment; they would have been regularly investigated and their truth or falsity determined by the verdict of the jury and placed on record. But owing to the practice of selection the infliction of the death penalty was often made dependent on facts which were not expressly charged and proved, after full opportunity had been given to the accused to controvert them. This important aspect of the

[32] 4 Comm. 376–377.

[33] See Romilly, *Observations on the Criminal Law* (2nd ed., 1811), p. 16 *et seq.*, and below, pp. 326–329, where a few striking instances of the varying appraisal of extenuating and aggravating circumstances by different judges are quoted.

administration of capital statutes, first examined by Romilly,[34] was the subject of a searching inquiry by a committee appointed in 1836 to inquire into the state of criminal law.[35]

(c) *Increased particularity of statutory provisions*

It is generally agreed that statutes were then unnecessarily analytical and verbose. It would seem that this technique of framing laws was adopted partly as a reaction against the very strict constructions then usually put on statutes, notably those imposing capital punishment. The connection between the framing of statutes by the Legislature and the method of their interpretation by the courts is thus aptly described by the commissioners appointed to inquire into the consolidation of statute law: 'The extreme nicety and strictness of construction adopted by the courts, in some cases relating to penal statutes, may be considered as having in some degree given rise to the verbosity and causeless multiplication of provisions in many of the statutes, these having, without any reference to general rules or principles, been introduced to obviate different

[34] See also Lord Brougham, *Contributions to the Edinburgh Review* (1856), Vol. 3, p. 86, and below, note 18 at p. 328.

[35] See 'Second Report on Criminal Law' (1836), 343, p. 29; *Parl. Papers* (1836), Vol. 36, p. 183, at p. 215.

The Report states: 'The inconveniences of the principle of selection on which we have insisted, appear to us to be much greater than those which necessarily attach to the principle of defining aggravations which shall, in ordinary course, subject offenders to the punishment of death. The principle of defining aggravations is obviously open to the objections, that some uncertainty must always arise from the interpretation to be given to the definition itself; that where a line is drawn between offences, the offences immediately on each side of it may too closely resemble one another to warrant any considerable disproportion between the punishments respectively annexed to them; that from circumstances for which it is impossible to legislate beforehand, those offences which are not made capital may, in some few instances, present a more atrocious character than those which are; and, further, that much salutary terror will be removed from persons committing offences all but capital, and who at present would incur great danger of actually suffering the extreme punishment. But such inconveniences are, to a certain extent, necessarily incident to all accurate distinctions between offences, and we think . . . would be more than counterbalanced by the advantages of holding out, at least in the generality of cases, to persons who might be tempted to commit crimes of peculiar atrocity, a much greater certainty of suffering death, and of taking away from those who might be tempted to commit crimes now punishable, but not actually punished with death, one great chance of impunity, and of removing those complaints, as well of injustice to prisoners, as of impediment to the administration of justice and of violence to the sentiments and feelings of the community, which, as we conceive, we have shown to be imputable to the present system'.

doubts or difficulties which had arisen in the construction of former Acts '.[36]

§ 2. ATTITUDE OF GRAND AND PETTY JURIES

This attitude to capital statutes could obviously not have been confined to judges, but must in some degree at least have been common to all those concerned with the administration of criminal justice. As David Hume puts it, '. . . although, in any tolerably well-governed country, the decision of an individual case ought, and in general does, depend not on the wishes and feelings of the people, or any part of the people, with respect to the persons concerned, but solely on the letter of the law and the state of the fact; yet the general spirit of that law will always, in some measure, be bent and accommodated to the temper and exigencies of the times; . . .'.[37]

Persons committed for trial who were not prosecuted

Apart from the judges, the dispensing of criminal justice was most directly influenced by the attitude of the grand juries in its preliminary stages and by juries during the trial. The procedure then customarily followed by the grand jury is thus described by Blackstone:—

> 'When the grand jury have heard the evidence, if they think it a groundless accusation, they used formally to endorse on the back of the bill, "*ignoramus*"; or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "not a true bill"; or (which is the better way) "not found"; and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it "a true bill"; anciently, "*billa vera*". The indictment is then said to be found, and the party stands indicted. But to find a bill there must be at least twelve of the jury agree: for so

[36] 'Report of the Commissioners appointed to inquire into the Consolidation of the Statute Law' (1835), 406, p. 19; in *Parl. Papers* (1835), Vol. 35, p. 365, at p. 383.

[37] *Commentaries on the Law of Scotland, respecting Crimes* (1844), Vol. 1, p. 2.

> tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court'.[38]

It is evident that even this preliminary phase of criminal proceedings afforded great scope for the evasion of capital punishment. To what extent this opportunity was actually exploited cannot be precisely ascertained, since up to 1810 the statistical returns for England and Wales only gave the total number of bills not found for all offences, both capital and non-capital. In view of the importance of the subject, however, it is proposed to make use of such information as is available.

Total number of persons committed for trial and the total number of bills not found, for England and Wales (1805–1810).[39]

	1805	1806	1807	1808	1809	1810
Committed for trial (all offences)	4,605	4,346	4,446	4,735	5,330	5,146
No bills found and not prosecuted	730	766	801	886	887	858

This table shows that the considerable proportion of one out of every five or six persons committed for trial was not prosecuted. Although it does not indicate to what extent this was due to the fact that so many statutes imposed capital punishment, it may reasonably be assumed that the grand juries were not entirely impervious to the feelings which so materially influenced the judges,[40] the petty juries[41] and the Crown,[42] and that they, too, must have considered death an

[38] 4 Comm. 305.

[39] Compiled on the basis of Table 1, Appendix No. 1, to the 'Report on Criminal Laws' (1819), 585, *Parl. Papers* (1819), Vol. 8, p. 1, at pp. 126–127.

[40] Above, pp. 85–88, and below, pp. 112–114.

[41] Below, pp. 94–96.

[42] Below, pp. 119–122.

excessively severe penalty for at least some of the offences for which it was imposed.[43]

Incidence of acquittals

The foregoing remarks are also largely applicable to the verdicts of acquittal given by the juries.[44]

Total number of committals for trial and of acquittals in England and Wales (1805–1810).[45]

	1805	1806	1807	1808	1809	1810
Total number of:—						
Committals for trial (all offences)	4,605	4,346	4,446	4,735	5,330	5,146
Acquittals	1,092	1,065	1,078	1,126	1,205	1,130

In the course of these six years persons committed for trial were being acquitted at the rate of one in every four; 6,696 out of the total of 28,608.[46] As in the case of 'no bills found', these figures do not indicate what proportion of acquittals was directly due to the unwillingness of the juries to pass death sentences for certain offences. But again it may be assumed that since similar considerations strongly affected other phases of criminal proceedings and administration they were also the cause of a certain proportion of acquittals. According to Colquhoun, in the seven years prior to the reform of the police (1792), 'no less than 4,262 prisoners, who had been actually put upon their trial by the grand jury (at the Old Bailey) were let loose upon the public by acquittals'.[47] During the period from April, 1793, to March, 1794, inclusive, out of 1,060 persons committed for trial at the London Sessions, Middlesex

[43] See also the striking data relating to the incidence of acquittals in cases of forgery of bank-notes which Fowell Buxton brought to the knowledge of the House of Commons, below, pp. 537–539.

[44] 'If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation, except he be appealed of felony within the time limited by law. And upon such his acquittal, or discharge, for want of prosecution, he shall be immediately set at large without payment of any fee to the gaoler. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted'; Blackstone, 4 Comm. 362.

[45] Compiled on the basis of the table quoted in note 39 at p. 92 above.

[46] The numbers of acquittals and of 'no bills found' amounted together to 11,624, or between one-third and one-half of all committals for trial.

[47] *A Treatise on the Police of the Metropolis* (4th ed., 1797), pp. 23–24.

and Westminster, 567 were acquitted and discharged. Colquhoun thus explains this highly perturbing tendency: 'The acquittals will generally be found to attach mostly to small offences which are punishable with death: where Juries do not consider the crime deserving so severe a punishment, the delinquent receives no punishment at all. If all were convicted who were really guilty of these small offences, the number of victims to the severity of the Law would be greatly increased'.[48]

Elimination of capital charges by 'pious perjury'

A suspected person indicted under a capital statute may be found guilty and convicted, but need not necessarily be sentenced to death; the capital charge may be eliminated from the indictment during the trial, and the accused person be found guilty and convicted of a lesser offence not carrying the death penalty. It has been seen how this elimination of capital charges could be, and actually was effected by the judges and the juries. As the capital character of many statutes relating to offences against property depended on the value of the stolen property, the jurors could, by understating it, avoid the capital charge. Innumerable instances of this practice, defined by Blackstone as 'pious perjury',[49] are to be found in the *Old Bailey Session Papers*, and a number were quoted by Romilly in his first speech on penal reform in the House of Commons. These particular cases are important mainly because they occurred as early as the end of the seventeenth and the beginning of the eighteenth centuries.[50] A more thorough inquiry was made by Sir Thomas Fowell Buxton, who embodied the

[48] *Ibid.*, p. 293.

[49] 4 Comm. 239. 'Trying a prisoner at the Old Bailey on a charge of stealing in a dwelling-house to the value of forty shillings, when this was a capital offence', Lord Mansfield 'advised the jury to find a gold trinket, the subject of the indictment, to be of less value. The prosecutor exclaimed, with indignation, "Under forty shillings, my Lord! Why the *fashion*, alone, cost me more than double the sum". Lord Mansfield calmly observed, "God, forbid, gentlemen, we should hang a man for *fashion's sake*!"' Campbell, *The Lives of the Chief Justices of England* (3rd ed., 1874), Vol. 4, pp. 21–22. This is a highly significant episode for Lord Mansfield was not a lenient judge; as Campbell observes elsewhere (Vol. 3, p. 320), 'he did not allow the guilty much chance of escaping, and, for the sake of example, he was somewhat severe in the punishments he inflicted'.

[50] Below, pp. 329–330.

results of it in his memorable speech of 1821 supporting the repeal of the death penalty for forgery. Based on the records of judicial proceedings at the Old Bailey, its evidence is irrefutable. It shows that the common practice of the juries of eliminating capital charges by understating the value of stolen property was largely responsible for the virtual suspension of the operation of many capital statutes.[51] The cases of one Martha Walmsley and of one William Earl are particularly striking:

> 'Martha Walmsley was indicted for stealing 1 pair of silver shoe buckles, 2 pairs of leather shoes, 3 shirts, 3 other ditto, 3 aprons, a frock, a gown, a bedgown, 2 pair of hose and 2 curtains, with many other things, value £3 10s.; in the house of Henry Grinling. Court to prosecutor: "if you can fix the value under 40s., you will save the prisoner's life". Prosecutor: "God forbid I should take her life! I will value them at 8s.": Guilty. 8s.'
>
> 'William Earl, alias Day, was indicted for stealing 13¾ yards of lace, value £6, in the dwelling-house of Arabella Morris. Guilty 39s. He was a second time indicted for stealing 4½ yards of lace, in the house of Henry Pearse. Guilty again 39s. Now, it is somewhat curious that 4½ yards of lace and 13¾ yards of lace, upon the oath of twelve jurymen, should be valued at precisely the same sum. But, what is still more extraordinary, he was a third time indicted for stealing 6½ yards of Mecklin lace, and about 7 yards of English lace, in the shop of John Gubbins. Now, if 4½ yards were worth, upon oath, 39s., one would have thought that these 6½ yards of one description, and 7 yards of another, must have been worth something more. But it appears they were worth a great deal less; for the jury brought in their verdict, guilty of stealing to the value of 4s. 10d.'[52]

[51] 'One indicted of grand larceny may be convicted and have judgment of petit larceny only'; East 2 P.C. 778.

[52] *Parl. Deb.* (1821), N.S. Vol. 5, col. 944. Other cases quoted by Fowell Buxton *ibid.*, cols. 942–944, are as follows:—

'Mary Whiting was indicted for stealing 7 guineas and 34 shillings, in the house of John Sun. Verdict, guilty, 39s.—Jonathan Smith was indicted for stealing £20 in money in the house of J. Marsh: guilty, 39s.—Elizabeth Parsons was indicted for stealing 23 guineas in the dwelling-house of Richard Staples: guilty, 39s.—Joseph Court was indicted for stealing 8 pairs of gold ear-rings, value £3 16s.; 121 other pairs of ditto, value £74 10s. 6d.; 48 pairs of ditto, value £12 12s.; 204 pairs of ditto, value £36 9s.; 24 pairs of ditto, value £6 6s.; 2,488 gold beads, value £72 18s.; 864 coloured beads, value £18; 144 pairs of gold ear-rings, value £20 8s.; 3 pairs of gold enamelled

The practical importance of this factor was further enhanced by the great numerical preponderance of economic offences, so many of which carried the death penalty.[53]

On the whole it may be stated that the operation of capital statutes was restricted by the cumulative influence of the

bracelets, value £9; 18 pairs of gold ditto, value £11 7s. 6d.; 3 small cases of bracelets, value 6s.; 36 gold seals, value £33 12s.; 12 gold lockets, value £3; and a parcel of shoes, value 14s. 8d., all being the property of Messrs. Mackenzie and Grey in a lighter belonging to them on the Thames navigable river. Guilty, 39s.—Stephen Blanrise and John Parker were indicted for stealing 68 lbs. of beef, value 15s., and 12 lbs. of pork, also a stock-lock, privately, in the shop of Thomas Burdett. Guilty, 4s. 10d.—William Parker was indicted for stealing 4 cocks, 17 hens, 5 ducks, 15 drakes, 20 fowls, the property of E. Tilson. Guilty, 10d.—Barbara Hensley was indicted for stealing a gold watch and a gold chain, value £10; 2 cornelian seals value 40s.; privately from the person of Edward George. The watch and chain were found on the prisoner's person. Guilty, 10d.—David Dickson was indicted for stealing 18½ guineas in the dwelling-house of Mr. Hall. Guilty, 39s.—Edward Greenwood was indicted for stealing 240 gallons of vinegar, value £22, a hogshead and 6 half hogsheads, value £4, the property of Elizabeth White, on a wharf adjoining the Thames navigable river. Guilty, 39s.—William Moor was indicted for stealing 10 gallons of wine, value £10; 42 bottles 7s.; and a handkerchief 2s., in the house of Peter Dennis. Guilty, 39s.—George Taylor and William Dove were indicted for stealing a bed, bedstead, and curtains, set of fire-irons, a stove, a looking-glass, 4 checked linen shirts, a chest containing a bill, value £4 8s.; another bill, value £4 4s.; another bill, value £2 2s., two dollars and 7 bills (Spanish money) in the house of Mary Glass: Taylor, guilty, 39s.; Dove, guilty, 10d.—Catherine Tracey was indicted for stealing 6 guineas and 2 half guineas, from the person of George Bennington. Guilty, 10d.—John Powell was indicted for stealing 34 wooden half-firkins, and 1,150 lbs. of soap, value £20. Guilty, 10d.—John Martin was indicted for stealing 6 guineas, 2 crowns, 3 silver shoe-buckles and 11 silver buttons, in a small trunk, in the dwelling-house of Thomas Smith. Guilty, 39s.—Thomas Radford and Thomas Williams were indicted for stealing 7s.; a bank-note, value £10; 1 ditto, value £22; 3 others each £1; and 2 others, each £5, monies of John Hartshorne, in his dwelling-house. Guilty, 39s.—Alexander Chalmers was indicted for stealing 333 yards of Holland linen, value £105 5s.; 24 yards of printed linen, value £4 4s.; 45 yards of damask, value £16; 26 yards of striped linen, value £3 5s.; in the dwelling-house of Edward White. Guilty, 39s.—Joseph Day was indicted for stealing a gold watch, value £20; a gold watch-string, value £2; a gold chain value £10; a pair of diamond ear-rings, value £20; a silver snuff-box, value £3; 6 silk gowns, value £12; 2 pieces of gold and silver brocaded silk containing 40 yards, value £60; 10 pieces of silk containing 80 yards; and other things, in the dwelling-house of Thomas Cooke. Guilty, 39s.—William Fox was indicted for stealing £50 in money numbered, in the house of Alexander Steele. Guilty, 39s.—Philip Shovel was indicted for stealing 9 geese, value 40s. Guilty, 10d.—Mark Woddin was indicted for stealing 12 guineas and 4 shillings, in a dwelling-house. Guilty, 10d.—Henry Todd was indicted for stealing 2 live pigs, value 10s., the property of John Dunn. Guilty, 10d.'

[53] For a summary of the leading capital statutes concerning offences against property see Appendix 1, below, pp. 632–659. For the preponderance of offences against property see below, table at pp. 143–144. Often juries returned verdicts of simple larceny, where the facts clearly indicated an aggravated larceny.

following three factors: (1) the frequent commutation of death sentences by the Crown [54]; (2) the understating of the value of stolen property by the juries; (3) the merciful interpretation of capital statutes by the judges. Apart from these main factors, it is probable that a growing realisation of the disproportionate severity of numerous capital statutes was also responsible for a certain proportion of bills thrown out and of verdicts of acquittal. The relative weight of each of these factors cannot be assessed, but there can be little doubt that by recommending the Crown to make frequent use of its prerogative of mercy,[55] and by putting a very strict construction on many capital statutes, the judges took a particularly active part in this process.[56]

§ 3. INFLUENCE OF CAPITAL STATUTES ON CRIMINAL PROCEDURE

The main developments in the field of criminal procedure during the period 1760–1832 will be examined elsewhere, but at least a brief reference to the effect on criminal procedure of the administration of capital statutes should be made at the present juncture.[57]

Formalistic manner of framing indictments

The system of criminal procedure then in force was formalistic and cumbrous. This was particularly true of the manner of framing indictments, which Sir William Holdsworth describes as 'this extraordinary and irrational set of rules which had grown up round the wording of indictments . . .'.[58] He points out, too, that 'the dialectical acuteness of the judges, and the habit in later law of reporting these cases of construction and treating them as authoritative, stereotyped in the law a mass of captious and misplaced ingenuity'.[59] Highly involved even at the end of the medieval period, the rules of

[54] Below, pp. 112–122.
[55] *Ibid.*
[56] The fact that the judges put a merciful interpretation on capital statutes should not be taken as meaning that they were necessarily in favour of their revision; see on this below, pp. 507–509.
[57] On the liberal character of English criminal procedure and its superiority over that of other countries see above, pp. 25–28 and below, Appendix 3, pp. 714–719.
[58] *H. E. L.*, Vol. 3, p. 618.
[59] *Ibid.*, p. 619.

indictment had become even more complicated during the sixteenth and seventeenth centuries. In a chapter '*Concerning the* forms of indictments *in particular, and the* several parts *thereof*',[60] Hale describes the artifices and technicalities on which judicial proceedings then depended. These formalities were of great practical importance, for however serious the crime, and however certain the guilt of the delinquent, the slightest inexactitude in the wording was capable of invalidating the indictment. The opportunity to take full advantage of these technicalities was increased by the fact that the prisoner could raise this issue at any stage of the proceedings before judgment was pronounced against him, and also because permission had at a very early date been given to prisoners to employ counsel to argue any such exception to the indictment. Moreover, though the rule that persons accused of felony could not be defended by counsel was valid up till 1836,[61] the practice had existed long before this date of allowing counsel to do everything for this class of prisoners except address the jury for them.[62] Counsel could thus take advantage of the innumerable and complicated formalities of procedure, which almost invariably operated to the advantage of the offender. 'In favour of the prisoner', writes Stephen, 'it was provided that the most trumpery failure to fulfill the requirements of an irrational system should be sufficient to secure him practical impunity for his crime'.[63]

Strict fulfilment of the formalities insisted upon, particularly in capital cases

It is important to note that while this mass of formalities had to be fulfilled in all criminal cases their most strict observance was with special emphasis insisted upon in capital cases. In *Long's Case*, tried in 1605,[64] it was declared that 'indictments for felony, which are as counts and declarations for the King against the parties for their lives, ought to have certainty expressed in the record of the indictment, and shall not be

[60] 2 P.C. 174–193.
[61] Abolished by 6 & 7 Will. 4, c. 114.
[62] Stephen, *H. C. L.*, Vol. 1, p. 424.
[63] *Ibid.*, p. 284; see also Dean Roscoe Pound, *The Spirit of the Common Law* (Boston, 1925), p. 103.
[64] 5 Co.Rep. 120b.

supplied or maintained by intendment or argument. For if the counts between party and party for land or chattels ought to have two things, *scil.* truth and certainty, . . . *a fortiori* indictments, especially those which concern the life of a man, . . . ought to have full and precise certainty '. With the multiplication of capital statutes and the growing reluctance of the courts to put them into effect, the formalities of procedure began to be regarded not only as the necessary safeguards of legality but also as the means of restricting the operation of capital laws.

When discussing this practice Hale writes that ' in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy '.[65]

The growth of this process had not been arrested in Hale's time. While public opinion became increasingly more alive to the need to readjust punishments to the varying gravity of offences, the Legislature continued to enact new capital laws, and the courts took advantage of the intricacies of procedure to relax their extreme severity.[66] Contemporary judicial records

[65] 2 P.C. 193. But while urging the need to find a remedy Hale does not favour a revision of criminal law, insisting on the contrary that larceny should be punished by death; 1 P. C. 12–13. Emlyn, the editor of Hale's *Pleas of the Crown*, adds the following interesting comment: ' This advice of our author would, if complied with, be of excellent use, for it would not only prevent the guilty from escaping, but would likewise be a guard to innocence, for thereby would be removed the only pretense, upon which counsel is denied the prisoner in cases of felony, for if no exceptions were to be allowed, but what went to the merits, there would then be no reason to deny that assistance in cases, where life is concerned, which yet is allowed in every petit trespass '; *ibid.*, note (*h*). On Emlyn's views on the reform of criminal law and procedure see below, pp. 265–266.

[66] Thus the ' Second Report on Criminal Law ' states: ' It may be observed, also, that it is probably in consequence of the severity of the law in cases where

and periodicals provide abundant evidence of this tendency. Thus the *Annual Register* for the year 1800 records: '*Chelmsford* . . . John Taylor had been arraigned and tried on the charge of uttering a forged note, in the name of Bartholomew Browne, for 820*l.* 10*s.* with an intent to defraud the bank of Cricket & Co. at Colchester, of which the jury found him guilty; but just as Baron Hotham was about to put on his black cap, and to pass sentence of death on the prisoner, one of the barristers, not retained on the trial, happening to turn over the forged note, saw it signed Bartw. Browne; throwing his eyes immediately on the indictment, perceived it written therein Bartholomew Browne. He immediately pointed out the circumstance to Mr. Garrow, counsellor for the prisoner, who rose up and stated the variance as fatal to the indictment; in which the judge concurred, and discharged the prisoner '.[67] This case is particularly interesting in view of the known tendency to alleviate capital punishment much less readily for forgery than for other offences against property.[68] Even in cases tried under the statutes which provided an alternative to the penalty of death, proceedings

the punishment is capital, but is never inflicted, that much unreasonable strictness has arisen, or at least has been preserved in criminal proceedings; as for example, with respect to variances and like matters. The construction of penal statutes and the definitions of common law offences have been inconveniently influenced by the same cause. Such strictness has often been justified on the sole ground of its being *in favorem vitae* '; (1836), 343, p. 29; *Parl. Papers* (1836), Vol. 36, p. 183 at p. 215.

In his account of the trial of Jane Leigh Perrot, aunt of Jane Austen, who was indicted for stealing some lace in a shop, Sir Frank D. MacKinnon writes: 'When the law, imposed by the wisdom of Parliament, was in this state of horrible savagery, it is not surprising that there was a general conspiracy of benevolence, on the part of judges, jurors, and counsel, to mitigate its effects. Judges and counsel played their parts by the use of excessive technicalities of procedure '; *Grand Larceny* (1937), p. 39.

'A short time before the abolition of capital punishment for stealing to the amount of forty shillings in a dwelling-house, Lord Kenyon sentenced a young woman to death for that offence: whereupon she fainted, and the judge, in great agitation, exclaimed, "I don't mean to hang you; will nobody tell her, I don't mean to hang her?" '; A. Amos, *Ruins of Time exemplified in Sir Mathew Hale's History of the Pleas of the Crown* (1856), note 2, p. 202.

[67] *Annual Register* (1800), Vol. 42, *Chronicle*, March 30, pp. 6–7. See also *Gentleman's Magazine* (1800), Vol. 70, Part 1, pp. 269–270, and above, pp. 72–73.

[68] See below, p. 122, tables at pp. 155 and 157, note 15 at pp. 454–455, and pp. 556–557. Referring to Lord Mansfield's opinion that in cases of forgery capital sentences ought always to be put into execution, and explaining it by the then widespread belief that England's commercial credit required forgery to be punished by death, Campbell adds: 'I myself once heard a judge, at Stafford,

were often quashed for such irrelevant technical reasons. Typical in this respect is the case of *Rhenwick Williams*,[69] indicted in 1790 under 6 Geo. 1, c. 28, s. 11. The indictment stated that the prisoner had assaulted a woman with intent to cut her clothes and that on the said day he had cut the clothes of the said woman, etc. It was contended that it was not clear from this indictment whether the assault and the cutting of the clothes were effected simultaneously and that it could therefore be assumed that the assault had taken place in the morning and the cutting of the clothes in the evening. The court upheld this objection. A number of similar decisions in capital cases are quoted by Foster with full approval, because as he puts it, 'it may, I think, be laid down as a general rule, That indictments grounded on penal statutes, especially the most penal, must pursue the statute, so as to bring the party precisely within it: and this rule holds as well with regard to statutes which take away clergy from felonies at common-law, as to statutes creating new felonies'.[70] The soundness of this rule is not questioned, but the decisions in these cases show that it was carried to extreme lengths.[71]

The danger of over-emphasis

When the rules regulating the various phases of judicial proceedings are indeterminate, or are not punctiliously observed, the whole administration of criminal justice is in danger of becoming arbitrary and unpredictable. The English

thus conclude an address to a prisoner convicted of uttering a forged one-pound note, after having pointed out to him the enormity of the offence, and exhorted him to prepare for another world: "And I trust that, through the merits and mediation of our Blessed Redeemer, you may there experience that mercy *which a due regard to the credit of the paper currency of the country forbids you to hope for here*"'; *Lives of the Chief Justices* (3rd ed., 1874), Vol. 3, note at p. 321.

[69] 1 Leach 529; *Celebrated Trials* (1825), Vol. 5, p. 154 *et seq.*; also below, p. 167.

[70] *Crown Law*, 3rd ed., 1792, p. 423.

[71] 'If a man', writes Sir F. D. MacKinnon, 'were indicted as John Smith and he could prove that his name was James Smith the indictment was quashed, and he went free, whatever his offence. If he were indicted in his proper name for stealing in the house of John Smith, and it was really James Smith's house, he escaped. If before 1730 his counsel could successfully impugn the Latinity of the indictment, or if "burglariter" (or, after 1730 "burglariously") was by accident omitted from it, he was released'. He further relates the case of one John Matthews, tried in 1719. Counsel for the defence submitted that the indictment was wrong, since it said 'impressit' while it ought to have been 'impressit *anglice* printed'. The objection was overruled by

system of criminal justice has always been firmly based on the authority of law, while English criminal procedure has been notably formalistic. This is no coincidence, for there is between the two a close interdependence. In his survey of the main developments in the field of English criminal procedure up to the time of Hale, Sir William Holdsworth draws attention to it [72] while pointing out at the same time how the formality became over-emphasised, to the serious prejudice of the effectiveness of the system of criminal justice. This over-emphasis differed in degree for various branches of criminal law. 'I do not think that anything has tended more strongly to bring the law into discredit', writes Stephen, 'than the importance attached to such technicalities. . . . As far as they went their tendency was to make the administration of justice a solemn farce.' But, Stephen adds significantly, such scandals 'do not seem, however, to have been unpopular. Indeed, I have some doubt whether they were not popular,

King, C.J., on the ground that 'imprimere' had come to mean 'to print'; he cited also the precedent of 'imprimatur'. But, observes MacKinnon, 'if he had sustained the objection, and quashed the indictment, no one would have regarded it as an absurdity'. See 'The Law and the Lawyers' in *Johnson's England* (ed. by A. S. Turberville, 1933), Vol. 2, p. 308, and note 2, *ibid.*

72 'But in spite of these evil effects this state of the law had three very obvious advantages. Firstly, as Stephen has pointed out, it prevented the "arbitrary multiplication of offences and extension of the criminal law by judicial legislation in times when there were no definitions of crimes established by statute, or indeed by any generally recognised authority". As he says "looseness in the legal definitions of crimes can be met only by strictness and technicalities in indictments". The decision, for instance, that an indictment accusing a man with being a *communis latro* was insufficient by reason of the uncertainty of the offence charged was very salutary. Secondly, the fact that the crown was treated like the appellor in an appeal, and therefore compelled to state its case with the same particularity and formality, was the strongest security against the arbitrary power of the crown, and the strongest guarantee that the law would be enforced even as against the crown. For this reason the enforcement of these strict rules played no small part in securing the victory of the mediaeval ideal of the supremacy of the law. Thirdly, it preserved the idea that, as the crown must prove its case, any defences which could disprove that case were open to the accused. For this reason it helped to implant in the minds of the common lawyers that fear of convicting the innocent to which Fortescue testifies when he says that "I would rather wish twentie evill doers to escape death through pitie than one man to be unjustly condempned". It helped to engrain in the common law that presumption in favour of innocence which it has always professed. In the following period, when that presumption was considerably weakened, it was mainly in these rules as to the sufficiency of indictments that it lived on, and was able to influence our modern criminal procedure'; *H. E. L.*, Vol. 3, p. 620.

as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law '.[73]

It would seem that in this respect the subtle interpretation of the rules of criminal procedure may be compared to the institution of the benefit of clergy, in which Blackstone saw ' the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment '.[74] Certainly it may be stated that like the benefit of clergy, the rigid interpretation of capital statutes and of rules of criminal procedure considerably mitigated the severity of criminal law.

§ 4. CAPITAL STATUTES AN UPSETTING FACTOR IN THE ADMINISTRATION OF CRIMINAL JUSTICE

The impact of capital statutes on the system of interpretation became clearly apparent when in the nineteenth century the great majority of these laws was abrogated and the death penalty confined to a few serious offences.[75] Only in exceptional cases involving ambiguous and equivocal statutes was the predominantly merciful interpretation so prevalent in the eighteenth century still adhered to. In all others a strict interpretation was followed, which neither narrowed nor broadened the scope of the statutes. Secondly, the adopted interpretation, while remaining essentially strict, became less rigidly formal. The frequent taking into account of the legislative intent as well as of the nature of the mischief intended to be repressed caused the distinction between a strict and a liberal interpretation to be less definite. Processes of this nature are usually produced by more than one cause, but it

[73] *H. C. L.*, Vol. 1, p. 284.

[74] 4 Comm. 372. This well-known passage is often quoted as a particularly striking example of Blackstone's complacency. It should be noted, however, that Blackstone was in favour of the reform of criminal law; see on this below, pp. 345–347. A similar view of benefit of clergy was taken by Foster; see *Crown Law* (3rd ed., 1792), p. 305.

[75] This final stage of the movement for the reform of criminal law will be examined in a subsequent volume of this *History*.

may nevertheless be stated that the reform of criminal law, in so far as it restored the balance between the gravity of offences and the severity of their punishment, had a direct and very considerable influence on the shaping of the interpretative technique.[76] ' " Although the common distinction ", as Pollock, C.B., said in *Nicholson* v. *Fields*,[77] " taken between penal Acts and remedial Acts, that the former are to be construed strictly and the others are to be construed liberally,[78] is not a distinction, perhaps, that ought to be erased from the mind of a Judge ", yet the distinction now means little more than " that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope ".' [79]

Here let it be stressed again that these broader canons were evolved and applied only after the great majority of capital

[76] ' The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times when the number of capital offences was very large, when it was still punishable with death to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gipsies, or for a soldier or sailor to beg and wander without a pass. Invoked in the majority of cases *in favorem vitae*, it has lost much of its force and importance in recent times, and it is now recognised that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain meaning and to promote its object '; Sir P. B. Maxwell, *The Interpretation of Statutes* (8th ed., by Sir Gilbert H. B. Jackson, 1937), p. 230.

[77] (1862), 7 H. & N. 810.

[78] On the liberal interpretation of remedial statutes in the eighteenth century see above, note 4, p. 84.

[79] This last quotation is taken from the American author Sedgwick, *Statutory Law*, 2nd ed., p. 282. It was quoted in *Att.-Gen.* v. *Sillem* (1863), 2 H. & C. 531–532, by Bramwell, B., who calls it ' a passage in which good sense, force, and propriety of language, are equally conspicuous, and which is amply borne out by the authorities, English and American, which he cites '. And in *Foley* v. *Fletcher*, Bramwell, B., quotes with approval the following principle of construction, also formulated by Sedgwick (*ibid.*, p. 287): ' The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature, without unwarrantable severity on the one hand, or equally unjustifiable lenity on the other '; (1858), 28 L.J.Ex. 106. See also *Dyke* v. *Elliot* (1872), L.R. 4 P.C. 191; Day, J., in *Newby* v. *Sims* (1894), 63 L.J. M.C. 229; Maxwell, *op. cit.*, pp. 248–49 and 240–41, as well as W. F. Craies, *A Treatise on Statute Law* (4th ed., by H. S. Scott, 1936), pp. 454–55.

statutes had been abrogated.[80] None the less, the principle that the judiciary ought not to trespass upon the functions of the Legislature and ought to be extremely cautious in supplying a *casus omissus* remains unchallenged. The cardinal rules observed by the courts in this sphere are thus most lucidly summed up by Beal: 'Penal statutes should be interpreted strictly so that no cases shall be held to be reached by them but such as are within both the spirit and the letter of such laws. If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail. If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum'.[81] It is not the court's province, declared Lyndhurst, L.C., 'to supply an omission in an Act, still less will the court be inclined to correct'.[82] Similarly, Pollock, C.B., thus commented upon this crucial issue:—

> 'Mr. Justice Blackstone well lays down the rule: "The freedom of our Constitution will not permit that in *criminal cases* a power should be lodged in any Judge to construe the law otherwise than *according to the letter*".[83] Our institutions were never more safe, in my opinion, than at the present moment, but we must not lose any of the grounds of our security; no calamity would be greater than to introduce a lax or elastic interpretation of a criminal statute to serve a special but temporary purpose. . . . The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the *true* construction of a statute? If I were asked

[80] Livingston Hall notes that also in the United States '. . . the nineteenth century . . . marked the end of the death penalty as the chief mode of punishment for serious crimes. And with its passing, the factor which has brought the doctrine of strict interpretation into existence as literally *in favorem vitae* disappeared . . .'; 'Strict or Liberal Construction of Penal Statutes', *Harvard Law Review* (1935), Vol. 48, p. 763.

[81] E. Beal, *Cardinal Rules of Legal Interpretation* (3rd ed., by A. E. Randall, 1924), pp. 392 and 497.

[82] Quoting this statement and implementing it by the decision reached in *Jubb* v. *Hull Dock Co.* (1846), 9 Q.B. 443, 455, Maxwell stresses, however, that where the choice lies between either supplying by implication words 'which appear to have been accidentally omitted', or adopting a construction which deprives certain existing words of all meaning, it is usual to supply the words; *The Interpretation of Statutes* (1937), p. 240.

[83] 1 Comm. 92.

> whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law'.[84]

These, and many other judicial pronouncements,[85] all evince the same fundamental tendency—to emphasise the determinate character of criminal laws.

The purpose of the expansion of the law is usually to enhance its severity; that of the contraction—to make it more lenient. They both constitute an unsettling element in the administration of criminal justice. The unduly rigid interpretation of statutes imposing capital punishment adopted in the eighteenth and at the beginning of the nineteenth centuries may be said to have been a positive phenomenon in as much as it mitigated the severity of criminal law. At the same time, however, it tended to make the administration of criminal justice uncertain, while as Lord Macmillan says: 'The conception which it (the reign of law) embodies is the conception of certainty as opposed to arbitrariness'.[86]

[84] *Att.-Gen.* v. *Sillem and Others* (1864), 33 L.J.Ex. 110. See also *Parry* v. *Croydon Com. Gas Co.* (1863), 15 C.B.(N.S.) 575–76.

[85] See James, L.J., in *Dyke* v. *Elliot* (1872), L.R. 4 P.C. 191; Brett, J., in *Dickenson* v. *Fletcher* (1873), L.R. 9 C.P. 7; Wright, J., in *London County Council* v. *Aylesbury Dairy Co.* (1898), L.R. 1 Q.B. 109; Collins, L.J., in *Hildesheimer* v. *W. F. Faulkner, Ltd.* (1901), 70 L.J.Ch. 802.

[86] *Law and Other Things* (1938), p. 273.

CHAPTER 4

COMMUTATION OF DEATH SENTENCES THROUGH THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

§ 1. THE WORKING OF THE PREROGATIVE

No light is thrown on the day-to-day working of the prerogative of mercy by the contemporary Parliamentary Papers. Valuable information is, however, scattered throughout the four volumes of the publication known as the *Calendar of Home Office Papers of the Reign of George III*, which was issued under the direction of the Master of the Rolls with the sanction of the Secretary of State for the Home Department.[1]

The Royal prerogative of mercy, writes Sir William Anson,[2] 'is nothing more than an exercise of a discretion on the part of the Crown to dispense with or to modify punishments which common law or statute would require to be undergone'. It was then, as it is today, a matter of the King exercising his discretion according to the particular circumstances of each case coming under the cognisance of his ministers; no general rules governed the granting of a pardon.[3] There was an essential difference between the power of pardon and the dispensing power of the Crown; 'A dispensation obtained doth *jus dare*, and makes the thing prohibited lawful to be done by him who hath it, . . . a pardon frees from the punishment due for a thing unlawfully done'.[4] The effect of the pardon was not merely to prevent the carrying out of the sentence, but to give to the defendant a new capacity, credit, and character.[5]

[1] Vol. 1 (1760–1765), published in 1878; Vol. 2 (1766–1769), 1879; Vol. 3 (1770–1772), 1881; Vol. 4 (1773–1775), 1899.

[2] *The Law and Custom of the Constitution* (4th ed., 1935), Vol. 2, Part 2, p. 29.

[3] Chitty, *Criminal Law* (2nd ed., 1826), Vol. 1, pp. 764 and 769.

[4] *Thomas* v. *Sorrell* (1673), Vaug. 333. 'Pardon relates to something that has already been done, dispensation to something that is to be done in the future'; Maitland, *Constitutional History* (1908), p. 303.

[5] See on this Chitty, *op. cit.*, p. 775. On various issues involved in pardon, such as whether in the case of a conviction for felony it would restore the competency

On the modalities of pardon, Hume writes[6]: 'A pardon is either a free pardon, releasing the convict from all the consequences of his sentence; or it may be limited with some condition, such as transportation to parts abroad, or serving his Majesty in his fleet or army, or with a reservation of all forfeitures and escheats, accruing from the conviction. For as it is in his Majesty's pleasure, whether he will at all listen to the application for mercy, so he may qualify his royal grace with such terms as seem requisite towards the public interest, or suitable to the justice of the case'. And elsewhere he states: 'Having power to pardon, the King enjoys also the power of respiting execution; and such a delay may be granted by his Majesty, either for a time certain, and named in his letter, or indefinitely, till his further pleasure shall be notified'.

It would appear that the power of the Crown to grant a conditional pardon was dependent on the consent of the criminal.[7]

Early practice

The first impulse to send convicts under sentence of death abroad seems to have been given in 1611 by Sir Thomas Dale, who suggested that all such should be sent to a colony for three years.[8] According to J. C. Jeaffreson, in 1655, eleven

of the witness, see General Index to *State Trials* (1828), pp. 220–221, where, under the heading 'Pardon', references to judicial decisions on these matters are grouped together.

[6] *Commentaries on the Law of Scotland, respecting Crimes* (1844), Vol. 2, pp. 500 and 501.

[7] W. Forsyth, *Cases and Opinions on Constitutional Law, etc.* (1869), p. 461. 'It is a nice question', writes Maitland, *Constitutional History* (1908), p. 480, whether a condemned offender, pardoned on condition of his going into penal servitude, 'might not insist on being hanged'. The following singular petition is to be found in the *Calendar of Home Office Papers*, Vol. 2, No. 244, p. 66: 'Robert Webber, a convict in Maidstone Gaol, to the Earl of Shelburne, "in Hill Street, Berkley Sq., London".

Enclosing a petition [which is not now with the letter], to be presented to His Majesty. Was sentenced to death at Maidstone for a robbery committed on board H.M.S. *Medway*, but reprieved by the judge, which he did not ask for nor desire. Hopes the laws won't be broken by transporting him, death being all he requires. If his request is granted he promises to discover something that will be of very great service to H.M.'s subjects'.

[8] W. F. Craies, 'The Compulsion of Subjects to Leave the Realm', *The Law Quarterly Review* (1890), Vol. 6, p. 398. Sir Thomas Dale, who died in 1619, twice held the office of Marschal of Virginia; as a governor he displayed great firmness as well as administrative efficiency.

offenders sentenced to death in Middlesex were pardoned on condition they were transported; in 1656, six, and in 1658, twelve—a total of twenty-nine in three years in one county only.[9] 'Though earlier instances appear in the Middlesex records, where transportation was substituted for the capital execution in respect to a few exceptionally favoured individuals', he writes, 'these three batches are the earliest of the numerically considerable groups of convicts, described in the records as pardoned on condition of transportation. Henceforth even stronger lots of conditionally pardoned convicts are mentioned in the records as sent in the same way to the plantations. The three batches, therefore, may be said to mark the period when transportation first came, at least so far as Middlesex is concerned, to be largely employed as a convenient and in various ways beneficial substitute for capital execution'.[10] After the Restoration, pardons were frequently granted conditionally upon the prisoners consenting to be transported to the plantations for a number of years.[11] This practice, at first mainly confined to clergyable offences, was later extended so as to cover all offences, and in

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[9] *Middlesex County Records* (1888), Vol. 3, p. XIX. In the same years the executions in Middlesex numbered thirty-eight in 1655, twenty-five in 1656, and thirty-three in 1658. It thus appears that already in the middle of the seventeenth century one capital felon was transported for every two executed.

[10] *Ibid.*, p. XX. A form of transportation as a penal measure was introduced for the first time by the interesting Act of 39 Eliz. c. 4 (1597), entitled: 'An Acte for Punyshment of Rogues, Vagabonds and sturdy Beggars'. It provides that where the said rogues 'shall be dangerous to the inferior sort of People', or shall remain incorrigible 'in their roguish kind of Life' after the discipline of this statute has been applied to them, they may be committed to jail to await the quarter sessions, where the justices may ordain that they 'be banished out of this Realm, and all other the Dominions thereof', and 'be conveyed into such Parts beyond the Seas as shall be at any Time hereafter for that Purpose assigned by the Privy Council unto her Majesty'. As J. H. Burton rightly observes, 'Something like transportation is enacted in the celebrated vagrancy statute of 39 Elizabeth'; see 'Prison Discipline', *Encyclopædia Britannica* (8th ed., 1859), Vol. 18, p. 576.

[11] According to Kelyng it was usual 'that for Felonies within Clergy, if the Prisoner desire it, not to give his Book, but to procure a conditional Pardon from the King, and send them beyond Sea to serve 5 Years in some of the King's Plantations, and then to have Land there assigned them according to the use in those Plantations, for Servants after their time expired, with a Condition in the Pardon to be void if they do not go, or if they return into England during seven Years, or after without the King's Licence'; *Reports* (1708), p. 45.

1679 was provided with a statutory basis by the Habeas Corpus Act.[12]

4 Geo. 1, c. 11

An important statute on this subject is 4 Geo. 1, c. 11, passed in 1717, which provided that offenders convicted of certain clergyable felonies could be transported to American plantations for seven years instead of being whipped or burnt in the hand; it also contained a provision [13] enabling courts to order that criminals convicted of non-clergyable offences, but conditionally pardoned, be transported for fourteen years or for any other term specified in the pardon. This statute is rightly considered by Sir William Holdsworth as a turning-point in the history of transportation.[14] After the Declaration of Independence, 19 Geo. 3, c. 74 (1779), enacted that since 'the Punishment of Felons, and other Offenders, by Transportation to his Majesty's Colonies and Plantations in *America*, is attended with many Difficulties', such persons 'shall be transported to any Parts beyond the Seas, whether the same be situated in *America*, or elsewhere'. It was then that Australia became the main place to which offenders were transported.[15]

Power of the judges to grant a reprieve

The term *reprieve*, derived from *reprendre*, signifies the withdrawing of the sentence for an interval of time, thus effectively delaying its execution. It could be granted either by the King or the judge by whom the offender was tried, or could be the outcome of special circumstances which rendered an immediate execution inconsistent with humanity or justice. The power to grant the respite belonged to every tribunal invested with the authority to condemn to death, and could be

[12] 31 Car. 2, c. 2, s. 14, which stipulated 'That if any Person or Persons lawfully convicted of any Felony, shall in open Court pray to be transported beyond the Seas, and the Court shall think fit to leave him or them in Prison for that Purpose, such Person or Persons may be transported into any Parts beyond the Seas; . . .'

[13] Section 1.

[14] *H. E. L.*, Vol. 11, p. 573.

[15] Transportation as well as all other secondary punishments, will be examined at greater length in a subsequent volume of this *History*.

used even in cases of high treason.[16] It was usually granted by the judges either when the defendant applied for it, or when it seemed possible that the offence was included in some general act of grace, or when it was questionable whether the offence was in fact as serious as it was claimed to be in the indictment. When dissatisfied with the verdict, or in doubt as to the prisoner's guilt, or when intending to recommend the prisoner to mercy, the judge might also grant a respite before giving judgment, or at least intimate his intention to do so.[17] In the latter case he sent a memorial or certificate to the King, directed to the Secretary of State's office,[18] stating that favourable circumstances appearing at the trial caused him to recommend the prisoner to His Majesty's mercy, and to a pardon conditional on transportation or some other punishment being inflicted. We have it on the authority of Blackstone—and his opinion is confirmed by Chitty, who had a wide knowledge of the working of the machinery of justice—that this recommendation was always attended to.[19]

The early procedure on circuit and at the Old Bailey was as follows[20]: 'A sign manual issues, signifying the King's intention of either an absolute or conditional pardon, and directing the Justices of Gaol Delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out; which they do accordingly, taking his recognisance to perform the conditions of the pardon, if any'.

This procedure was later considerably simplified by 8 Geo. 3, c. 15 (1768). The preamble to this Act stated that the usual practice was not to inform the judges that a pardon had been granted until the next assizes after the conviction; in consequence, offenders had to spend several months in

[16] 'And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may upon due circumstances do it, as well in case of treason, as felony'; Hale, 1 P.C. 368.

[17] See on these points Chitty, *Criminal Law* (2nd ed., 1826), Vol. 1, pp. 757–758.

[18] All petitions for the pardon of a convicted criminal passed through the hands of the Home Secretary who, if necessary, referred them to another department; thus the opinion of the Treasury might be taken upon the case of a coiner. Gradually it became the practice for the Secretaries to tender advice to the Crown with regard to these petitions; M. A. Thomson, *The Secretaries of State* (1932), pp. 109–110.

[19] Chitty, *op. cit.*, p. 770; Blackstone, 4 Comm. 403, note 1.

[20] *R. v. Beaton* (1764), 1 W.Bl. 479.

prison.[21] To eliminate this evil the Act provided that when the judge decided to commute the death sentence to transportation he could do so *ex mero motu*, and could order the prisoner's conveyance to the place of his exile as soon as the King's acquiescence was received, without waiting till the next assizes. The effect of the condition thus imposed was the same as if it had been imposed under the Great Seal. Down to the end of the reign of William IV the case of a convicted felon who had been reprieved by a judge was considered at a Council at which the sovereign was present. 'All his Majesty did on these occasions', writes Croker,[22] 'was to express verbally his assent or dissent to or from the execution of the sentence; and, though the King was on such occasions attended by his Ministers and the great legal Privy Councillors, the business was not technically a Council business, but the individual act of the King'. The Lord Chancellor was always there to give advice. The report of the judge would also be available. In cases tried at the Old Bailey, the Recorder was to send a report after each session.[23]

§ 2. ATTITUDE OF THE COURTS

The valuable information contained in the four volumes of the *Home Office Papers* relates chiefly, though not exclusively, to offenders under sentence of death. The tables include information concerning the conditions on which pardons were granted, the kinds of offences committed and the punishments which were imposed. They may be divided into two separate

[21] 'Whereas several Offenders, convicted of Crimes for which they are by Law excluded from the Benefit of Clergy, are reprieved by the Judge who tries them, and recommended by him to His Majesty's Mercy; who generally, on such Recommendation, is graciously pleased to extend the same to them, on Condition of Transportation to some of His Majesty's Colonies and Plantations in *America* for Life, or for the Terms of Fourteen Years; and such Intention of Mercy, is signified by One of His Majesty's Principal Secretaries of State to the Judges at the next Assizes. . . . And whereas by this Method . . . such Offenders lie several Months in Gaol after Conviction; whereby they are rendered less capable of being useful to the Publick in the Parts of *America* to which they are sent: . . .'

[22] Boswell's *Life of Johnson* (ed. by G. E. Hill, 1934), Vol. 3, p. 121.

[23] 'When Queen Victoria came to the throne', writes Sir Frank D. MacKinnon, 'the practice was altered. For it was thought, indeed with reason, that it would be hard for a young girl to be charged, even in appearance, with the duty of deciding upon such questions of life and death'; *Grand Larceny* (1937), p. 44. On the question whether this procedure allowed the individual circumstances of each case to be taken fully into account see below, p. 116

groups which, though inter-related, may be examined separately: (1) Reports of judges' certificates, chiefly addressed to the King; (2) Warrants for the pardon of convicted criminals.

Recommendations of the judges in capital cases (1761–1765)

In the table below, all the recommendations made by the judges in capital cases during the period 1761–1765,[24] are surveyed, the recommendations brought forward in subsequent years being very similar.

Death sentences recommended for commutation (1761–1765)

Offence	Recommended for commutation to:—						
		Transportation for:					
	Life	14 years	7 years	Term not stated	Enlistment	Free pardon	Not stated
Robbery	5*	59	—	2	1	1	2
Burglary	2	24	—	1	—	—	3
Housebreaking	—	6	—	1	—	—	—
Stealing in a Dwelling-house	—	4	1	—	—	—	—
Stealing from the Person	—	1	—	—	—	—	—
Stealing (including Shoplifting)	—	27	—	1	—	—	1
Horse-stealing	—	46	—	8	1	—	1
Sheep-stealing	1	43	—	—	—	—	1
Cattle-stealing	—	4	—	—	—	—	—
Sending Threatening Letter	—	3	—	—	—	—	—
Returning from Transportation	—	1	—	1	—	1	—
Wounding a Horse	—	1	—	—	—	—	—
Being found in the company of Egyptians	—	1	—	—	—	—	—
Arson	—	3	—	—	—	—	—
Rape	—	2	—	—	—	—	—
Murder	—	—	—	—	—	1	—
Total	8	225	1	14	2	3	8

* In one of these cases commutation was for life *or* 14 years

The fact that in the overwhelming majority of cases—225 out of 261—the judges recommended the death sentence to be commuted to transportation for fourteen years only, is a striking testimony to the growing realisation that in many instances capital punishment was a penalty ill-adjusted to the gravity of the offence. Since in numerous cases capital charges were being eliminated in the course of the trial, it might

[24] Computed on the basis of the data contained in the *Calendar of Home Office Papers*, Vol. 1 (1760–1765), Tables Nos. 429, 748, 1157, 1570, 2117; at pp. 107–108, 225–226, 352–353, 484–487, 658–662.

reasonably have been assumed that the majority of the offenders ultimately sentenced to death would in fact have been executed; but as the above table shows, the courts felt that even in respect to a great number of these most serious capital cases the law should not take its course.

Extenuating circumstances advanced by the judges as warranting pardon

The judges' recommendation that a pardon should be granted was usually supported by the formula 'favourable circumstances', but in some cases specific reasons warranting the grant of the pardon were stated. In other instances the judges recommended the offender to mercy, but on not too lenient terms. This information is undoubtedly of great value, since it indicates the factors which the courts felt should be taken into account when selecting a punishment. It also indirectly brings to light certain defects in the law then in force which, by appointing inflexible and stringent punishments, made the royal pardon an indispensable element in the administration of criminal justice. The judges' observations may be grouped under three headings: (a) those supporting recommendations for pardon; (b) those explaining why a given case was undeserving of the royal mercy; (c) those supporting recommendations for pardon on certain not too lenient terms.

In the case of Buxton, found guilty of burglary and sentenced to death, the judge recommended transportation for fourteen years on the ground that the offender 'was young, and his master and others gave him a character'.[25] In the case of Reynolds, capitally sentenced for robbery: 'The prosecutrix was the only witness against him. The prisoner met her returning home to . . . , threw her down, and stole a ring and 1s. 6d., and then ran away. He had no pistol, nor offensive weapon, and offered no indecency. It was also dusk, when the crime was committed'.[26] In the case of Rogers, convicted of larceny: 'It was her first offence, and she had borne previously a good character'.[27] In the case of Baxter, sentenced to death for robbery, when recommending

[25] *Op. cit.*, Vol. 1, No. 429, p. 107. [26] *Ibid* [27] *Ibid.*, p. 108.

the commutation of the sentence to transportation for life, the judge wrote: 'His master gave him a good character; believed that it was his first offence, and that necessity drove him to it'.[28] In the case of Hall, capitally sentenced for burglary, the judge proposed no alternative punishment, but stated: 'The prisoner was only eighteen years old, had borne a previous good character, and she could not have been convicted of burglary but on her own confession'.[29] 'Youth, and the robbery unattended with any acts of cruelty' were mentioned as the extenuating circumstances in the case of Marson, sentenced to death for robbery; the judge proposed commutation to transportation for fourteen years or for life.[30] In the case of Croton, mercy was recommended, 'the person from whom the sheep were stolen having had them back again in five days'.[31] In the case of Bird, sentenced to death for sheep-stealing, the judge thought the offender 'not an improper object of mercy, his petition being subscribed by divers persons of character, and his master being desirous of taking him again'.[32] The case of Ovins, sentenced to death for robbery, should also be mentioned since it indicates that many prosecutors were themselves unwilling to be parties to a capital conviction, this negative attitude of the wronged party being quoted by the judge as warranting the granting of the pardon: 'The prosecutrix made every effort to save the prisoner's life, going 30 miles to Baron Smythe's house in Kent to renew her entreaties. In a letter to him, annexed, she says that if the prisoner should suffer death on her account, the terrors of her mind, would be inexpressible'.[33] The judge's recommendation was supported by a letter endorsed and signed by the foreman and two of the jury proposing commutation to transportation for life.

It appears from this survey that the main circumstances invoked by the courts in favour of the granting of a pardon were: the youth of the offender; this being his first offence; his previous good character; that the offence was unattended by violence; that he was driven to crime by necessity; that he made no use of weapons, or was unarmed; that he returned the stolen object to the owner; that he was only convicted

[28] *Ibid.*, No. 1157, p. 353.
[29] *Ibid.*, No. 1570, p. 487.
[30] *Ibid.*, No. 2117, p. 660.
[31] *Ibid.*, p. 662.
[32] *Ibid.*, Vol. 2, No. 1076, p. 410.
[33] *Ibid.*, Vol. 1, No. 2117, p. 661.

owing to his own confession; that strong compassion would be evoked were the law to take its course. Obviously, all these circumstances are of real importance and should be taken into account in selecting the proper punishment. They should, however—as far as possible—be embodied in the law itself, not invoked by the judges in order to obtain pardons. That they were so proves that many capital statutes were inherently defective. The Crown was thus called upon to do what Saleilles called *individualisation de la peine* [34]—a procedure incompatible with a rationally conceived system of criminal justice. Moreover, it is doubtful whether the procedure then followed by the Council allowed for an adequate assessment of the peculiar circumstances attending each particular case. 'I was exceedingly shocked', stated Lord Eldon, 'the first time I attended to hear the Recorder's report, at the careless manner in which, as it appeared to me, it was conducted. We were called upon to decide on sentences, affecting no less than the *lives* of men, and yet there was nothing laid before us, to enable us to judge whether there had or had not been any extenuating circumstances; it was merely a recapitulation of the judge's opinion, and the sentence. I resolved that I never would attend another report, without having read and duly considered the whole of the evidence of each case, and I never did. It was a considerable labour in addition to my other duties, but it is now a comfort to reflect that I did so, and that in consequence I saved the lives of several individuals'.[35]

Aggravating circumstances advanced by the judges as justifying the refusal of pardon

With respect to the cases which the judges thought undeserving of the royal mercy, the following opinions may be mentioned. In the case of Russel, capitally sentenced for robbery, the judge was against granting a pardon because the

[34] On Saleilles' book bearing this title see above, note 42 at p. 14.

[35] H. Twiss, *Life of Lord Chancellor Eldon* (1844), Vol. 1, pp. 398–399. Lord Eldon related further the following interesting episode: 'In one of the Recorder's reports, there was one man condemned for a robbery in Bedford Square. The King, George III, consulted his council whether this man's sentence should be executed, and all the ministers except one advised that it should. "I observe", said the King, "that Lord Eldon has not yet spoken; what says he?" I answered, "I will tell your Majesty my opinion: it has

offender's ' behaviour on trial was far from that of an innocent man '.[36] In the case of Heathwood, a labourer sentenced to death for stealing from a dockyard, the judge ' could not recommend the prisoner to mercy, he having no extenuating plea of necessity. It was of more consequence, by way of example (the end of punishment), that one man in good circumstances should suffer than twenty miserable wretches '.[37] In the case of Parish, convicted of burglary, ' the prisoner having lived a servant in the house, the judge on the trial thought it of too dangerous example for him to interpose '.[38] Similarly, in the case of Bould, found guilty of breaking into a house in the daytime, the judge's opinion was: ' Not an object of mercy. An Act which has for its object the protection of the industrious poor ought not to be a dead letter, and transportation in the case of common offenders had almost ceased to be a punishment '.[39] In the case of Pearse, capitally sentenced for stealing from a wreck, the judge admitted that in some respects the prisoner was not as depraved as others who were not brought to justice, but yet ' the inhumanity of plundering the distressed, and increasing the calamities of the unfortunate ', determined him to leave the man for execution.[40] In the case of Morris, found guilty of being at large after conviction for larceny, the judge stated that ' Morris appeared upon his trial to be a bold, artful man. The judge saw nothing at that time, nor had he since been apprised of anything, that might render him a proper object for pardon '.[41]

On the whole, it may be said that when refusing to recommend a case for royal mercy, the courts were actuated

been the custom to hang for street robberies, and a very bad crime it is; but I think a distinction might fairly be made between those cases which are attended by personal violence, and those which are not; therefore, as this man did not use any violence, I differ from the other Lords, and think he is not an improper object for your Majesty's clemency ". " Well, well ", said the King, " since the learned judge *who lives in* Bedford Square, does not think there is any great harm in robberies there, the poor fellow shall *not* be hanged " '; *ibid.*, p. 399.

[36] *Calendar*, Vol. 1, No. 1570, p. 485.
[37] *Ibid.*, p. 487.
[38] *Ibid.*, Vol. 2, No. 376, p. 115.
[39] *Ibid.*, p. 115.
[40] *Ibid.*, No. 703, p. 251.
[41] *Ibid.*, Vol. 3, No. 992, p. 377.

not only by the lack of strong extenuating circumstances such as those mentioned above,[42] but also by the belief that a commutation of the death penalty would weaken the deterrent effect of punishment.

How important was this latter consideration may also be seen from the judges' attitude to those cases which they thought unworthy of pardon, but which they submitted to the Crown in deference to the strong public resentment at the severity of the sentence. Thus in the case of Lidston, found guilty of robbery and tried with two others, one of whom was acquitted, the judge 'thought the verdict just. Had at first left Lidston for execution, but on the representation of several persons of distinction, reprieved him that His Majesty might be informed of the case. Five persons gave him a good character, with one of whom he had lived as servant for several years. A young man, not more than twenty-three or twenty-four, active and robust. Belonged to the Devonshire Militia. The judge hoped that, for example's sake, the terms of mercy would not be too tender'.[43] So strong was public feeling not only against the death penalty, but against the stringency of the criminal law generally, that in some cases even after the capital charge had been eliminated by understating the value of the stolen property, pressure was still exercised to commute even the sentence of transportation. In the case of Jones, sentenced to seven years' transportation for privately stealing in a dwelling-house, the judge objected to any such further relaxation of the law on the following grounds: 'The things stolen were above the value of 40s., which made it a capital offence; but, under the circumstances, and the goods being of such a nature as to leave it in the power of the jury to set a value on them, on the recommendation of the judge, they found them of the value of 39s., which saved the prisoner's life'.[44]

This was indeed not the only instance of the alleviation of a punishment being sought, although it was already rendered more lenient than that imposed by law. Such a system of double commutation was obviously detrimental to criminal justice, making it uneven and uncertain.

[42] Above, pp. 114–116.
[43] *Op. cit.*, Vol. 1, No. 429, p. 108.
[44] *Ibid.*, No. 2117, p. 660.

§ 8. ATTITUDE OF THE CROWN

From the second series of documents contained in the *Calendar* and relating to the warrants for the pardon of convicted criminals,[45] information may be derived on the attitude of the Crown.

Pardons granted by the Crown in capital cases (1761–1765)

In view of the great similarity of the figures over the whole period covered by the four volumes of the *Calendar*, it has been thought that a shorter synoptical table for the five years from 1761–1765 will suffice as an example. This table states the nature of the offence and the penalty to which the death sentence was commuted by the Crown.

Warrants for pardons to criminals capitally convicted (1761–1765) [46]

Offences	Death sentence commuted to:—							
	Transportation for:							
	Life	21 years	14 years	7 years	Term not stated	Enlistment	Free pardon	Not stated
Robbery	25	1	72	4	1	3	5	3
Burglary	10	1	62	1	—	1	1	—
Housebreaking	—	—	7	—	1	—	—	—
Stealing in Dwelling-house	—	—	5	—	1	—	—	—
Stealing from the Person	—	—	5	—	—	—	—	—
Stealing (including Shoplifting)	6	—	53	7	—	1	3	—
Deer-stealing	—	—	1	—	—	—	—	—
Horse-stealing	—	—	88	4	—	6	3	—
Sheep-stealing	1	—	80	1	2	1	8	1
Cattle-stealing	—	—	15	—	—	—	—	—
Wounding a Horse	—	—	1	—	—	—	—	—
Forgery	4	—	—	—	—	—	—	—
Feloniously Personating	1	—	3	—	—	—	—	—
Sending Threatening Letters	—	—	3	—	—	—	2	—
Returning from Transportation	—	—	4	—	—	—	2	—
Shooting at	1	—	1	—	—	—	—	—
Piracy	—	—	—	—	—	—	2	—
Buggery	1	—	—	—	—	—	2	1
Riot	—	—	1	—	—	—	—	—
Arson	—	—	3	—	—	—	1	—
Rape	1	—	2	—	—	—	3	—
Found with Egyptians	—	—	1	—	—	—	—	—
Sacrilege	—	—	—	—	1	—	—	—
Murder of Bastard Child	—	—	—	—	—	—	1	—
Murder[47]	3	—	1	—	1	—	8	2
High Treason	—	—	—	—	—	—	1	—
Other Felonies (not stated)	8	—	7	1	—	—	2	—
Total	61	2	415	18	7	12	44	7

[45] Above, p. 113.

For footnotes 46 and 47 see next page.

This table shows the extent to which the operation of capital statutes was being restricted by the exercise of the royal prerogative of mercy. In these five years only, 567 death sentences were commuted,[48] a by no means exceptional number, as the figures given in the *Calendar* for all subsequent years show an equally high ratio throughout the eighteenth and during the beginning of the nineteenth centuries.

The attitude of the Crown, however, is still better revealed by the nature of the punishments to which the death sentences were commuted. Only 61 out of 567 commutations were to transportation for life, and two for twenty-one years. At the same time there were as many as 415 for the relatively short term of fourteen years, while the aggregate number of free pardons and pardons conditional on the offender enlisting in the army, or serving in the navy, was nearly equal to that of transportations for life. It should also be observed that although in their recommendations for pardon in the years 1761–1765, the courts only once mentioned transportation for the shortest term of seven years, the Crown chose this penalty in an appreciable number of cases.[49]

Adherence by the Crown in most cases to the recommendations of the judges

On the question of whether a pardon should be granted or not, the Crown generally followed the recommendations of the judges. Some interesting information on this point is to be found in a letter from the Earl of Shelburne to the Rt. Hon.

[46] Computed on the basis of the following documents recorded in Vol. 1 of the *Calendar*: Nos. 430, 749, 1158, 1571, 2118; on pp. 109–115, 226–231, 354–358, 487–494, and 662–670.

[47] Four of these cases of murder occurred outside England.

[48] No data on capital convictions in England and Wales during these years are available. According to Colquhoun, in the last decade of the eighteenth century more than four-fifths of all capitally convicted offenders had their sentences remitted; see below, p. 134. The incidence in the middle of the eighteenth century—though considerable—was lower than in later years. Thus during the five years from 1761–1765, out of 211 offenders sentenced to death in London and Middlesex, 115 were executed; see Appendix No. 5 to 'Report from Select Committee on Criminal Laws' (1819), 585; in *Parl. Papers* (Reports, 1819), Vol. 8, p. 153.

[49] An offender who had been capitally convicted and whose sentence was commuted to transportation could, once transported, again become an object of pardon, and thus have his punishment mitigated for a second time. By 30 Geo. 3, c. 47, for instance, the Governor or Lieutenant-Governor of any

Humphry Morice[50]: 'The cases of Richard Williams and William Pearse have been referred to the Judge, on whose recommendation His Majesty has extended his mercy to the former, on condition of transportation for life. But the circumstances of William Pearse's case are so abundantly worse as reported by the Judge, that His Majesty does not think himself at liberty to extend the same mercy to him. Since his Lordship has been in office, it has been His Majesty's invariable rule to pay the greatest regard to the opinion of the Judges, not having, to his Lordship's knowledge, differed in any one case from it. The reason and justice of it must be clear, since, on the one hand, it is highly reasonable that country convicts should have the same chance as those of the capital, whose cases are always reported by the Recorder. On the other hand, after trial, sentence, and reconsideration by the Judge, it is highly expedient that justice should take place, for the good of the community, on whichever side it appears'.

It would appear, however, that George III paid great personal attention to many cases brought before him, often desiring to acquaint himself with all the circumstances which could bear upon his decision.[51] Inevitably, therefore, he was

place to which convicts were transported was empowered to remit, absolutely or conditionally, the whole or any part of their sentences of transportation. This remission was to have the same effect as if the King had signified his intention of mercy, and the names of such convicts were to be inserted in the next general pardon to pass the Great Seal.

[50] *Calendar*, Vol. 1, No. 564, pp. 187–188.

[51] See on this point *The Correspondence of King George the Third, from 1760 to December, 1783* (ed. by Sir John Fortescue, 1927), Vol. 1, pp. 395 and 507; Vol. 2, pp. 375, 379, 380–381. An interesting case is that of George Clippingdale. A certain Thomas Pierce had discovered a styptic capable of stopping the most violent bleeding. He had made some successful experiments on animals and was anxious to try it on a human being. Clippingdale, a criminal lying at Newgate under sentence of death, expressed his willingness to lose a limb for the purpose of testing the efficacy of this invention. The matter was submitted to surgeons and pending their opinion Clippingdale had been reprieved by the King for a fortnight. The surgeons' opinion was negative; they recommended the experiments to be conducted on the smaller arteries, on patients in hospitals. The King decided, however, that since George Clippingdale had offered himself for experiment, he 'shall not now suffer death, but that he shall be transported for life, unless they wish him to be provisionally detained in order to make further experiments'; *Calendar*, Vol. 1, No. 907 and No. 909, at pp. 283–284. Some time later another offender, John Benham, also under sentence of death, was pardoned because he too consented to have a limb amputated for the sake of the same experiment. This time the experiment was carried out, Benham lost a leg and was then released; *ibid.*, Vol. 2, No. 510, p. 175.

influenced by his own views on the gravity of some offences, particularly forgery, and on the way they should be punished. As the table given above indicates, pardons were granted for forgery in four instances only, and it is even more significant that in each case the death penalty was commuted to transportation for life—the most severe alternative available. That this rigorous treatment of forgery was largely due to the King's personal opinion of this particular offence is clearly indicated by Lord Weymouth's letter to John Calcraft[52]: Lord Weymouth 'is extremely sorry to find that any expectations of mercy should have been raised in the mind of the unhappy young man who was found guilty of forgery at Pool. Did not delay a moment laying before the King the petition in the condemned's favour; but His Majesty was clearly of opinion that no reference should be made to the Judge, nor any respite sent, in a crime of so dangerous a nature, particularly in a commercial country, unless there appeared some new circumstances which could not have come to the Judge's knowledge to authorise it'.

§ 4. PROBLEMS OF THE PREROGATIVE

It may be held that the royal prerogative of mercy is a necessary, and indeed an indispensable component of any well-balanced system of criminal justice. None the less, it has been acknowledged that even when exercised with circumspection—as it is in modern times—it yet raises many thorny issues.

A modern view

Thus Sir Edward Troup, whose long experience as Permanent Under-Secretary at the Home Office lends particular weight to his views on penal matters, writes[53]: 'The King's Prerogative of pardoning offenders is exercised on the advice of the Home Secretary, and the duty of advising in this matter, especially in relation to death sentences, is the most difficult and exacting of all his responsibilities'. He states further that until 1907, when the Criminal Appeal Act was passed, the Home Office was forced to become a veritable Court of Appeal in criminal cases,

[52] *Ibid.*, Vol. 2, No. 841, p. 326.
[53] *The Home Office* (2nd ed., 1926), p. 55.

confronted with all the difficulties inherent in such a position. The Home Office—he writes—' had from time to time to review the whole of the evidence in the most difficult cases, and to arrive at a decision on the question whether the law should take its course or the alleged offender should receive either a Free Pardon, which in this case amounted to a declaration of his complete innocence, or a Conditional Pardon, which mitigated the penalty substituting for instance penal servitude for capital punishment. The Home Office possessed none of the ordinary powers of a court of law for this purpose—evidence could not be taken on oath, and witnesses could not be cross-examined: and this disadvantage was only partially balanced by the circumstance that, not being bound by the technical rules of evidence, the Home Secretary could obtain knowledge of facts which necessarily remained unknown to the court. The chief disadvantage, however, was that, there being no public hearing, no one knew what evidence was received or why alleged evidence was rejected: and any decision at which the Home Secretary might arrive was liable to be made the subject of violent attacks in the press and in Parliament '.[54]

If the royal prerogative of mercy was raising so many debatable questions early in the twentieth century—although it was then exercised with great discrimination—these problems must have been considerably more numerous in the eighteenth century. It is not proposed at present to examine opinions

[54] *Ibid.*, pp. 58–59. Sir Edward Troup also stresses that as no rigid and well-defined formula exists to guide the Home Secretary in arriving at a decision, he ' may even properly take into account popular feeling in the matter and intervene in a case in which the execution of the death sentence would do more harm than good by the shock it would give to the great mass of the public '; *ibid.*, p. 63. In support of this contention Troup quotes the following statement of Lord Gladstone:—

' It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations—the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case; and the decision depends on a full review of a complex combination of circumstances. . . .' Gladstone then quoted Sir William Harcourt, who said, ' The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil '. ' There are, it is true ', Gladstone continued, ' important principles which

formed *a posteriori*, but rather to ascertain whether the practice evoked any contemporary criticism.

Some contemporary criticisms

An examination of the *Calendar* from this point of view reveals the following main trends of contemporary opinion. Dissatisfaction was expressed with the practice of making pardons conditional on enlistment in the army or navy, a practice well reflected in the following letter[55]: 'His Majesty has approved of the proposal contained in the letter from the Recorder of London, which is enclosed with a list of the convicts in Newgate. Directs him, therefore, to order a proper person to examine which of the convicts may be fit for H.M.'s service, that warrants for pardon may be prepared accordingly'. Many similar letters are to be found in other volumes of the *Calendar;* but there is also strong evidence that this system was not unanimously approved of. Thus, replying to the letter quoted above, Viscount Barrington wrote that he would send a proper person to examine the convicts, although 'the commanding officers of the several corps abroad are very much averse to accept of men under such circumstances, and have often solicited him not to send them to their regiments. It would further introduce great uneasiness and confusion into the service if these convicts should be put into H.M.'s regiments for a limited time, when the honest volunteer engages to serve for life'.[56] From another letter, written a few days later by the Earl of Rochcford, it appears that in view of 'the extreme unhealthiness of the climate on the coast of Africa', the King ordered that the armies which were to be stationed there should be fitted rather 'with such men as must look upon that duty as a mitigation of their sentences than with well-deserving volunteers'.[57] It may be that this instruction was in deference to the objection raised by Viscount Barrington. Nevertheless,

I and my advisers have constantly to bear in mind; but an attempt to reduce these principles to formulae and to exclude all considerations which are incapable of being formulated in precise terms, would not, I believe, aid any Home Secretary in the difficult questions which he has to decide'; *ibid.*, pp. 63–64.

[55] *Calendar*, Vol. 2, No. 1190, p. 468.

[56] *Ibid.*, No. 1193, p. 469.

[57] *Ibid.*, No. 1200, p. 470.

the practice of commuting the death penalty to enlistment in the armed forces or in the navy continued, and the consequent widespread discontent may be deduced from a letter dispatched on March 28, 1771, in which the Lords of the Admiralty expressed ' their wishes that no more convicts may be ordered on board H.M.'s ships, as such persons may not only bring distempers and immoralities among their companies, but may discourage men of irreproachable character from entering into H.M.'s service, seeing they are to be ranked with common malefactors '.[58]

Another very important criticism was levelled at the practice of commuting the sentences of offenders indicted on a capital charge which was subsequently eliminated in the course of the trial, either by undervaluing the stolen property or by some other means. Such a double commutation, which commonly occurred, prejudiced the effective prevention of crime by lowering the intimidating effect of punishment. Hence the reluctance of the judges to recommend such cases for pardon.[59] An outspoken criticism of this practice is to be found in a letter written in 1773 by the well-known London magistrate, Sir John Fielding, to the Earl of Suffolk.[60] Replying to Suffolk's inquiry regarding the records of criminals under sentence of death in order ' to prevent impositions on applications to the Crown for mercy ', Fielding points out that since some executions were necessary as an example, the most dangerous and incorrigible offenders should be selected for this purpose. This selection should not be haphazard, but should be based on the offender's record, kept in the public office in Bow Street, which alone provided reliable information as to the dangerousness and criminal antecedents of every offender. He believed that the royal mercy was most abused in the cases of criminals who, though they had been condemned to transportation only after being indicted for a capital offence, yet attempted to secure a further mitigation of punishment: ' The impositions which affect the fountain of Royal mercy most frequently and most fatally are those which

[58] *Ibid.*, Vol. 3, No. 604, p. 228.
[59] Above, p. 118.
[60] *Calendar*, Vol. 4, No. 39, pp. 10–11.

procure free pardons for offenders under sentence of transportation; for it often happens that many notorious criminals, after having escaped justice, though often tried for the highest offence, are at last convicted for petty thefts, either owing to the leniency of the prosecutors or the nature of the case. Here the offence appearing trivial . . . strong application (deceitfully obtained) for mercy seldom fails of success. And under these circumstances, to his certain knowledge, some very daring robbers have been let loose to the terror of society'. Fielding recommends that in such cases pardons should be granted with much greater discrimination, and the law also be more stringently enforced for being found at large when condemned to transportation or for unlawfully returning from transportation.[61]

Since so many death sentences were being commuted by the Crown it was undoubtedly of paramount importance to ensure the effective enforcement of transportation, and speedily to detect and to remove all offenders who had been pardoned on condition that they were transported. Throughout the eighteenth century, however, this branch of the administration of criminal justice was notoriously inefficient, and a great many offenders who should have been transported were at large and continuing their depredations; even if apprehended they were seldom executed. Such a flagrant breach of the conditions on which pardons had been granted further weakened the system of criminal justice.[62]

§ 5. THE MAIN TRENDS OF THOUGHT CONCERNING THE PREROGATIVE: THREE APPROACHES

This chapter on the royal prerogative of mercy as one of the factors which restricted the operation of capital statutes may

[61] Fielding held transportation to be the wisest and most humane punishment, for it 'immediately removes the evil, separates the individual from his abandoned connexions, and gives him a fresh opportunity of being an useful member of society, thereby answering the great ends of punishment, *viz.*, example, humanity, and reformation'; *ibid.*, p. 11.

[62] For a most penetrating later criticism of the system of granting pardons see *Old Bailey Experience*, published anonymously in 1833, p. 117 *et seq.*, and in particular the remarkable book by E. G. Wakefield, *Facts relating to the Punishment of Death in the Metropolis* (1831); on Wakefield see also below, p. 596.

usefully be implemented by a brief survey of contemporary thought on this matter.

Arguments against the prerogative adduced by Beccaria

The most radical doctrine was evolved by Beccaria.[63] His views on the royal prerogative of mercy will be better understood if considered in relation to the guiding principles of his general penal doctrine. 'One of the greatest preventives of crimes is', he writes, 'not the cruelty of the punishments attached to them, but their infallibility'.[64] His second principle is that trials should be conducted, and punishments imposed, strictly in accordance with laws laid down and made known beforehand. 'Under a fixed code of laws citizens acquire that consciousness of personal security, which is just, because it is the object of social existence, and which is useful, because it enables them to calculate exactly the evil consequences of a misdeed'.[65]

No system of criminal justice based on these two principles could, Beccaria contends, tolerate the granting of either free or conditional pardons, which in his opinion could have but one effect: to weaken the certainty of punishment and to prejudice the legality of penal administration. Beccaria could only have justified the English system of granting pardons on the grounds of expediency, since its effect was to restrict the operation of many unwarranted capital statutes. But such considerations were incompatible with his general approach to the problem. Ineffective or unreasonable laws, he holds, should be either revised or abrogated. But the most dangerous result of the commuting of capital sentences by the Crown was to attenuate the severity of the law and so to delay its reform. Beccaria sums up his views on the royal prerogative of mercy in the following words[66]:—

> 'Clemency, therefore, . . . ought to be excluded in a perfect system of legislation, where punishments are mild and the

[63] Beccaria's penal doctrine is fully examined below, pp. 277–283.
[64] *Crimes and Punishments* (ed. and transl. by J. Anson Farrer, 1880), p. 189.
[65] *Ibid.*, p. 129; Beccaria's theory was evolved under the influence of conditions totally different from those prevailing in England.
[66] *Op. cit.*, pp. 190–191.

> method of trial regular and expeditious. This truth will appear a hard one to anybody living in the present chaotic state of the criminal law, where the necessity of pardon and favours accords with the absurdity of the laws and with the severity of sentences of punishment. This right of pardon is indeed the fairest prerogative of the throne, the most desirable attribute of sovereignty; it is, however, the tacit mark of disapproval that the beneficent dispensers of the public happiness exhibit towards a code, which with all its imperfections claims in its favour the prejudice of ages, the voluminous and imposing array of innumerable commentators, the weighty apparatus of unending formalities, and the adhesion of those persons of half-learning who, though less feared than real philosophers, are really more dangerous. But let it be remembered that clemency is the virtue of the maker, not of the executor, of the laws; that it should be conspicuous in the code of laws rather than in particular judgments; that the showing to men, that crimes may be pardoned and that punishment is not their necessary consequence, encourages the hope of impunity, and creates the belief that sentences of condemnation, which might be remitted and are not, are rather violent exhibitions of force than emanations of justice.'

Beccaria's disapproval of the royal prerogative was complete. He would have it abolished altogether and would admit no exceptions. 'In proportion as punishments become milder, clemency and pardon become less necessary. Happy the nation in which their exercise should be baneful!'.[67]

Blackstone's views on this subject

In contrast to these views of Beccaria—the idol of French Encyclopædists—stand the opinions of Sir William Blackstone. In many respects strongly influenced by Beccaria,[68] Blackstone does not share his strong objection to pardons, possibly owing to the fundamentally different political atmosphere of England as compared with that of Italy and France. In England the King was not an absolute but a constitutional monarch. The individual rights of the subject were safeguarded by many guarantees, most scrupulously observed were he suspected of an offence and brought to trial. Torture was at this date unknown. No system of public prosecutions existed.

[67] *Ibid.*
[68] Below, pp. 346-317.

Parliament was vigilant, and justice was dispensed by an independent and highly esteemed judiciary. There was an alert public opinion, and respect for the law was deeply rooted.[69]

Thus Blackstone clearly could not view the royal prerogative of mercy with Beccaria's suspicion. To him this prerogative seemed but one more link between the King and his people[70]: 'This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment'. Blackstone defends the royal prerogative of mercy on the grounds of expediency as well as on this wider constitutional plane. He disagrees with Beccaria that in a perfect legal system, with mild but certain punishments, there is no room for pardon. Exceptional cases always occur, he holds, necessitating exemption from, or the commutation of the penalty. If the power to grant pardons were not vested with the King, it would have to be vested with the courts, thus creating the dangerous situation of the judge or the jury being able to construe 'the criminal law by the spirit instead of the letter'.[71] Furthermore, the power to judge and to pardon would thus become centred 'in one and the same person', which it should never be.[72] In support of this point Blackstone quotes Montesquieu, who observed that the vesting of both these faculties in the person of the judge would often make him contradict himself. This in its turn would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell whether a

[69] 'Blackstone's mental attitude was, in fact, the mental attitude of many representative Englishmen in the eighteenth century. Many representative Englishmen in that century were proud, and rightly proud, of English institutions and English law. Was not England the one State in Europe where the law was supreme, and the liberty of the subject was protected? Had not English institutions and English law won the praise of such representative foreigners as Montesquieu and Voltaire?'; Holdsworth, 'Some Aspects of Blackstone and his Commentaries'; *Cambridge Law Journal* (1932), Vol. 4, No. 3, pp. 274–275.

[70] 4 Comm. 397.

[71] *Ibid.*, 396.

[72] *Ibid.*, 397.

prisoner were discharged because of his innocence, or had obtained a pardon through favour.[73]

The failings of these two doctrines

Beccaria's doctrine cannot be accepted in its entirety, particularly his view that in a rational and enlightened system of criminal justice there should be no extra-judicial exemption from, or commutation of sentences, even in exceptional cases. For while history has confirmed the wisdom of Beccaria's obvious postulate that clemency and pardon become proportionately less necessary as punishments become milder, its logical corollary that the institution of pardon should consequently be abolished has never become established. On this point Blackstone was right, and not Beccaria.

Blackstone's weakness, on the other hand, consists in having discussed this royal prerogative *in abstracto*. While he mentions Beccaria's objection that the royal prerogative of mercy 'seems a tacit disapprobation of the laws',[74] he does not examine its weight in the light of English practice as it then was. Even if one agrees with Sir William Holdsworth that

[73] It is instructive to note that in his *Commentaries of the Law of Scotland, respecting Crimes* (1844), Vol. 2, p. 495, David Hume thus acknowledges the great advantages he held to be inherent in the Royal prerogative of mercy, if exercised with discrimination: 'We have already seen that, for reasons of indispensable necessity, a power is lodged with the Lords of Justiciary, to delay execution in extraordinary cases. But it does not, and ought not to belong to them, or to any court of justice, to *pardon* a convict in any case, or finally release him from his appointed doom, or any part of it: This is reserved as the benign and peculiar attribute of the Sovereign alone, who, in our polity, is the fountain of grace and mercy, as he is of justice; and will not fail to attend to the recommendation of the court, or the jury, in every instance where it is grounded in sufficient reasons. And, that our constitution has provided this excellent resource, for redressing those hardships in particular cases, which may sometimes arise out of the equal and inflexible, but wholesome severity of our penal laws and customs,—this is a consideration which ought never to be forgotten, on such occasions, either on the Bench or with the assize. So that for no reason of favour, or compassion, or regard of popular opinion, may they be tempted to swerve from their oath, or that obedience which they owe to the laws of the land; whose wisdom they ought not to challenge, and whose authority they ought not to disown. And indeed, if we ever allow any such deviation from the plain line of duty, and positive injunction of the law, where shall any bounds be set to such a licence, or how shall we obviate the hurtful influence and evil construction of this sort of example with the public?'

[74] 4 Comm. 396.

'owing to the defects in the criminal law, it was a very necessary power',[75] the question still remains whether the large-scale granting of pardons was compatible with a well regulated system of criminal justice and the effective prevention of crime. Blackstone's aim was to prove that the institution of pardon fitted well into the constitutional framework of the country and that it was indispensable in a rationally conceived system of criminal justice. His remarks were, however, somewhat divorced from reality. They referred to the privilege of granting pardons in certain carefully selected cases, although by that time pardons had long ceased to be exceptional measures but were extensively used as correctives of excessively severe laws. Even as late as 1812 James Abercromby (afterwards Lord Dunfermline) deplored in the House of Commons '. . . the extended practice of admitting convicts into the military service of the country and the greatly increased number of free pardons'.[76]

Blackstone avoids an examination of this issue; indeed his approach to it may be contrasted with his attitude to the benefit of clergy. After a masterly survey of the intricate history of the benefit of clergy, he acknowledges that in his time it was being made to serve a purpose which it was never intended to fulfil, being 'very considerably different from its original institution',[77]—an opinion consistent with his views on legal fictions which he strongly commends as contributing to the stability and continuity of the legal system.[78]

The attitude of penal reformers: Eden and Colquhoun

However, the defects of the current system of granting pardons were too glaring to be overlooked, and Blackstone's interpretation of them too narrow to be accepted as their satisfactory

[75] *H. E. L.*, Vol. 10, p. 415.

[76] 'Motion Respecting Convicts discharged upon entering the Army or Navy', *Parl. Deb.* (1812), Vol. 21, cols. 1253–1258. Abercromby also asked whether the Home Department 'was acquainted with all the circumstances of the individual cases in question . . . the particulars of the offences and characters of persons pardoned . . .'

[77] 4 Comm. 372.

[78] Dr. William Paley, who opposed the revision of capital laws and held that their rigour should be mitigated by a merciful administration, was in favour of an extensive use of the royal prerogative of mercy. He also maintained

justification. The interconnection between the manner of administering this royal prerogative and the general state of criminal law became gradually apparent to all who approached the problem without prejudice and in a spirit of bold inquiry. The conviction also grew that the disadvantages of the system greatly outweighed its immediate usefulness in attenuating the excessive severity of the criminal law. It was held to jeopardise the legality of the system of criminal justice, to enhance the chances of impunity and correspondingly to lower the deterrent effect of criminal law.

Two writers representative of this approach are Eden and Colquhoun. But while they both belonged to the same school of thought their general intellectual equipment was fundamentally different, their respective contributions being distinct though complementary. Eden was essentially a theoretical writer, interested in the broader aspects of criminal jurisprudence[79]; Patrick Colquhoun (a London magistrate possessed of rich experience of crime and criminals) aimed mainly at evolving an efficient system of detection and control of crime.[80] Their views on the problem of pardon are identical. But while Eden confines himself to laying down the guiding principles to be observed in the exercise of this royal prerogative, Colquhoun's practical instinct led him to discuss details; he describes the anomalous extension of pardons, the abuses committed at the expense of public safety and justice, and lays down concrete proposals for future administration.

A staunch supporter and fervent propagator of Beccaria's penal doctrine, Eden yet refuses to endorse his extreme views on pardon: '. . . we must allow, that, even in the mildest systems of which human societies are capable, there will still exist a necessity of this discretionary power, founded in the possible circumstances of every conviction '.[81] Nevertheless, he holds that it should be applied in exceptional cases only, in order to be compatible with a clearly determined and undeviating system of criminal justice. 'The English courts of

that it ought to be regarded 'as a judicial act'; *Principles of Moral and Political Philosophy* (1817), p. 413. This book was first published in 1785; on Paley, see below, pp. 248–259.

[79] On Eden see below, pp. 301–313.

[80] On Colquhoun see below, note 1 at p. 567.

[81] *Principles of Penal Law* (2nd ed., 1771), p. 320.

judicature', he writes, 'have long been eminent for the extraordinary wisdom and probity of the judges. Benevolence hath a natural prevalence in such characters, but benevolence ceases to be a virtue when it induces them to forget that they are not authorised to interpret the penal laws, and that they are entrusted with the execution of them by a Legislature actually existing, and alone competent to such interpretation'.[82] The import of this remark becomes apparent when it is examined in conjunction with his subsequent arguments. 'If Larceny, . . . to the value of twelve-pence', he says, 'had regularly received the judgment of death according to law, a law so absurd would not now exist; and Pilfering destined to a more adequate, but certain correction, would no longer be encouraged by the confidence of impunity'.

It has been pointed out already, that when granting a pardon the King followed the recommendation of the judges. It is obvious, therefore, that this extra-judicial commutation of punishments could not have been effected without their active co-operation. This in its turn could not have been secured were the judges convinced that existing legal provisions should be put fully into effect. The interdependence of these factors was noted by Eden, who thus comments upon it: 'Yet it seems necessary to remark that every disproportionate severity of the penal laws hath a tendency to familiarise the minds of princes to the exertion of this prerogative; and consequently to lead them in many cases to the abuse of it'.[83] And further on: 'It is a political truth, that, *when the laws are good, those, who deserve punishment, rarely escape the arm of Justice*'.[84] The fundamental difference between Blackstone's and Eden's approach to this problem thus becomes apparent. While Blackstone's prime concern was to show that the prerogative of mercy is an essential element in a constitutional monarchy, Eden endeavoured to throw into relief the connection between the way in which it was administered and the state of criminal law; his basic contention is that the more imperfect the law the more disabused is that prerogative, the only rational solution being to reform the law.

[82] *Ibid.*, p. 318.
[83] *Ibid.*, p. 320.
[84] *Ibid.*, p. 321.

In his book [85] Colquhoun examines the system in detail and brings forward proposals aiming at the elimination of at least its most glaring deficiencies. He first draws attention to the extraordinarily high incidence of remissions, stating that more than four-fifths of every hundred offenders condemned to death were usually pardoned, often unconditionally.[86] 'Hence it is', he writes, 'that, calculating on all the different chances, encouragements to commit crimes actually arise out of the system intended for their prevention: first, from the hope of avoiding detection and apprehension; second, of escaping conviction, from the means used to vitiate and suborn the evidence; third, from the mercy of the Jury, in considering the punishment too severe; and fourth, from the interest of persons of rank or consideration, applying (under circumstances where humanity becomes the friend of every person doomed to die), for the interference of Royal Mercy, by Pardons'.[87] Like Eden, Colquhoun was particularly anxious to make it clear that he was not in principle opposed to vesting this power in the Crown, but that it was only expedient to exercise it in certain isolated cases, since it was most unlikely that an innocent person could ever be convicted of a capital offence in England.

Pardons, according to Colquhoun, are mainly granted from motives of humanity, to which feeling offenders therefore appeal, resorting unscrupulously to every kind of falsehood and misrepresentation to secure their end. Thus, 'no sooner does

[85] *A Treatise on the Police of the Metropolis* (4th ed., 1797).

[86] *Ibid.*, p. 294.

[87] *Ibid.*, pp. 294–295; no reliable evidence is available to support the view that circumstances quoted by the author under point four accounted for more than a very small proportion of cases, but with the royal prerogative of mercy so freely exercised, it was inevitable that—for various reasons—petitions for pardons should sometimes have been strongly pressed. Thus, for instance, on August 31, 1767, Humphry Morice wrote to Lord Shelburne asking him 'to intercede for a pardon for two criminals, whose petitions are inclosed. Can't in any way avoid interceding for 'em, as the borough of Launceston, which he represents, and also that of Newport, where he chooses two members, both interest themselves that they should be saved. If it should be improper to grant their requests, asks the favour of an ostensible letter'; *Calendar*, Vol. 2, No. 548, p. 184; see also *ibid.*, No. 551, pp. 184–185. M. A. Thomson, *The Secretaries of State* (1932), p. 110, records that among Newcastle's memoranda, the following note may be found: 'Thomas Newman smuggler in Horsham Gaol; has many friends in Sussex; to be released.—40 or 50 double votes depend on this'. However, the motives for such outside pressure were not necessarily sinister or pecuniary, but often sprang from a genuine compassion founded on a conviction that the law was too severe, or that in a particular case certain favourable circumstances had been overlooked.

the punishment of the Law attach on a criminal, than false humanity becomes his friend. . . . it is known that His Majesty's great goodness and love of mercy has been frequently abused by the tricks, devices, and frauds, too commonly resorted to, by the convicts and agents equally depraved as themselves, . . . By such nefarious practices, it is much to be feared, that many a hardened villain has eluded the punishment of the Law, without any previous reference to the committing Magistrates, who may be supposed to have accurately examined into his character and connections; . . .'[88] When pardons, and particularly free pardons, are obtained by such means not only is 'a link broken in the chain of justice', but some offenders, not necessarily worse than many others, are actually executed, their lives 'being sacrificed rather to the vengeance of the Law than to the good of the Public'.[89]

Finally, Colquhoun makes the following proposals for the reform of the system[90]: (a) Deception should be avoided by establishing a regular and well defined procedure for obtaining the fullest authentic information. (b) The royal mercy should be extended to those convicts under sentence of death who discover all their accomplices and confess all the crimes they have committed. (c) Pardoned offenders should be transported, or should make retribution to the injured parties by remaining at hard labour for life, or until ample security be given for their good behaviour. (d) Free pardons should if possible be avoided, but if granted, should be conditional on two responsible persons giving bail for the good behaviour of the convict for at least seven years; they should forfeit a certain portion of their money if the pardoned convict commits a new crime within that period. This condition might be extended to all persons applying for a pardon.[91] But while emphasising the need for the reorganisation of the system of pardon, Colquhoun always considers this to be but one element in a wider scheme of reform, which would include the revision of criminal laws, the

[88] *Op. cit.*, pp. 24–25.
[89] *Ibid.*, p. 298.
[90] *Ibid.*, pp. 29, 296 and 317.
[91] Colquhoun was not the only London magistrate to express strong misgivings on the too frequent granting of pardons. Similar objections were earlier advanced by Bernard Mandeville, and by Henry Fielding in his pamphlet, *Inquiry into the Causes of the late Increase of Robbers*. The relevant chapter is significantly entitled: 'Of the Encouragement given to Robbers by

establishment of an efficient police force and the development of an adequate prison system.

The humanising function of the prerogative in the eighteenth century

It may be said that in their attitude to the royal prerogative of mercy Eden and Colquhoun were representative of those who favoured penal reform generally, all of whom fully endorsed Burke's well-known observation that 'mercy is not a thing opposed to justice. It is an essential part of it; as necessary in criminal cases, as in civil affairs equity is to law'.[92] The prerogative of mercy as it was exercised late in the eighteenth and early in the nineteenth centuries was objected to because the increasingly more frequent interference of an extra-judicial factor rendered justice insecure and capricious; it weakened the intimidating effect of appointed punishments by increasing their uncertainty; it enhanced the offender's chances of impunity, thus acting as an incentive to crime; finally, it was dangerous in so far as it delayed the reform of criminal law by providing an immediate mitigation of its severity. It was generally agreed that once the criminal law were reformed, pardon by royal prerogative would quite naturally become an exceptional measure, in which form alone its retention within the framework of a well regulated system of criminal justice was held to be justified.

These contemporary objections were largely well founded, though the fact remains that by the generous use of this power the Crown achieved a marked relaxation of the severity of criminal law. Hundreds of offenders were thus saved from a punishment which was admittedly out of all proportion to the gravity of their offences. The soundness of the argument that the royal prerogative of mercy was delaying the reform may be questioned, for it is doubtful whether any comprehensive

frequent Pardons'. See *Works* (ed. by Leslie Stephen, 1882), Vol. 7, pp. 261–264. On Fielding see also below, pp. 401–415.

Like many other penal reformers, Colquhoun objects particularly to free pardons and to making pardons dependent on the willingness of the offender to join the army or navy. He also questions the advisability of making too frequent use of respites.

[92] 'Remarks on the Policy of the Allies with respect to France', *Works* (Bohn's ed., 1855), Vol. 3, p. 453.

reform of criminal law could have been carried out in the eighteenth century.[93]

Eden asserted[94] that if the capital laws relating to petty theft had been allowed to take their course instead of being continually mitigated in practice, they and other similar enactments would have long since been abrogated. This statement, while logically sound, is yet hypothetical and not uncontrovertible. Both the history of the English legal system and English constitutional as well as political experience show that the essential prerequisites of success of any important reform are first that the social need for it should assert itself, and secondly that it be supported by an overwhelming section of public opinion. The firm establishment and wide diffusion of such a conviction is necessarily a slow process, and certain long established institutions, often sponsored for quite different purposes, may well serve to bridge the gap between these emerging social needs and the old law, during the inevitable stage of transition.[95] Their operation is often erratic, but their social usefulness cannot be questioned. In the eighteenth and the beginning of the nineteenth centuries the generous exercise of the royal prerogative of mercy helped to redress the balance between the antiquated criminal law and the modern notions of guilt and punishment then beginning to take shape. As such it performed a valuable and markedly humanising function.

[93] On some factors which impeded the progress of the movement for the reform see above, pp. 23–35, and below, pp. 351–354.

[94] Above, p. 133.

[95] Sir Henry Maine writes, for instance: '. . . social necessities and social opinion are always more or less in advance of Law. We may come infinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed. . . . A general proposition of some value may be advanced with respect to the agencies by which the Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation'; *Ancient Law* (1906), p. 29.

Chapter 5

CAPITAL STATUTES IN OPERATION[1]

Object of this inquiry

In the foregoing part the state of English criminal law in the eighteenth century has been surveyed with particular reference to capital punishment. It will be seen later that while the tendency to maintain and even to extend the scope of this punishment was still predominant, new ideas were germinating and foundations being laid for an extensive reform.[2] This new approach to penal matters contrasted sharply with the refusal of Parliament to implement the very modest reforms submitted for their consideration in the years 1750–1787.[3] But little has been said so far on the actual operation of capital statutes.

To what extent and in what manner were the capital statutes being used by those who were called upon to administer them? It has been ascertained that the operation of a great number of the most severe enactments was restricted owing to their merciful interpretation by the courts and to the extensive use made of the royal prerogative of mercy.[4] Were then capital statutes meant to be put fully into effect? Or, in accordance with Paley's doctrine, was it assumed that they would achieve their object even if only occasionally enforced?[5] Was there a stable or a variable ratio of capital sentences to executions? If a variable one, can it be shown that the incidence of executions was rapidly decreasing? Can a certain divergence between law and practice be held to prove that the law was at variance with the predominant trend of public opinion? Or is it also necessary to prove that the disparity had arisen and reached considerable proportions within a relatively short period of time? Did such an acute disparity arise at the close

[1] As explained above, p. 3, note 2, the expression 'capital statutes' is herein used to indicate statutes imposing capital punishment.
[2] Below, Chaps. 10 and 11, p. 301 *et seq.*
[3] Below, Chaps. 12 and 13, p. 399 *et seq.*
[4] Above, Chaps. 3 and 4, p. 83 *et seq.*
[5] On Paley see below, p. 248 *et seq.*

of the eighteenth century? It is hoped that the present inquiry will throw some light on these problems, although the dearth of reliable information precludes it from being as comprehensive as would have been desired, and some points have had to be worked out on what may be called the basis of reasonable assumption.

§ 1. SCARCITY OF STATISTICAL INFORMATION

Severity of criminal law in the sixteenth and seventeenth centuries

At some periods of English history criminal law was administered with great rigour. Thus, to give only one well-known instance, we have it on the authority of Hume that during the reign of Henry VIII, 72,000 criminals were put to death for theft and robbery alone, an average of nearly 2,000 a year.[6] This often-quoted information is derived from Harrison's *Description of Britain* incorporated into Holinshed's *Chronicle*. Pike holds that as the author does 'not appear to have consulted those records from which the information might have been obtained, and which are now, unfortunately, not all in existence, his figures must be regarded as merely conjectural'.[7] The exactness of these figures is rightly denied by Froude, who scrutinised the basic evidence and reached the conclusion that they could not be accepted as reliable. 'Historians who are accustomed to examine their materials critically, have usually learnt that no statements must be received with so much caution as those which relate to numbers. . . . Men not remarkably inaccurate will speak of thousands, and, when cross-questioned, will rapidly reduce them to hundreds, while a single cipher inserted by a printer's mistake becomes at once a tenfold exaggeration'.[8]

In Stephen's opinion the early criminal law was extremely severe, its severity being further increased under the Tudors; from the time of Elizabeth to the end of the seventeenth century it varied but little.[9] A similar view is expressed by Professor Jerome Hall. In *Theft, Law and Society* Hall

[6] *History of England* (The World Library, no date), Vol. 2, p. 230.
[7] *History of Crime* (1873), Vol. 2, pp. 619–620; see also p. 110.
[8] *History of England* (1870), Vol. 3, note 2 at pp. 221–223.
[9] *H. C. L.*, Vol. 1, p. 466.

writes[10]: '. . . if one were to mark out the period of greatest severity in modern English law the sixteenth and seventeenth centuries would undoubtedly form the central area. The non-clergyable felonies had already piled up whereas evasion of the statutes did not occur to any great extent until the eighteenth century'. The following crimes were then punishable with death without benefit of clergy: high treason, petty treason, piracy, murder, arson, burglary, house-breaking and putting in fear, highway robbery, horse-stealing, stealing from the person above the value of a shilling, rape and abduction with intent to marry. In the case of persons who could not read, all felonies, including manslaughter, every kind of theft above the value of a shilling, and all robberies were capital crimes.[11]

Some tentative evaluations of the incidence of executions in the sixteenth and seventeenth centuries

While it is impossible to ascertain precisely how these laws were administered for the whole of England, some information is available on the working of the administration of criminal justice in certain districts of the country. Thus, instructive data are to be found in A. H. A. Hamilton's valuable book *Quarter Sessions from Queen Elizabeth to Queen Anne*, constructed on the basis of original records chiefly of the county of Devon. These records relate to the latter part of Queen Elizabeth's reign, starting from the year 1592, and show that during 1598, seventy-four persons were sentenced to death in Devonshire alone.[12] If this figure is taken as a representative yearly average of the death sentences in each of the forty English counties—an assumption which in view of the high incidence of crime peculiar to so many regions outside Devon may well be an under-statement—it would appear that about

[10] (1935), p. 86.

[11] Pike is inclined to think, however, that there were fewer executions, and even less crime at the end of the sixteenth century than there had been at any previous time in English history, and explains this decrease in the following manner: 'A great number of causes contributed towards the same result. The throne was more secure, the country had increased in wealth, there was a law for the relief of the poor, which, however imperfect, was better than none, and (most important of all) the restless spirits had learnt to seek adventures by sea rather than by land'; *op. cit.*, Vol. 2, pp. 110–111.

[12] A. H. A. Hamilton, *Quarter Sessions from Queen Elizabeth to Queen Anne* (1878), p. 71.

2,960 death sentences were pronounced in England in that one year alone. Obviously not all of these verdicts were actually implemented, but there are good reasons to believe that the number of executions could not have been much below one-half or one-third of the number of sentences recorded.[13]

A much more extensive and reliable computation was made by J. C. Jeaffreson, who rendered a notable service to legal and social historians by editing the *Middlesex County Records*.[14] According to him, 704 offenders were executed in Middlesex during the ten successive years of the reign of James I (1607–1616), a yearly average of over seventy.[15] Jeaffreson rightly assumes that the incidence of crime, and consequently also of executions, was much higher in the city of London than in the county of Middlesex. But he adds, 'in arguing inferentially, it is . . . best to avoid a suspicion of overstating the case. Let it therefore be assumed that in James the First's time, . . . the felonies done in London only equalled in number the felonies done in Middlesex, and that the persons who perished at Tyburn . . . for crimes perpetrated in London were neither more nor less numerous than the persons who perished . . . for the felonies done in Middlesex'.[16] It can thus be contended that in the ten years from 1607–1616, 1,408 offenders were executed in London and Middlesex, an average of over 140 a year. Jeaffreson submits

[13] 'If the average number of executions', writes Stephen, *H. C. L.*, Vol. 1, p. 468, 'in each county was only twenty, or a little more than a quarter of the number of capital sentences in Devonshire in 1598, this would make 800 executions a year in the forty English counties. The number of executions was notoriously very great'. From the 'List of Prisoners tried at the Castle of Exeter at Midsummer Sessions in the Fortieth year of Queen Elizabeth, 11th July, 1598', and reprinted by Hamilton, *op. cit.*, pp. 33–34, it appears that all the eight offenders then sentenced to be hanged had committed offences against property, such as horse and sheep-stealing, cutting a purse, pocket-picking, housebreaking and receiving stolen goods. Seven further offenders were admitted to the benefit of clergy and were ordered 'to be branded and set free'. There were seven acquittals and thirteen offenders were sentenced to flogging. According to Hamilton, 'it seems probable that flogging was generally thought a sufficient punishment for a first offence, while repeated offences, thought not of a very heinous nature, were considered to deserve capital punishment'.

[14] (1886–1892), 4 vols.

[15] *Op. cit.*, Vol. 2, p. XVII. In addition, during the same period thirty-two persons, of whom three were women, died by the *peine forte et dure* for declining to confess or plead to indictments for crimes committed in Middlesex; *ibid.*, pp. XVIII and XIX.

[16] *Ibid.*, p. XX.

further that in his opinion the Middlesex records afford no ground for assuming that the yearly average of executions was greater in James's reign than in the reign of Elizabeth, and calculates that during the Queen's reign at least six thousand persons were put to death in London and Middlesex alone.[17]

During the ten years of the reign of Charles I the incidence of executions— though still high—was considerably lower than in the previous periods, the yearly average being forty-five for Middlesex, or about ninety for London and Middlesex together.[18] During the ten years of the Commonwealth period (1649–1658)[19] the yearly average of executions was 42.9 for Middlesex, or just over eighty-five for London and Middlesex.[20]

[17] *Ibid.*, p. XXII. 'To realise fully the significance of this penal death-rate', Jeaffreson adds, 'readers should calculate how many of the 4,000,000 inhabitants of what is termed modern London (he was writing in 1887) would be yearly killed by judicial sentences, if we hung and pressed people to death at the Jacobean rate. It is a ghastly thought that, had we to this hour persisted in killing criminals at the Jacobean rate, we should in each of the latest years of her present Majesty's reign have hung or pressed to death about 2,263 of the inhabitants of the metropolis'.

[18] *Ibid.*, Vol. 3, pp. XVII–XVIII. On Jeaffreson's explanation of this remarkable fall in 'the penal death-rate', see below, note 57 at p. 162.

[19] According to Jeaffreson, 1659—the last year of the Commonwealth—'was a year in which the arm of justice was partially paralysed by the political crisis . . .'; *ibid.*, p. XIX. The data for that year must therefore be considered as incomplete.

[20] On the basis of Jeaffreson's data, A. Marks calculates that in estimating the number of executions for the reign of Henry VIII, 'we may take the Jacobean rate of 140 per annum for the earlier years of the reign, from 1509–35—twenty-seven years. We shall probably be well under the mark in quadrupling the Jacobean rate for the remaining eleven years of the reign, and for the six years of the reign of Edward VI. For the troubled reign of Mary we will double the Jacobean rate'; *Tyburn Tree its History and Annals* (no date), p. 77. The results of these calculations Marks presents in the form of the following table:—

Reign	Duration, Years	Assumed Yearly Average of Executions at Tyburn	Total	
Henry VIII . .	27	140	3,780	9,940
Ditto . . .	11	560	6,160	
Edward VI . .	6	560	3,360	
Mary . . .	5	280	1,400	
Elizabeth . . .	44	140	6,160	
James I . . .	22	140	3,080	
Charles I . . .	24	90	2,160	
Commonwealth . .	11	90	990	
	150		27,090	

Marks emphasises that 'it is, of course, not claimed that this table presents more than the results of reasonable conjecture—with the data available we cannot get beyond conjecture'; *ibid.* It should be noted that Marks puts the number of executions during the Commonwealth period at ninety, as compared with Jeaffreson's eighty-five.

Crime in England circa 1817: *predominance of capital offences.*

Since at the end of the eighteenth century the death penalty was imposed both for the most serious crimes and for a great many trifling offences, particularly against property, the annual average number of executions would have been extremely high had criminal justice been administered strictly in accordance with the Statute Book. Available criminal statistics are too incomplete to provide an exact picture of the structure of crime in England in the period *circa* 1800, the earliest fuller returns dating from the year 1810. Since then, however, they have been regularly issued by the Home Department, and some information on the subject now under review can be gathered from the tables giving the total number of persons committed for trial in each consecutive year. Such a return for the year 1817 is reproduced below.[21]

Total number of persons committed for trial in 1817

Arson and other Wilful Burning of Property	30
Bigamy	36
Burglary	627
Cattle, Stealing	30
Maliciously Killing and Maiming	7
Child Stealing	6
Coin, Counterfeiting the Current	3
Putting off and Uttering Counterfeit	346
Embezzlement (by Servants)	80
Forgery and Uttering	98
Forged Bank Notes, Having in Possession, etc.	124
Fraudulent Offences	249
Framebreaking and Destroying Machinery	8
Game Laws, Offences against	168
Horse Stealing	114
Housebreaking in the Day-time and Larceny	229
Larceny, Simple	9,396
In Dwelling-Houses, to the value of 40s.	207
In Shops, etc., privately, to the value of 5s.	52
On Navigable Rivers, etc., to the value of 40s.	9
From Bleaching Grounds, etc.	13
Of Naval Stores, to the value of 20s.	2
From the Person	519
Letters containing Bank Notes, etc., Secreting and Stealing	3
Letters, Sending Threatening	1

[21] 'A Statement of the Number of Persons charged with Criminal Offences, who were committed to the different gaols in England and Wales'; Appendix, No. 1, to 'Report from Select Committee on Criminal Laws' (1819), 585, *Parl. Papers* (Reports, 1819), Vol. 8, p. 125 *et seq.* It would have been possible to quote

Mail Robbery	0
Manslaughter	68
Murder	80
Shooting, Stabbing and Administering Poison with Intent to Murder	64
Concealing the Birth of their Infants	10
Oath, Unlawful Taking and Administering	0
Perjury	14
Piracy	0
Prisoners of War, aiding the Escape of	0
Rape, etc.	47
Assault with Intent to Commit Rape	42
Riot and feloniously Demolishing Buildings	0
Robbery on the Person, on the Highway and other Places	276
Sacrilege	7
Sheep Stealing and Killing with Intent to Steal	306
Sodomy	8
Assault with Intent to Commit, and other Unnatural Offences	27
Stolen Goods, Receiving	935
Treason, High	39
Transports, being at large, etc.	7
Felony and Misdemeanour (not otherwise described)	245
Total number of persons committed for trial	13,932

According to this return—the most characteristic for the whole period as regards the number and the nature of crimes—the majority of all offenders committed for trial in 1817 were liable to be punished by death.

It should, however, be pointed out that the exact proportion of offenders liable to be punished by death cannot be established on the basis of statistical returns. As the law then stood simple larceny was theft unaccompanied by any aggravating circumstances.[22] A simple theft of goods *above* the value of twelve-pence was considered grand larceny and was punishable with death, whereas a theft *to* this value (or under) constituted what was known as petty larceny and did not carry this punishment.[23] But it has already been noted that in order to avoid the infliction of the death penalty, many

figures for the year 1810, which would have been nearer in time to the period now under observation. Since, however, the criminal records for 1817 are more typical of the entire period, they have been preferred as an illlustration to those for 1810. In the latter year crime was exceptionally low, but only remained so in the four subsequent years, whereas the level recorded in 1817, though not the highest, is much more representative of the period 1800–1832 taken as a whole.

22 Appendix 1, below, pp. 632–633.

23 Blackstone, 4 Comm. 229–230 and 239. In *Principles of Penal Law* (1771), p. 292, Eden writes: '. . . it is, and hath been from the year 1109, the law of England, that in general all persons guilty of larceny above the value of twelve-pence shall be hanged'.

offenders were being prosecuted for the less serious offence although they were in fact guilty of the more serious one.

It may be advanced that the above quoted return is somewhat misleading since it relates to the number of persons brought to trial, whereas in the later stages of criminal proceedings many bills of indictment are not found, and in many other cases a verdict of acquittal is given. Partially valid as this objection is, it would yet be wrong to interpret the fact that a bill is not found or that the accused is acquitted as an *eo ipso* proof of his innocence. Figures for the final stage of criminal proceedings will, however, best supplement the above observations:

Total number of persons committed for trial in 1817 . . .		13,932
No bills found, and no prosecution	2,198	
Persons acquitted	2,678	
		4,876
Total number of persons convicted of all offences		9,056

Thus in 1817, 9,056 persons were convicted out of the 13,932 committed for trial. But even if assessed on the basis of this final, much less substantial figure, the number of offenders who should have suffered death would still have been extremely high had the capital statutes been strictly enforced.

Tables of capital convictions and executions preserved by Janssen: Statistical records compiled for the Committee of 1819

It has been pointed out already that factual information about the administration of capital laws in the eighteenth century is inadequate. Moreover, such statistical returns as are available do not cover the whole of England but only limited areas, and even so their peculiar construction precludes a full examination of the issue in question. A certain amount of information is to be found in John Howard's *State of the Prisons*.[24] In this book Howard reproduces a valuable table relating to the number of capital convictions, executions and pardons in London and Middlesex during the years 1749–1771, which was

[24] (3rd ed., 1784), pp. 482–483. See also a table for the years 1771–1783, *ibid.*, p. 484.

preserved by Sir Stephen T. Janssen, the Chamberlain of London, and later ingeniously analysed by Sir Samuel Romilly in the course of his great speech in the Commons on February 9, 1810.[25] But the information which this, and a number of supplementary tables computed by Howard give, is too fragmentary for the purposes of the present inquiry.[26]

The only other major source of information are the returns computed for the Select Committee on Criminal Laws, set up in 1819 under the chairmanship of Sir James Mackintosh. Realising the importance of statistical information in the discussion and framing of plans for law reform, the Committee instructed the clerks to the assizes in many parts of the country to construct retrospective statistical returns for as long a period of time as was possible. A number of notable records were reconstructed and embodied in an appendix to their *Report*.[27] It is hoped that the appropriate arrangement of the data

[25] Below, pp. 325–326.

[26] The following interesting conclusions can be drawn from the three main tables reproduced by Howard, *op. cit.*, Table VI, p. 479; Table VII, p. 480; and Table IX, pp. 482–83: (1) There was no uniform ratio of executions for the whole country. Thus while in London and Middlesex (1749–1771), out of 1,121 offenders sentenced to death, 678—or more than a half—were executed, the ratio in the Norfolk Circuit (1750–1772) was much lower—117 executed out of 434 sentenced to death, and it was lower still in the Midland Circuit (1750–1772), where for 518 death sentences there were 116 executions. (2) The number of executions was steadily decreasing. This can be ascertained by examining the incidence of death sentences and executions for each year covered by these tables. Thus it appears that during the first three years of the period 1749–1771, out of 230 offenders sentenced to death in London and Middlesex 163 were executed, while during the last three years of that period there were 107 executions for 222 death sentences. In the Norfolk Circuit, out of sixty-five sentenced to death in the first three years of the period 1750–1772, thirty-three were executed, while in the last three years, there were forty-seven death sentences, and only twelve executions. In the Midland Circuit (1750–1772) there were sixty-eight death sentences and eleven executions in the first, and forty-three death sentences and only eight executions in the last three years of the period. (3) It can finally be ascertained (Table IX) that out of 678 offenders executed in London and Middlesex (1749–1771) 251 have been convicted of highway robbery, 118 of housebreaking, seventy-two of murder, eighty-one of forging and coining, twenty-two of horse stealing, twenty-two of returning from transportation, three of defrauding creditors, and 109 of other crimes, including shop-lifting. The highest ratio of executions was for murder, forgery and coinage offences, robbery, returning from transportation and defrauding creditors. The lowest for horse stealing (twenty-two executed for ninety sentenced to death).

[27] The Appendix contains about 240 pages of statistical returns and tables. See note 21 at pp. 143–144 above as to the reference where it can be found. The records of crime in England reconstructed owing to that Committee's initiative are of outstanding value.

contained in these returns will throw some light on the subject under examination.

§ 2. ADMINISTRATION OF CAPITAL STATUTES IN LONDON AND MIDDLESEX IN THE EIGHTEENTH CENTURY

The most complete return is that for London and Middlesex, covering the period 1749–1818.[28] Except for the last seven years, however, it only gives the numbers of capital convictions and executions—together with a specification of the offences—and fails to show either the total number of convictions (or of persons brought to trial) or the distribution of all the other penalties. Consequently, it is impossible on the basis of this return to ascertain the respective ratios of capital convictions and executions to all other convictions. On the other hand, the number of both death sentences and executions is established, and their relationship can be examined with respect to each particular offence.

Number of persons capitally convicted and executed (1749–1799)

In the table below information is given on the number of persons capitally convicted and on the number executed in London and Middlesex in the period 1749–1799.

	Capitally convicted	Executed		Capitally convicted	Executed		Capitally convicted	Executed
1749	61	44	*1766*	39	20	*1783*	173	53
1750	84	56	*1767*	49	22	*1784*	153	56
1751	85	63	*1768*	54	27	*1785*	151	97
1752	52	47	*1769*	71	24	*1786*	127	50
1753	57	41	*1770*	91	49	*1787*	113	92
1754	50	34	*1771*	60	34	*1788*	83	25
1755	39	21	*1772*	79	37	*1789*	97	26
1756	30	13	*1773*	101	32	*1790*	67	33
1757	37	26	*1774*	87	32	*1791*	83	34
1758	32	20	*1775*	74	46	*1792*	89	24
1759	15	6	*1776*	80	38	*1793*	58	16
1760	14	10	*1777*	63	32	*1794*	71	7
1761	22	17	*1778*	81	33	*1795*	49	22
1762	25	15	*1779*	60	23	*1796*	93	22
1763	61	32	*1780*	94	50	*1797*	81	10
1764	52	31	*1781*	90	40	*1798*	82	19
1765	41	26	*1782*	108	45	*1799*	72	24

Appendix No. 2 and No. 3, pp. 135–145; quoted above, pp. 143–144, note 21.

During these fifty-one years nearly every second offender capitally convicted in London and Middlesex was executed (1,696 out of 3,680). These figures, it should be remembered, relate to London and Middlesex only, the number of death sentences and executions for the whole country being obviously very much higher. In one year, 1785, ninety-seven persons were put to death in London and Middlesex alone. In 1938 the number of offenders sentenced to death in the *whole* of England and Wales was twenty-two (nineteen males and three females). Of these, eight were executed (males only), the others having their sentences commuted to penal servitude for life.[29]

Predominance of executions for offences against property

The great majority of the ninety-seven offences for which the executions took place in 1785 were offences against property, there being only one case of murder,[30] no other serious crimes against the person or sex, and none against the safety of the State or public order.

Burglary and housebreaking	43
Forgery and uttering forged instruments	4
Horse stealing	4
Larceny on a navigable river	5
Murder	1
Personating others to obtain prize money	2
Robbery on the highway and other places	31
Transportation, unlawfully returning from	4
Various (not specified)	3
Total number	97

These figures relate to one year only, but are by no means exceptional. Out of 678 offenders executed in London and Middlesex in the twenty-three years from 1749 to 1771, seventy-two had committed murder, fifteen attempted murder, two rape, two sodomy, one high treason, and two other felonies. Thus out of 678 capital sentences for which executions took place, only ninety-four were for very serious crimes against the person and the State; all the remaining 584 were for offences against property.

[29] *Criminal Statistics, England and Wales, for 1938* (1940), 6167, Table 1, p. 30, col. 10, and note b.

[30] This figure confirms the opinion of foreign observers who held that the number of murders was much lower in England than in most other countries; below, pp. 708–709.

§ 8. ADMINISTRATION OF CAPITAL STATUTES IN THE HOME CIRCUIT DURING THE SEVENTEENTH AND EIGHTEENTH CENTURIES

Further information on the issue in question may be derived from the data relating to the Home Circuit, contained in Nos. 6, 7 and 8 of the already quoted 'Appendix' to the *Report on Criminal Laws* (1819).[31] In addition to the number of offenders sentenced to death and of those executed, this return also gives the aggregate number of persons brought to trial, thus making it possible to assess the incidence of both death sentences and executions in relation to the total number of offenders. However, no comparison is possible of the figures for death sentences and executions with those for all convictions,[32] as only the figures for those brought to trial were recorded. It is therefore necessary to make use of such figures as are available, always bearing in mind that they are not strictly comparable.

High incidence of death sentences and of executions

In the table below three periods have been singled out, for each of which yearly averages of (a) commitments on all charges, (b) capital convictions and (c) executions are given. The return contains no data for the years 1719–1753 which therefore had to be omitted.

Yearly average number of persons	1688–1718	1754–1784	1785–1794
Committed for trial on all charges	297	281	548
Capitally convicted	38	46	66
Executed	20	13	23

It is seen that a relatively very high proportion of offenders capitally convicted were actually executed: over 50 per cent. in the period 1688–1718 and about 33 per cent. in the latter part of the eighteenth century. Taking the seventy years comprising the three periods of 1688–1718, 1754–1784 and 1785–1794 as a whole, it can be ascertained that out of the 3,284 offenders sentenced to death, 1,188 were executed.[33]

[31] Above, note 21 at pp. 143–144.
[32] See also remarks above, p. 147.
[33] A yearly average of 16.9 executed out of 46.2 sentenced to death.

The severity of the English criminal law and its administration at that period is further borne out by the fact that out of a yearly average of 297 offenders committed for trial on all charges in the period 1688–1718, the average number of death sentences was thirty-eight; in other words, for approximately every eight persons committed for trial, one was sentenced to death. This ratio became even higher in the years 1754–1784, but reverted to the original one-in-eight at the close of the century, in the years 1785–1794. It should be pointed out here that this calculation is in fact an under-statement, because the number of offenders sentenced to death is compared with the total number of persons committed for trial, many of whom, as has already been stated, were acquitted.[34] Some indirect light may be thrown on this matter by the data contained in the returns for London and Middlesex, which from 1812 onwards record the cases of no bills found, acquittals and convictions, as well as the committals for trial.[35] Thus in 1812 the total number of persons committed for trial on all charges was 1,663, of whom 998 or rather less than two-thirds were convicted (of capital and non-capital offences). If it is assumed that a similar ratio obtained in the Home Circuit during the period under consideration, the correct number of persons convicted will be found by reducing the available figure of those committed by about one-third. Since the yearly average number of persons committed on all charges during the periods 1688–1718 and 1754–1784 was respectively 297 and 281, the average number of all convictions (capital and non-capital offences) must be put at approximately 200 a year. Consequently it appears that at that time, *out of every five offenders convicted in the Home Circuit (of capital or non-capital offences), one was sentenced to death.* While this is, of course, no more than an estimate, it may certainly be accepted as an indication of the then prevailing trend in the administration of capital statutes.

Predominance of executions for offences against property

Moreover, whereas in the first period a comparatively high proportion of these delinquents was executed for murder, in

[34] Above, pp. 92–94.
[35] Appendix No. 3, pp. 140–145; above, note 21 at pp. 143–144.

the last the bulk of executions was for various offences against property. Thus out of forty-seven offenders put to death in 1689, eighteen, or slightly more than one-third, were found guilty of murder; two were of misprision of treason, also a serious offence against the person; twelve of highway robbery; four of burglary; four of housebreaking, and most of the remainder of cattle-stealing. But in 1785 only one of the sixty-four executions which took place that year was for murder, and all the other sixty-three for offences against property. Of these, twenty-five were for highway robbery, fifteen for burglary, nine for robbery, three for larceny in dwelling-houses, three for housebreaking, six for horse- or cattle-stealing, and two for coining. Thus in 1785 the death penalty was inflicted almost exclusively for economic offences.[36]

§ 4. GRADUAL RELAXATION IN THE ADMINISTRATION OF CAPITAL STATUTES

Relaxation in London and Middlesex towards the end of the eighteenth century

It has thus been ascertained that the administration of capital laws in the eighteenth century was very strict, but became progressively more lenient as the century drew to its close. This trend becomes more apparent if the figures for the last ten years of the century are compared with those for the ten years 1749–1758.[37]

	Sentenced to death	Executed
1749–1758	527	365
1790–1799	745	220

Thus the 1749–1758 ratio of two in three offenders sentenced to death in London and Middlesex being executed was reduced to less than one in three by the end of the century.[38]

[36] This is also true for the remaining years of the period 1785–1794.

[37] On the basis of Appendix No. 2, pp. 135–139; above, note 21 at pp. 143–144.

[38] A similar tendency may be ascertained in respect to the Home Circuit. While in the period 1688–1718 every second offender capitally convicted was executed—in the period 1754–1784 this proportion dropped to about one in three.

A further stage of this process: 1800–1810 (*London and Middlesex*)

This relaxation, although considerable, appears almost insignificant when compared with the changes which took place in the first decade of the nineteenth century. On the basis of records already quoted,[39] it has been possible to compute a table giving the numbers of capital convictions and executions in London and Middlesex in the years 1800–1810.

	Capitally convicted	Executed
1800	101	19
1801	101	14
1802	97	10
1803	82	9
1804	67	8
1805	63	10
1806	60	13
1807	74	14
1808	87	5
1809	89	8
1810	118	13
Total	939	123

The importance of the conclusions which may be drawn from these figures cannot be over-emphasised. In the years 1749–1758, more than two-thirds of the offenders who were capitally convicted were executed; in the years 1790–1799, the proportion fell to less than one in three. But in the next eleven years (1800–1810) only about one offender out of every seven sentenced to death was executed.

How extraordinarily sudden was this change in the administration of capital statutes becomes evident from a comparison of the first three with the last three years of the period 1800–1810.

	Capitally convicted	Executed
1800–1802	299	43
1808–1810	294	26

With the number of capital sentences passed in these two periods practically the same, the ratio of executions to capital convictions changes from one in seven in the first period to

[39] Above, note 28 at p. 147.

approximately one in ten in the second. While these far-reaching changes were taking place, the Legislature not only opposed the revision of the existing capital statutes, but even created a number of new capital offences.

The changes examined for the whole of England and Wales (1805–1810)

Although there can be no doubt that the administration of capital statutes in London and Middlesex is a reliable index of the main trends peculiar to the whole country, the conclusions based on an analysis of them should also be tested on a broader basis. Since statistical records for the whole country were only initiated in 1805, it is proposed to examine the dominant trend in the administration of capital statutes in England and Wales in the years 1805–1810. This can be done on the basis of the following table, showing the total number of offenders in the larger area convicted (of all offences), sentenced to death and executed respectively.[40]

	1805	*1806*	*1807*	*1808*	*1809*	*1810*
Offenders convicted . . .	2,783	2,515	2,567	2,723	3,238	3,158
Offenders capitally convicted .	350	325	343	338	392	476
Offenders executed . . .	68	57	63	39	60	67

(a) During the whole of this period a total of 16,984 offenders were convicted, of whom 2,224 were sentenced to death and 354 executed. In other words, approximately one offender was sentenced to death out of every seven convicted, and one was executed out of every six capitally convicted. Thus the tendency towards considerable leniency in the administration of capital laws in London and Middlesex early in the nineteenth century is fully confirmed by the data relating to the whole country.

(b) The figures given in the above table further indicate that while the ratio of all convictions to capital convictions remained fairly constant, that of executions to capital convictions fell from one in five in 1805 to almost one in seven in

[40] Computed on the basis of material contained in Appendix No. 1, pp. 125–134; above, note 21 at pp. 143–144.

1810. This would seem to indicate that it was precisely in the last stage, *i.e.*, when the death sentences were due to be carried out, that certain restraining forces tended to assert themselves and most effectively to restrict the operation of capital statutes.

This assumption cannot be fully endorsed, however. It has been shown that an appreciably higher percentage of offenders capitally convicted was executed in the eighteenth than at the beginning of the nineteenth century, as well as that a larger proportion of all sentences was capital. In the years 1785–1794 in the Home Circuit, one out of every eight persons committed for trial was sentenced to death.[41] But as the table below indicates, the corresponding proportion was much lower early in the nineteenth century.

	1805	*1806*	*1807*	*1808*	*1809*	*1810*
Proportion of capital convictions to committals for trial on all charges (England and Wales)	1 *in* 13	1 *in* 13	1 *in* 13	1 *in* 14	1 *in* 14	1 *in* 11

Bearing in mind that the figures relating to the Home Circuit are not strictly comparable with those relating to England and Wales, it may yet be contended that the alleviation of the extreme severity of criminal law was being effected both by the ever more frequent commutation of death sentences, and by the concomitant less frequent imposition of such sentences by the courts.

§ 5. ADMINISTRATION OF CRIMINAL JUSTICE WITH RESPECT TO MAJOR CAPITAL OFFENCES

This inquiry would be incomplete without some reference to the administration of criminal justice in respect to particular capital offences. The early statistical returns were not detailed enough to provide an adequate basis for such an investigation, for they were confined to the aggregates of committals, convictions, capital sentences and executions in respect to all offences. The first return which provides information also on particular offences relates to the year 1810.[42]

[41] Above, p. 149.

[42] On the basis of Appendix No. 1, pp. 125–134; above, note 21 at pp. 143–144.

Offences for which executions took place in England and Wales in 1810

Capital offences for which executions took place in England and Wales in 1810.	Committed for trial	No bills found and not prosecuted	Acquitted	Convicted	Executed
Burglary	157	22	47	88	18[43]
Cattle-stealing	17	1	2	14	1
Coining and uttering counterfeit money	123[44]	11	29	83	1
Forgery and uttering	48	6	15	27	18
Horse-stealing	80	6	16	58	4
Housebreaking in the day-time with larceny	68	9	12	47	–[45]
Larceny in a dwelling-house to the value of 40s.	119	18	34	67	1
Murder	64	19	30	15	9
Shooting, stabbing and administering poison with intent to murder	28	1	14	13	2
Rape	24	16	6	2	1
Robbery	97	19	39	39	6
Sheep-stealing and killing with intent to steal	82	9	34	39	1
Sodomy	12	2	5	5	4
Transports, being at large	16	1	1	14	1

Two main points emerge from this table:—

1. That while the capital offences numbered some hundreds, all the sixty-seven executions which took place in 1810 involved only fourteen of them. The great majority of executions were for six offences: approximately 66 per cent. being for burglary and housebreaking, forgery and uttering, and murder; and another 20 per cent. for robbery, sodomy and horse-stealing. In other words, only very few of the numerous capital statutes were made use of in practice.[46]

But—and this is particularly significant—even in respect

[43] Under this heading the return gives the number of executions for burglary and for housebreaking with larceny in the day-time.

[44] Comprising the capital offence of counterfeiting money and the offence of uttering the counterfeited money, which was only capital on the third conviction.

[45] There had been some executions for this offence, but it is not possible to ascertain how many because they were included under the heading of burglary.

[46] In the article on 'Capital Punishment' in Chambers' *Encyclopaedia* (1888), Vol. 2, pp. 742–745, J. A. M. Irvine states (pp. 743–744) that while 'at the commencement of the present (nineteenth) century . . . there were more than 200 offences on the statute-book for which capital punishment might be inflicted, there were only twenty-five offences for which any one had suffered death during the preceding three-quarters of a century'.

to these few offences the law was only partially implemented. Although most of the capital statutes related to various offences against property, and most of the offenders brought to justice were guilty of these offences, more than four-fifths of executions were for three of them only: burglary, forgery and robbery.[47] It is further to be noted that even for burglary and housebreaking with larceny the law was being substantially relaxed, for only eighteen of the 185 offenders convicted of these offences were put to death. In respect of larceny in dwelling-houses to the value of forty shillings, only one offender was executed out of the sixty-seven convicted. The proportion is even lower for so serious a crime as robbery, while out of the 111 offenders sentenced to death for cattle- horse- and sheep-stealing only six were executed. Similarly as regards coinage offences, of the four offenders sentenced to death for counterfeiting money for the third time, none was executed, while out of the six so sentenced for uttering counterfeited money for the third time only one was executed.

The only offence against property in respect of which no appreciable relaxation is to be noted was forgery, the ratio of executions to capital convictions remaining practically unchanged since the early eighteenth century (two executed out of every three sentenced to death).

2. As regards the serious crimes against the sex or the person, it would appear that the coefficient of executions was very high for sodomy and rape. This must be acknowledged, however, with two reservations: (a) that the number of convictions and executions was very small, and (b) that the number of cases in which no bills were found or which resulted in acquittals was exceptionally high.

This process is well illustrated by the figures relating to murder. Out of sixty-four persons committed for trial for this offence, forty-nine either had their cases thrown out by the grand jury or were acquitted. Of those capitally convicted, less than two-thirds were executed, while for shooting, stabbing and administering poison (with intent to murder)—crimes closely connected with murder—the incidence of no bills found and of acquittals was again extremely high, and of executions very low.

[47] Forty-two out of fifty.

Incidence of executions for major capital offences in the periods 1710–1714 *and* 1800–1804

The significance of these figures would become more apparent were it possible to compare them with those relating to the much more severe administration of the major capital statutes in the first half of the eighteenth century. Such an examination is made impossible by the lack of data, but some interesting information may be derived from the already quoted 'Appendix' to the *Report on Criminal Laws* (1819). This appendix contains statements of the number of persons who were capitally convicted and of those who were executed in London in the years 1699 and 1755, and in London and Middlesex between the years 1756–1804,[48] together with a statement of the effences of which they were convicted and for which they suffered death. Since the first return is confined to London only, it is not strictly comparable with that for later years relating to London and Middlesex; none the less, these figures throw much light on the extent of the changes which took place during the eighteenth century. To illustrate this process, two five-year periods have been selected.

In the period 1710–1714, 85 *per cent.* of the offenders capitally convicted in London were executed. In the period 1800-1804 the ratio for London and Middlesex was less than 15 *per cent.* The changed incidence of executions for some major capital offences is shown in the table below.[49]

Offences	London 1710-1714		London and Middlesex 1800-1804	
	Total number of persons		Total number of persons	
	Capitally Convicted	Executed	Capitally Convicted	Executed
Burglary	10	6	99	11
Horse-stealing	13	5	33	3
Larceny in shops and warehouses	50	10	20	—
Murder	4	3	6	5
Robbery	4	1	64	11
Forgery	—	—	26	15
Larceny in a dwelling-house	15	8	89	

[48] No. 4, pp. 146–151, and No. 5, pp. 152–163.

[49] On the basis of material contained in the Appendix No. 1, pp. 125–134, and No. 4, pp. 146–151; above, note 21 at pp. 143–144.

Only for murder and forgery was the incidence of executions approximately the same at the beginning of the nineteenth as in the first half of the eighteenth century. For all the other capital crimes the difference is striking. The ratio of executions to convictions for burglary fell from more than one in two in 1710–1714 to one in nine in 1800–1804; for larceny in a dwelling-house from more than one in two to one in twenty-seven; for horse-stealing from nearly one in three to one in ten. Furthermore, the ratio for larceny in shops fell from one in five to nil. Thus though not strictly comparable, these two sets of data vividly reflect the intensity of the process by which the operation of the capital laws was being restricted.

§ 6. GROWING DIVERGENCE BETWEEN LAW AND PRACTICE

It has been shown that capital statutes were very differently administered in the first half of the eighteenth and the beginning of the nineteenth centuries and that the extreme severity with which certain offences were supposed to be punished was being increasingly relaxed in practice. Thus there arose a divergence between the policy of the Legislature, which was to maintain and even to increase the number of capital statutes, and the attitude of those who were called upon to put the law into operation. The number of capital offences was large and growing, but the number of executions showed a rapid decline.

Two questions now arise, the first being whether it is possible to ascertain more precisely when this process began, and the second when the definite breach was made in what may be called the old system.

This inquiry is again vitiated by the inadequacy of statistical data, the most helpful being those contained in one of the papers compiled for the Committee of 1819.[50] This paper, which gives the number of persons convicted and executed in London and Middlesex between 1756 and 1804, specifying also the offences of which they were convicted, makes it possible to determine with some precision when 'the coefficient of penal severity' first fell below the level of the early eighteenth century.

[50] Appendix No. 5, pp. 152–163; above, note 21 pp. 143–144.

On the basis of this return the following table has been constructed, covering the first and the last ten years of the period 1756–1804 :—

The number of offenders capitally convicted and executed in London and Middlesex

	1756-1765			1795-1804	
	Capitally Convicted	Executed		Capitally Convicted	Executed
1756	28	11	1795	56	14
1757	33	24	1796	87	4
1758	29	16	1797	84	19
1759	16	7	1798	80	21
1760	12	10	1799	70	18
1761	27	16	1800	97	23
1762	22	10	1801	101	10
1763	64	33	1802	93	7
1764	56	30	1803	82	9
1765	42	26	1804	69	7
Total	329	183	Total	819	132

In the first decade more than half of all convicted persons were actually executed, the maximum ratio (in 1760) being three out of every four, and the minimum ratio (in 1756) slightly more than one out of every three. In the second decade the ratio was approximately only one out of every six. But the extent of the change becomes even more apparent when a comparison is made between the average figures for the first and the last three years.

	Capitally convicted	Executed
1756-1758	90	51
1802-1804	244	23

In the middle of the eighteenth century the ratio was still more than one in two; early in the nineteenth century it was only one in ten. The first sharp decline came in 1801, from which date the ratio never rose again to its former high level.

Alternative punishments employed in England and Wales in 1805

The great number of capital statutes would seem to indicate that only a very modest part in the prevention and punishment of crime was assigned to other penalties. But in fact this was

not the case, transportation and imprisonment having by the beginning of the nineteenth century already largely superseded all other punishments.[51]

Punishments employed in England and Wales (1805)

Committed for trial	4,605		
No bills found	730		
Acquitted	1,092		
Convicted	2,783	Death	350[52]
		Transportation	595
		Imprisonment	1,680[53]
		Whipping and fine	158

In 1805 rather less than two-thirds of all those committed for trial were convicted. Of these the overwhelming majority were sentenced to transportation or imprisonment. As regards capital punishment, the ratio of capital to all other convictions was one in eight, while that of executions was approximately one in forty. These figures clearly show that although imposed for such numerous offences, the death penalty was only chosen as the most appropriate penalty in a small number of cases.

Deprivation of liberty could then be effected either by transportation or by imprisonment, and it is important to note that this second, by far the less serious, penalty was most frequently made use of. Out of 2,783 offenders convicted in 1805, more than half were sentenced to imprisonment and only less than a fourth to transportation.

Sentences of transportation and imprisonment in England and Wales (1805)

Total Number of Sentences of Transportation	595	*Total Number of Sentences of Imprisonment*	1,680
— for life	0	— for 5 years	0
— for 14 years	34	— for 4 years	1
— for 10 years	0	— for 3 years	4
— for 7 years	561	— from 1 to 2 years	123
		— from 6 months to 1 year	333
		— up to 6 months	1,219

This table further shows that transportation was almost invariably ordered for the lowest term of seven years, with

[51] Compiled on the basis of Appendix No. 1, p. 126; above, note 21 at pp. 143–144.

[52] Of these sixty-eight were executed.

[53] A certain number of offenders sentenced to imprisonment were also ordered to be whipped, fined, put in the pillory, or kept to hard labour. But no separate figures are available for these additional penalties.

only a few sentences for fourteen years and none for life. A similar tendency is apparent in respect to imprisonment. Only one offender was sentenced to four years, and four to three years; whereas the short terms of imprisonment for between six months and one year were inflicted in 333 cases, and the overwhelming majority of offenders were sentenced for six months or less. Thus with more than 200 capital provisions on the Statute Book, nearly half of the offenders convicted of all offences were sentenced to the shortest term of imprisonment.

Some divergence a constant element

Examining the most striking features of the system of criminal justice in England during the reign of Henry VIII, Froude writes:—

> 'The English criminal law was in its letter one of the most severe in Europe: in execution it was the most uncertain and irregular. There were no colonies to draw off the criminals, no galley system, as in France and Spain, to absorb them in penal servitude; the country would have laughed to scorn the proposal that it would tax itself to maintain able-bodied men in unemployed imprisonment; and, in the absence of graduated punishments, there was but one step to the gallows from the lash and the branding-iron. But, as ever happens, the extreme character of the penalties for crime prevented the enforcement of them; and benefit of clergy on the one hand, and privilege of sanctuary on the other, reduced to a fraction the already small number of offenders whom juries could be found to convict. In earlier ages the terrors of the Church supplied the place of secular retribution, and excommunication was scarcely looked upon as preferable even to death. But in the corrupt period which preceded the Reformation the consequences were the worst that can be conceived. Spasmodic intervals of extraordinary severity, when twenty thieves, as Sir Thomas More says, might be seen hanging on a single gibbet, were followed by periods when justice was, perhaps, scarcely executed at all.' [54]

Summing up, Froude states: 'So many anomalies have at all times existed among English institutions that the nation has been practised in correcting them; and, when even at their worst, the old arrangements may have worked better in reality than under the naked theory might appear to be possible. In

[54] *History of England* (1870), Vol. 3, pp. 220–221.

a free country each definite instinct or tendency represents itself in the general structure of society. When tendencies, as frequently happens, contradict each other, common sense comes to the rescue, and, on the whole, justice is done, though at the price of consistency '.[55] Holdsworth states that already ' in Edward III's reign juries were beginning to use their power to save petty thieves from the gallows by depreciating the value of the stolen property. " One was arraigned for that he had stolen two sheep value twenty pence, and the jury found him guilty but they said that the sheep were only worth ten pence; wherefore he was remanded to prison as a punishment, and he will be liberated at the next session ".'[56]

Comparing the administration of capital statutes under James I and Elizabeth, J. C. Jeaffreson writes that ' the criminal law was less rigorously administered under James than it had been in the days of Elizabeth. In so far as it was likely to affect the criminal death-rate, the slight growth of crime and of the number of persons who committed crime was more than counterbalanced in James's reign by the greater disposition of juries to convict culprits of petty larceny on clear evidence that they were guilty of capital felony, and by doing so to allow them to escape the gallows, albeit with shoulders scored by a whip of tails '. When comparing the Jacobean with the Elizabethan records, Jeaffreson notes further that in the times of Elizabeth a greater proportion of persons accused of capital offences was acquitted. This, he explains, was due to ' the growing practice of juries to acquit of capital felony and convict of petty larceny, on evidence of grand larceny '. At the same time, ' the greater readiness of juries to convict of petty larceny on evidence of grand larceny seems to have been attended by a greater readiness to acquit culprits altogether, when their guilt could be regarded as doubtful '.[57] A. H. A. Hamilton quotes a passage from a paper

[55] *Ibid.*, p. 225.

[56] *H. E. L.*, Vol. 3, p. 367.

[57] *Middlesex County Records* (1886), Vol. 2, pp. XXI and XXXIX. Finally Jeaffreson thus comments on the sharp decline in the number of executions in the reign of Charles I as compared with that of James I (the yearly average fell from just over seventy to forty-five; see above, p. 142): ' Referable in a greater or less degree to a general abatement of crime, for which the recently established House of Correction may be held in some measure honourably accountable, the fall in the yearly number of executions is also attributable in various degrees

preserved by Strype, which was written in 1596 by a Somersetshire justice. This document states that forty persons had been executed in that county in one year, and yet 'the fifth part of the felonies committed in the county were not brought to trial; the greater number escaped censure, either from the superior cunning of the felons, the remissness of the magistrates or the foolish lenity of the people'.[58]

Marked divergence a symptom of defect

In the light of such statements, which are equally relevant to the period now being considered and which might easily be amplified, it may be asserted that a limited non-execution of capital statutes at any given period does not in itself warrant the conclusion that criminal law was then being administered in a manner and spirit which ran counter to the intentions of the Legislature. Such an inference would only be justified if it could be proved that during a certain lengthy period of time (a) the divergence between law and practice was becoming steadily more pronounced, and (b) that it became exceptionally striking, particularly when compared with the beginning of the period under consideration.

It has been shown that a certain divergence existed already at the beginning of the eighteenth century. Since then, however, it had continually grown, until early in the nineteenth century the operation of a considerable number of capital statutes was greatly restricted in practice. The fact that the same laws were much more closely adhered to only about fifty

to the following causes, to wit, (a) the increasing diffusion of education that was steadily qualifying a larger proportion of the convicted culprits to plead their clergy effectually; (b) the growing disposition of juries to convict culprits of petty larceny on evidence of grand larceny; (c) the larger number of reprieves, followed by free or conditional pardon, granted to convicts before or after judgment; (d) the operation of the statute 21 James I, c. 6, that, granting to the female sex what was in a large number of cases tantamount to benefit of clergy, provided that women convicted of simple larcenies under the value of ten shillings should be exempted from the death penalty; and (e) the greater readiness of juries to give the prisoner the full benefit of the doubt, that may be presumed to have attended their greater readiness to convict of petty larceny, on evidence of grand larceny'; *ibid.*, Vol. 3, pp. XX–XXI.

[58] 'Quarter Sessions from Queen Elizabeth to Queen Anne, etc.' (1878), p. 31. This interesting document is quoted in full by F. Aydelotte, *Elizabethan Rogues and Vagabonds* (1913), Appendix No. 6, pp. 168 *et seq.*

years before indicates that when promulgated they were intended to be acted upon. Consequently there is no basis for maintaining that by building up a formidable capital code the Legislature aimed at ensuring the prevention of crime by the threat of a potential death penalty, which it did not intend should actually be carried out.[59]

[59] This theory was evolved by Dr. Paley and was widely accepted; see below, pp. 248–259.

CHAPTER 6

EXECUTION OF CAPITAL SENTENCES

THE method of carrying out capital sentences evolved through a number of stages. In the eighteenth century offenders were usually driven in public procession to certain public places selected for the execution of all capital sentences.[1] Sometimes they were put to death near the place of their crime. Later, public processions were abandoned in favour of executions—still carried out publicly—in front of prisons.[2] Ultimately this system, too, was found unsatisfactory, and in the nineteenth century executions were withdrawn from the public view behind prison walls. This evolution bears witness to a profound change in the attitude of public opinion towards crime and punishment.

The penal principle underlying the system of public executions is thus stated in the *Report from the Select Committee on Capital Punishment*[3]: 'Open executions were based on the argument that the death penalty was the most effective deterrent and that, consequently, the more people who witnessed it the greater would be its salutary effect'. It was also contended that a public system exposes the offender to the full impact of the moral reprobation of the community and thus brings home to him the enormity of his crime.[4]

[1] In the effort to make the system as open and public as possible, the bodies of executed offenders were sometimes exposed to public view, and when it was enacted that the bodies of murderers were to be dissected, that too was often carried out in public. See on this practice A. Andrews, 'The Eighteenth Century or Illustrations of the Manners and Customs of our Grand-Fathers'; *New Monthly Magazine* (1855), Vol. 105, p. 376.

[2] At the beginning of this phase some recourse was still had to the practice mentioned in the preceding footnote. For instance, the body of Mrs. Phipoe, a murderess executed in 1798 in front of Newgate, was afterwards publicly exhibited on a structure erected for that purpose in the Old Bailey. About the same time the bodies of two murderers, Clench and Mackay, were publicly exposed in a stable in Little Bridge Street; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, pp. 266–267.

[3] (1930), 15, p. 12; *Parl. Papers* (1930–31), Vol. 6, p. 15.

[4] Another argument adduced in support of public executions was that: 'where the Trial and Execution are in private, it not only defeats the end of Justice (that a public example be made of Offenders in order to deter others from

To what extent did public executions as carried out in the eighteenth century achieve this double object? In order to reply to this question their conduct must be retraced through all its stages.

§ 1. IN NEWGATE BEFORE THE EXECUTION

A criminal lying under sentence of death was allowed to indulge in almost any excess and dissipation.[5] For his last supper, of which the Ordinary of the prison was expected to partake, he could order anything he desired.[6] In 1763 Gilly Williams thus wrote to his friend, George Augustus Selwyn[7]: 'I will give you a Newgate anecdote, which I had from a gentleman who heard it. He called on P. Lewis the night before the execution,[8] and heard one runner call to another, and order a chicken boiled for Rice's supper;[9] but, says he, you need not be curious about the sauce, for you know he is to

the like crimes), but affords an opportunity of secretly destroying innocent men, which must needs expose the subject to a variety of fears and dangers inconsistent with the liberties of a free people'; S. Emlyn, 'Preface to the Second Edition of the State Trials' (1730); reproduced in 1 St.Tr. XXV–XXVI.

Even as late as 1867, H. W. Woolrych, an enlightened legal author, opposed private executions on the ground that they would deprive the dying person 'of the inalienable right of an English citizen, to confess the crime, or publicly proclaim his innocence'; *Private Executions* (1867), p. 4. On Woolrych's book on capital punishment see below, p. 596.

[5] The accommodation provided at Newgate for condemned offenders was suggestive of a much more stringent regimen. Such offenders were 'secured in cells built expressly for that purpose; . . . about nine feet in length, by six in width. In the upper part of each cell is a small narrow window double-grated. The doors are four inches thick. The strong wall is lined all round with planks, studded with broad headed nails. In each cell is a barrack bedstead. It is observed that prisoners who had affected an air of boldness during their trial, and appeared quite unconcerned when sentence was pronounced on them, were struck with horror, and shed tears, when they were brought to these dark and solitary abodes'; G. T. Wilkinson, *The Newgate Calendar* (1816), Vol. 1, pp. IX–X.

[6] In his *Lettres sur les Anglais et les Français* (ed. by Otto von Greyerz, 1897), p. 76, B. L. Muralt writes: 'Il se commet généralement toutes sortes de débauches et d'infamies dans les prisons, et parmi les condamnés, tout comme si, étant une fois en *ces lieux*, on n'avait plus rien à craindre, ou qu'une mort prochaine et inévitable fût un motif de plaisir et de corruption'. On the importance of this tract written in 1694 and first issued in 1725, see below, Appendix 3, p. 699. On the curious explanation which Muralt gives to the lenient attitude of the authorities towards these excesses see *ibid.*, pp. 714–715.

[7] J. H. Jesse, *George Selwyn and his Contemporaries* (1843), Vol. 1, p. 245.

[8] Paul Lewis was an officer of the Royal Navy who became a highwayman and was executed in May, 1763.

[9] John Rice was a well-known City stockbroker who was executed for forgery.

be hanged tomorrow. That is true, says the other, but the Ordinary sups with him, and you know he is a hell of a fellow for butter!'[10] Three days before his execution in 1774, John Rann had seven girls to dine with him at Newgate; 'The company were remarkably cheerful; nor was Rann less joyous than his companions'.[11]

The shocking immorality of these conditions arrested the attention of several observers, and numerous descriptions and comments upon it are to be found in contemporary books and newspapers. Thus *The Oracle* of August 20, 1790, gives the following account of 'The Monster's Ball'—an entertainment given at Newgate by Renwick Williams, known as the 'Monster of London'[12]: 'The Monster sent cards of invitation to about twenty couples among whom were some of his alibi friends, his brothers, sisters, several of the prisoners, and others, whom we shall take a future opportunity to notice. At four o'clock, the party set to tea; this being over, two violins struck up, accompanied by a flute, and the company proceeded to exercise their limbs. In the merry dance, the cuts and entrechats of the Monster were much admired, and his adroitness in that amusement must be interesting, from the school in which he acquired this branch of his accomplishments. About eight o'clock, the company partook of a cold supper, and a variety of wines, such as would not discredit the most sumptuous gala, and about nine o'clock departed, that being the usual hour for locking the doors of the prison'.[13] Similarly, Mandeville[14] refers indignantly to 'the substantial Breakfasts'

[10] The freedom allowed to the capitally convicted offenders and to their friends stood in flagrant contradiction to the elementary rules of prison discipline. When the sentence of death passed on Major John Oneby was under consideration for pardon, an undertaker came to the press-yard in Newgate and was allowed to send the following letter to Oneby: 'Honoured Sir, This is to inform you, that I follow the business of an Undertaker, in Drury Lane, where I have lived many years, and am well known to several of your friends. As you are to die on Monday, and have not, as I suppose, spoke to any body else about your funeral, if your honour shall think fit to give me orders, I will perform it as cheap, and in as decent a manner as any man alive. Your honour's unknown Humble Servant, G. H.' This letter is reproduced by the Rev. Villette in *The Annals of Newgate* (1776), Vol. 1, p. 373.

[11] *Celebrated Trials* (1825), Vol. 4, p. 500.

[12] Williams attacked several women and attempted to stab them or to cut their clothes. For this case which raised interesting legal issues see above, p. 101.

[13] Quoted by Ch. Gordon, *The Old Bailey and Newgate* (no date), p. 233.

[14] *An Enquiry into the Causes of the Frequent Executions at Tyburn, etc.* (1725), pp. 18 and 19.

and 'the Seas of Beer' consumed and drunk by condemned offenders.[15]

Strange as it may now appear, criminals sentenced to death were then regarded as proper objects for exhibition. For a certain fee, which the gaolers collected and were allowed to keep, the public was admitted to the cells of the condemned. Thus a paper of the period relates that when John Sheppard was recaptured, the keepers of Newgate collected hundreds of pounds from the crowds of people who daily flocked to see him: 'Nothing contributes so much to the entertainment of the town at present, as the adventures of the famous housebreaker and gaolbreaker, John Sheppard'. In a letter to Sir Horace Mann, Horace Walpole writes that on the Sunday after the condemnation of M'Lean, a notorious highwayman, three thousand people visited him in his cell.[16] When Doctor Dodd was condemned to death for forgery he was put in a separate room at Newgate where for two hours he remained on public view.[17]

§ 2. THE PROCESSION TO TYBURN

For their last journey to Tyburn condemned offenders were allowed to dress as they liked and usually took great care to appear in their best clothes.[18] This custom was observed by

[15] On other similar excesses see A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, p. 270; Villette, *The Annals of Newgate* (1776), Vol. 3, p. 25.

The Rev. Charles Rogers, *Social Life in Scotland* (1884), Vol. 2, p. 59, writes that until the beginning of the nineteenth century, 'on the evening prior to execution, the magistrates of Edinburgh indulged a procedure which they described as "splicing the rope"; they met at Paxton's tavern . . . and made their arrangements over liquor. After every execution at Paisley, the burghal authorities had a municipal dinner'. When Thomas Potts was hanged in 1797, the cost to the town was £33 5s. 3½d., of which £13 8s. 10d. was spent on a civic feast and £1 14s. 3d. on the entertainment of the executioner and his assistants.

[16] Letter to Sir Horace Mann, October 18, 1750; in *Letters* (ed. by Mrs. P. Toynbee, 1903), Vol. 3, p. 21. 'I am almost single in not having been to see him. Lord Mountford, at the head of half White's, went the first day: . . . But the chief personages who have been to comfort and weep over this fallen hero are Lady Caroline Petersham and Miss Ashe . . .' *Ibid.*, August 2, 1750, p. 7.

[17] On Dr. Dodd's case see below, Chap. 14, p. 450 *et seq.*; for other instances see also Villette, *The Annals of Newgate* (1776), Vol. 1, p. 110; and *ibid.*, Vol. 3, p. 25.

[18] See, for instance, the descriptions given by M. Misson, *Memoirs and Observations in his Travels over England* (1719), p. 124 (written in 1698,

all ranks of criminals. Thus a few days before his execution, Richard Turpin 'bought himself a new fustian frock and a pair of pumps,'[19] while another offender wore for his execution 'a pea-green coat, with an immense nosegay in the button-hole, which had been presented to him at St. Sepulchre's steps; and his nankin small-clothes, . . . were tied at each knee with sixteen strings'.[20] Charles Ratcliffe (Lord Derwentwater), beheaded on Tower Hill on December 8, 1746, was dressed in a scarlet coat faced with black velvet and trimmed with gold, a gold-laced waistcoat, and a hat with a white feather in it. Some offenders put a white cockade in their hats as an emblem of innocence; some others were dressed in shrouds.[21]

transl. from French), where he writes: 'He that is to be hang'd, or otherwise executed, first takes Care to get himself shav'd, and handsomely drest, either in Mourning or in the Dress of a Bridegroom'. Similarly, B. L. Muralt, who writes: 'On voit les criminels traverser la ville sur des charrettes, parés de leur plus beaux habits, avec des gants blancs et des bouquets . . .' *Lettres sur les Anglais et les Français* (ed. by O. V. Greyerz, 1897), p. 51.

[19] Villette, *The Annals of Newgate* (1776), Vol. 3, p. 26.

[20] J. T. Smith, *Nollekens and his Times* (ed. by W. Whitten, 1920), Vol. 1, pp. 20–21.

[21] Swift's description of Thomas Clinch's journey to Tyburn faithfully renders the atmosphere of such processions:—

'*Clever Tom Clinch, Going to be Hanged, 1727.*

As clever Tom Clinch, while the rabble was bawling,
Rode stately through Holborn to die in his calling,
He stopt at the George for a bottle of sack,
And promised to pay for it when he came back.
His waistcoat, and stockings, and breeches, were white;
His cap had a new cherry ribbon to tie't.
The maids to the doors and the balconies ran,
And said, "Lack-a-day, he's a proper young man!"
But, as from the windows the ladies he spied,
Like a beau in the box, he bow'd low on each side!
And when his last speech the loud hawkers did cry
He swore from his cart "It was all a damn'd lie!"
The hangman for pardon fell down on his knee;
Tom gave him a kick in the guts for his fee:
Then said, I must speak to the people a little;
But I'll see you all damn'd before I will whittle!
My honest friend Wild (may he long hold his place)
He lengthen'd my life with a whole year of grace.
Take courage, dear comrades, and be not afraid,
Nor slip this occasion to follow your trade;
My conscience is clear, and my spirits are calm,
And thus I go off without prayer-book or psalm;
Then follow the practice of clever Tom Clinch,
Who hung like a hero, and never would flinch;'

J. Swift, *Poetical Works* (1833), Vol. 1, p. 202. 'Whittle' was an expression used by criminals which meant a confession at the gallows; for various other expressions see 'The Thieves' New Canting Dictionary', 'The Thieves'

No reliable information is available on the origins of this strange custom. It may have sprung from a desire to deprive the hangman of his usual booty [22] or to indicate that the delinquent brought nothing into the world and could take nothing out of it.[23] Some condemned men insisted on being so dressed as a sign of their deep repentance.[24] Women were often dressed in white, with great silk scarves and carrying baskets of flowers and oranges, which they distributed to the crowd on their way.[25]

Offenders of some reputation were allowed to make the journey from Newgate to Tyburn in their own carriages which followed a hearse containing the coffin. Earl Ferrers, a homicidal lunatic sentenced to death for shooting his steward for no apparent motive, obtained permission to make the journey to Tyburn in his own landau, drawn by six horses. He was dressed in a light-coloured suit embroidered with silver, said to be his wedding suit.[26] Mary Young, a notorious thief who used to present herself as a crippled beggar,[27] was permitted to drive to Tyburn in a private coach, attended by a clergyman. In 1768 the same privilege was

Grammar', 'The Thieves' Key Found out', and 'The Thieves' Exercise' in A. Smith's *History of the Lives and Robberies of the Most Notorious Highwaymen, etc.* (ed. by A. L. Hayward, 1926), pp. 201, 583, 590 and 594.

22 See on this below, p. 192.

23 H. Bleackley, *The Hangmen of England* (1929), p. 46.

24 Thus Stephen Gardener for instance, sentenced to death in 1724 for burglary, refused to wear anything besides thin shrouds because as he put it 'he could not too much punish and afflict himself for the crimes he had committed: he was of opinion, that there must be an atonement for vice, either in this world or the next'; Villette, *The Annals of Newgate* (1776), Vol. 1, p. 214.

25 It would seem, however, that the following passage in Rogers' *Table Talk*, p. 181, is based on an inaccurate impression. He writes: 'I recollect seeing a whole cartful of young girls, in dresses of various colours, on their way to be executed at Tyburn. They had been condemned, on one indictment, for having been concerned in (that is, perhaps, for having been spectators of) the burning of some houses during Lord George Gordon's riots. It was quite horrible'. One hundred and thirty-four persons were tried as participants in these riots, of whom fifty-eight were found guilty and twenty-five executed. There were nine women among those brought to trial and of these four were hanged, but none at Tyburn. Most probably the girls noticed by Rogers were on their way to Tyburn as spectators and not as delinquents. See on this: *Notes and Queries* (January–June, 1856), 2nd Ser., Vol. 1, pp. 286–287; *ibid.*, pp. 518–519; and *ibid.* (July–December, 1856), Vol. 2, pp. 216–217.

26 The trial and execution of Lord Ferrers attracted much attention. See, for instance, Horace Walpole's vivid description in his *Letters* (ed. by P. Cunningham, 1891), Vol. 3, pp. 301–302, 303–304, and 304–311; see also *Life and Times of Selina Countess of Huntingdon* (1844), Vol. 1, pp. 401–408.

27 *Celebrated Trials* (1825), Vol. 3, p. 471.

accorded to James Gibson, an attorney-at-law convicted of forgery, who was not permitted, however, to invite into his coach a footpad—to be executed on the same day—which it was his desire to do.[28] The privilege of private carriages was generally refused to offenders found guilty of murder.[29] The normal practice for all convicts was to be transported in carts, usually three at a time[30]; they were manacled, seated upon their own coffins, and accompanied by a chaplain.[31]

Executions were looked upon as notable public events. The appointed day was known as 'Tyburn Fair' or—as Place records—the 'Hanging Match'.[32] From early morning factories and workshops were deserted, while at the coffee-houses and taverns parties even formed the previous day. Angelo

[28] A. Marks, *Tyburn Tree* (no date), p. 254.

[29] See, for instance, S. Roe, *The Ordinary of Newgate's Account of the Behaviour, Confession, and Dying Words of Four Malefactors* (1760), p. 15.

[30] The transport of dangerous offenders from one prison to another was sometimes effected in a much more unpleasant manner, particularly at the beginning of the eighteenth century. Thus the notorious highwayman Samuel Gregory was brought from Winchester Gaol to Newgate in handcuffs and chained under a horse's belly, with seven or eight well-armed persons to guard him; A. Andrews, *The Eighteenth Century* (1856), p. 274.

[31] For a remarkable account of how a group of offenders sentenced to death proceeded to the place of their execution in a state of religious ecstasy see John Wesley, *Journal* (1827), Vol. IV, October 9, 1748, pp. 79–85. It appears that the Rev. John Wood, a methodist, appointed Ordinary of Newgate on July 19, 1769 (retired in 1773) was the first regularly to accompany criminals to Tyburn in their carts. When four Jews were sentenced to death for murder, a rabbi went to see them in the press-yard of Newgate and delivered to each of them a Hebrew book, but he declined to attend them to the place of death and would not pray with them at the time of his visit; a day before they were anathematised in the synagogue; *Celebrated Trials* (1825) Vol. 4, p. 453.

[32] Francis Place, MSS., 27,826, f. 97.

Describing the popular sports and amusements of the seventeenth century, G. M. Trevelyan writes: 'Single-stick, boxing and sword-fighting, bull and bear baiting, were watched with delight by a race that had not yet learned to dislike the sight of pain inflicted. Indeed, the less sporting events of hanging and whipping were spectacles much relished'; *English Social History* (1944), p. 281. In a letter from London dated July 8, 1698, l'abbé du Bos writes to Thoynard that his English friends 's'excusent sur la morte-saison d'été, de ne pouvoir (lui) offrir mieux que la vue de six pendaisons en un jour'; George Ascoli, *La Grande-Bretagne devant l'Opinion Française au XVIIe Siècle* (1930), Vol. 1, p. 438. When Count Frederick Kielmansegg came to England to witness the coronation of George III, he took part in many most distinguished social gatherings, but he also went to Tyburn. 'On the morning of the 12th of November we went to Tyburn, to see a man hanged *à l'anglaise*—a young man named Lee, who had been employed as clerk or bookkeeper at a tradesman's, and had been tempted to issue false bills upon his former employer, in order to get sufficient money for his amusements';

notes that it was common in London for master coach-makers, tailors, shoemakers, and other craftsmen engaged to complete orders within a given time, to observe to their customers: 'That will be a hanging-day, and my men will not be at work'.[33]

The carts were driven slowly through the streets, the journey usually lasting about two hours.[34] Sometimes the assembled spectators showed their reprobation of the criminal, but this was exceptional; he was almost invariably applauded and fruits and flowers were thrown at him. In some instances the crowd expressed its sympathy. Thus when the two brothers Perreau were driven to Tyburn the people 'demonstrated their pity by their tears and prayers for them . . .'; when Earl Ferrers was hanged 'the spectators, struck with the novelty of seeing a peer of Great-Britain in such a situation, doomed to death for the dreadful crime of murder, and suffering like a common malefactor, for taking the life of one of their own rank, beheld him with a respectful silence, mixed with pity, and while they commiserated his fate, almost forgot his crime'.[35] During the journey the convicts were allowed to converse with any of their relatives or acquaintances who happened to be in the crowd, for which purpose the

Diary of a Journey to England in the years 1761–1762 (transl. by Countess Kielmansegg, 1902), pp. 157–158. The Count further records that when the convict had been hanged, 'his friends at once held him down by the feet, and kept holding him there, so that from the first moment nobody noticed the slightest movement'; *ibid.*, p. 158.

[33] *Reminiscences* (1828), Vol. 1, p. 472.

[34] 'The cortege was headed by the City Marshal on horseback, followed by the Under-Sheriff with a cavalcade of peace-officers. Next in order marched a body of constables, armed with staves. Sometimes, when a criminal of importance was taking part in the show, the two Sheriffs would condescend to put in an appearance, riding in their coaches, with their wands of office in their hands. Behind, lest they should come between the wind and the nobility of these great people, followed the carts containing the criminals, with more constables trudging alongside. A company of javelin men brought up the rear'; H. Bleackley, *The Hangmen of England* (1929), p. 27. In some cases a considerable number of troops stood by ready for an emergency; see, for instance, the precautions taken when Dr. Dodd was driven to Tyburn, below, note 50 at pp. 465–466.

[35] Villette, *The Annals of Newgate* (1776), Vol. 4, pp. 414 and 142. An anonymous contemporary writer observes that 'it must appear very wonderful, that no attempt was ever made to rescue any of the prisoners, then which, in such circumstances, nothing certainly could have been made more easy'; *The Right Method of Maintaining Security in Person and Property . . . in a Letter to a Member of Parliament*, by Philonomos (1751), p. 51.

procession would stop for a while.[36] When Edward Burnworth and his associates were being driven to the place of execution they diverted themselves by throwing money among the populace.[37]

It was an old custom that at the church of St. Sepulchre the criminals were presented by their friends with bouquets of flowers which they pinned to their coats or jackets. They were allowed to stop at taverns to enjoy some drink which was never refused to them by the tavern-keepers.[38] The 'parting cup' was most frequently offered to them at a tavern called 'The Bowl' which stood between the end of High Street and Hog Lane, St. Giles's.[39] This drinking during the journey, which followed the heavy drinking usually indulged in at Newgate before the start, caused great numbers of delinquents to arrive at Tyburn heavily intoxicated.[40] They often behaved in an unseemly manner.

[36] It was on such an occasion in 1709 that the following conversation took place between Dick Hughes, a housebreaker, and his wife. She met him at Saint Gile's Pound; when the cart stopped, she said: '*My dear, who must find the Rope that's to hang you, we, or the sheriff!* Her husband replyed: *The Sheriff, honey; for who's obliged to find him tools for his work! Ah!* replied his wife, *I wish I had known so much before, 'twould have saved me two pence, for I have been and bought one already. Well, well,* said Dick again, *perhaps it mayn't be lost; for it may serve a second husband. Yes,* quoth his wife, *if I've any luck in good husbands, so it may*'; A. Smith, *History of the Lives and Robberies of the Most Notorious Highwaymen* (ed. by A. L. Hayward, 1926), p. 239; Ch. Gordon, *The Old Bailey and Newgate* (no date), p. 340.

[37] 'A boy having picked up a halfpenny, one of a handful which Blewitt (Burnworth's associate) had thrown among the people, told him that he would keep that halfpenny, and have his name engraved on it, as sure as he would be hanged at Kingston, on which Blewitt gave him a shilling to pay the expense of engraving, and enjoined him to keep his promise, which, it is affirmed, the boy actually did'; G. T. Wilkinson, *The Newgate Calendar* (1816), Vol. 1, p. 372.

[38] This practice was so widespread that the Rev. Villette, Ordinary of Newgate, thought it important to record that when Hawkins and Simpson, sentenced for robbing the Bristol-Mail, were driven to Tyburn in 1722, '. . . they appeared in the carts with uncommon tokens of repentance, scarce ever raising their eyes from their books, to regard the great crowds about them, nor tarrying to drink quantities of liquor, as is usually done'; *The Annals of Newgate* (1776), Vol. 1, p. 103 (by mistake printed as 203).

[39] Characteristic of this custom were sayings such as that known in York: 'The saddler of Bawtry was hanged for leaving his liquor'; had he stopped, as it was usual, to drink his bowl of ale, his reprieve, which was on the way, would have arrived in time to save his life; W. Andrews, *Bygone Punishments* (2nd ed., 1931), p. 11.

[40] 'Were executed at Tyburn, Elizabeth Banks, for stripping child; Catherine Conway, for forging a seaman's ticket; and Margaret Harvey, for robbing

The character assumed by London on an execution-day may best be judged from the following description of a contemporary eye-witness[41]: 'Those of the lower grade, who were most eager for these sights, early in the morning surrounded the felons'-gate at Newgate, to see the malefactors brought forth; who received nosegays at St. Sepulchre's. These gloried in their prowess, in keeping their stations through the crowd, from thence to the place of execution. Others appeared at various stations, and fell into the ranks according to convenience; hence, the crowd accumulating, on the cavalcade reaching St. Giles's, the throng was occasionally so great, as to entirely fill Oxford-street, from house to house, on both sides of the way, when the pressure became tremendous, within half a mile of Tyburn'.[42] In accordance with a bequest made in 1605 by Robert Dowe, a merchant taylor,[43] the big bell of St. Sepulchre's church was rung on the night preceding every execution of convicts confined at Newgate; at midnight the sexton would come outside the convict's cell and after ringing

her master. They were all drunk, contrary to an express order of the Court of Aldermen against serving them with strong liquors'; Ch. Phillips, *Vacation Thoughts on Capital Punishment* (4th ed., 1858), p. 13.

[41] H. Angelo, *Reminiscences* (1828), Vol. 1, pp. 474–475.

[42] 'Could the taste of Londoners for horrors', writes W. B. Boulton, 'the interest in suffering which appeared in half their sports and amusements, be better displayed than in the records of their delight in the exhibitions of Tyburn and Tower Hill? We believe that no spectacle of the last century, no coronation, no triumphal progress of captured standards to St. Paul's, or treasure to the Mint during the first Mr. Pitt's great war, ever drew such crowds into the streets as when Balmerino and Kilmarnock went to Tower Hill, or Lord Ferrers or Dr. Dodd, Jack Sheppard or John Rann, made the long and doleful journey from Newgate to Tyburn, the threefold gibbet which stood in fields opposite the present Marble Arch, somewhere very near the present Connaught Square. When the criminal was notorious, or distinguished, or pitied, or execrated above the common, his agony was prolonged by crowds in such numbers as lengthened the passage through the streets by hours. The space of time which lay between the stroke of the bell at midnight under the condemned man's cell window in Newgate Gaol and the claiming of his body by his friends, or by the surgeons for dissection, as his luck might determine, was a time of revel and merrymaking for his fellow-citizens'; *The Amusements of Old London* (1901), Vol. 2, p. 244. For descriptions by contemporary witnesses see T. Somerville, *My own Life and Times* (1861), pp. 160–161; Ferri de St.-Constant, *Londres et les Anglais* (1804), Vol. 4, p. 181 *et seq.*

[43] He left £50 to the vicar and churchwardens of St. Sepulchre 'for ringing the greatest bell in the church on the day the condemned prisoners are executed, and for other services for ever, for which services the sexton is paid £1 6s. 8d.'; on this bequest see Stowe, *Survey of London* (1618), p. 125.

a hand-bell would deliver a speech.[44] Next morning—when the procession moved towards Tyburn—it stopped at St. Sepulchre's where a clergyman would say prayers for those to be hanged and the bell would ring again.

§ 3. PROCEEDINGS AT TYBURN

The crowd assembled at Tyburn

At Tyburn the place was packed,[45] and providing accommodation for spectators became a very good source of income. Around the gallows, on a plot of ground belonging to the widow of a cowkeeper named Proctor, a number of boxes were erected known as 'Mother Proctor's Pews'. The price was fixed according to the rank of the applicant and the notoriety of the criminal to be hanged. Angelo relates that the execution of Earl Ferrers in 1766 brought her in more than £500.[46] The tension which prevailed on the day appointed for an execution was greatly increased by the undesirable practice of often granting a reprieve at the last moment.[47] In 1705 the reprieve of a delinquent (John Smith) was announced after he had been

[44] William Maitland, *History of London* (1756), Vol. 1, p. 26. A slightly different version is given by Francis Place. According to him the bellman sang the following verses at midnight outside the cell of the condemned:—

'All you that in the condemn'd hold do lie,
Prepare you, for to-morrow you shall die.
Watch all, and pray, the hour is drawing near,
That you before the Almighty must appear.
Examine well yourselves, in time repent,
That you may not t' eternal flames be sent.
And when St. Sepulchre's bell to-morrow tolls,
The Lord have mercy on your souls!—
Past twelve o'clock!'

Francis Place, MSS., 27,826, f. 14.

P. Burke remarks that in accordance with the legacy of Robert Dowe these words were to be repeated by a clergyman and not by a bellman; *The Romance of the Forum* (no date), p. 295; see also Ch. Gordon, *The Old Bailey and Newgate* (no date), p. 346.

[45] See on this the description of Dr. Dodd's execution, below, note 50 at p. 465; 30,000 people attended the execution of the brothers Perreau in 1776; *Celebrated Trials* (1825), Vol. 4, p. 508. According to Sir Charles Petrie the record attendance was probably reached in 1767, when 80,000 people are said to have been present at one in Moorfields; *The Four Georges* (repr. of 1946), p. 195.

[46] *Reminiscences* (1828), Vol. 1, note at p. 468.

[47] J. Timbs relates in his *Curiosities of London* (2nd ed., 1868), p. 809, that in 1758, when Dr. Henesey was to be hanged for treason, the price of seats rose to 2s. and 2s. 6d.; when—at the day of the execution—it became known that he had been reprieved, a riot broke out and many of the seats were destroyed.

hanging for about a quarter of an hour; he was immediately cut down and carried to a neighbouring house where he was brought to life again. He was subsequently known as the 'half-hanged' John Smith.[48]

In the crowd which usually assembled to witness executions there were people from all walks of life. Griffiths observes that what 'was a morbid curiosity among a certain section of the upper classes became a fierce hungry passion with the lower. . . . It was a ribald, reckless, brutal mob, violently combative, fighting and struggling for foremost places, fiercely aggressive, distinctly abusive. Spectators often had their limbs broken, their teeth knocked out, sometimes they were crushed to death. Barriers could not always restrain the crowd, and were often borne down and trampled underfoot'.[49] The number of women and adolescents was very considerable; even children were brought there to witness the scene.[50] The underworld of London was of course well represented, as were the lower strata of society. But many persons belonging to the higher ranks

[48] 'But as he had been half-hanged, it appeared he was but half-cured of his dishonest and thievish inclinations; for though at first he kept himself within the limits of private frauds and petty larcenies; at length, when the pain of hanging was worn out of his memory, he entered again upon his former practice of house-breaking . . .'; *Celebrated Trials* (1825), Vol. 3, p. 280. For another similar incident see also S. Roe, *The Ordinary of Newgate's Account of the Behaviour, Confession and Dying Words of John Ayliffe, Esq.*, (1759), p. 22.

[49] *The Chronicles of Newgate* (1884), Vol. 1, p. 267. 'Choose a day on which to represent the most sublime and affecting tragedy we have; appoint the most favourite actors; spare no cost upon the scenes and decorations, unite the greatest efforts of poetry, painting and music; and when you have collected your audience, just at the moment when their minds are erect with expectation, let it be reported that a state criminal of high rank is on the point of being executed in the adjoining square; in a moment the emptiness of the theatre would demonstrate the comparative weakness of the imitative arts, and proclaim the triumph of real sympathy'; Burke, 'The Sublime and Beautiful', *The Works* (1854), Vol. 1, p. 81.

J. P. Grosley, *A Tour to London* (1772), Vol. 1, pp. 172–173, observes that children used to be flogged after being taken to executions, so 'that they might remember the example they had seen'.

[50] 'I remember well, when I was in my eighth year, Mr. Nollekens (the famous sculptor) calling at my father's house in Great Portland Street, and taking me to Oxford Road to see the notorious Jack Rann, commonly called "Sixteen-string Jack", go to Tyburn to be hanged for robbing Dr. William Bell. . . . After he had passed, and Mr. Nollekens was leading me home by the hand, I recollect his stooping down to me, and observing, in a low tone of voice, "Tom, now, my little man, if my father-in-law, Mr. Justice Welch, had been High-constable, we could have walked by the side of the cart all the way to Tyburn" '; J. T. Smith, *Nollekens and his Times* (ed. by W. Whitten, 1920), Vol. 1, pp. 20 and 21.

were also known to be keenly interested, George Augustus Selwyn, Thomas Warton, and the Duke of Montagu being frequent visitors.[51]

[51] 'Many a one', notes Angelo, *Reminiscences* (1828), Vol. 1, p. 466, 'whose fame now makes a figure in biography as an orator, poet, painter, composer, or actor, and some men of rank, philanthropists, and moralists too, are recorded in the list of amateurs of these sad exhibitions'. They were known as 'The Hanging Committee'. Once Thomas Warton, the poet, did not attend the execution of a man hanged for sheep-stealing. On his return to Trinity, one of the fellows reminded him of the loss of so interesting a sight. 'I knew of it', replied Warton, 'but I have been into a neighbouring county, where a man was hanged for murder'; *ibid.*, p. 474.

On Selwyn, J. H. Jesse writes: 'Not only was he a constant frequenter of such scenes of horror (criminal executions), but all the details of crime, the private history of the criminal, his demeanour at his trial, in the dungeon, and on the scaffold, and the state of his feelings in the hour of death and degradation, were to Selwyn matters of the deepest and most extraordinary interest. Even the most frightful particulars relating to suicide and murder; the investigation of the disfigured corpse, the sight of an acquaintance lying in his shroud, seemed to have afforded him a painful and unaccountable pleasure. When the first Lord Holland was on his death-bed, he was told that Selwyn, who had long lived on terms of the closest intimacy with him, had called to inquire after his health. "The next time Mr. Selwyn calls", he said, "show him up:—if I am alive I shall be delighted to see him, and if I am dead he will be glad to see me"'; *George Selwyn and His Contemporaries* (1843), Vol. 1, p. 5. Apparently Selwyn once went to Paris specially to see Damien being broken on the wheel for attempting to assassinate Louis XV. At the place of the execution he was anxious to be as near as possible to the scaffold. He was at first pushed back by one of the executioners, but when the latter was informed by Selwyn that he had made the journey from London solely for this purpose, he immediately caused the people to make way, exclaiming at the same time: 'Faites place pour monsieur; c'est un Anglois, et un amateur'; *ibid.*, p. 12. After Selwyn's death some of his intimate friends denied that he had such inclinations; see *D.N.B.*, XVII, 1169.

The interest evinced by persons belonging to the higher ranks was widespread, though it is difficult to quote concrete cases. In this connection the following passage of a letter addressed in 1779 by the Earl of Carlisle to George Selwyn is of some significance 'Hackman, Miss Ray's murderer, is hanged. I attended his execution, in order to give you an account of his behaviour, and from no curiosity of my own. I am at this moment returned from it: everybody inquired after you—you have friends everywhere'; *ibid.* (1844), Vol. 4, p. 85. Dr. John Warner, Rector of Stourton in Wiltshire, a noted classical scholar and an eloquent preacher, wrote to Selwyn: 'Mr. Hackman has been tried, condemned and executed, and is now a fine corpse at Surgeons' Hall, where I saw him yesterday; a genteel, well-made young fellow of four-and-twenty. There has been a deal of butchery in the case'; *ibid.*, p. 96. The Hon. Henry St. John (Norborne Berkeley, Lord Buttetourt) wrote to Selwyn about the execution of Waistcott, Lord Harrington's butler, for burglary, which he had attended together with his brother at the risk of breaking their necks 'by climbing up an old rotten scaffolding, which I feared would tumble before the cart drove off with the six malefactors'; he relates that he had a full view of Waistcott 'who went to the gallows with a white cockade in his hat, as an emblem of his whole innocence, and died with the same hardness as appeared through his trial'. While Gilly Williams, another of Selwyn's correspondents, adds: 'The dog died game, went in the cart in a blue and gold frock, . . . and had a white cockade. He ate several oranges

'Frightful scenes were witnessed at executions in those days', writes John Laurence,[52] 'the crowd standing awestruck as it watched the convulsions of the strangling culprit. Every contortion of the limbs was hailed with a cheer or a groan, according as the sufferer was popular or not; appalling curses and execrations occasionally rent the air and rendered the last moments of the unfortunate criminal more odious; hawkers boldly sang the praises of their wares the while a fellow creature was being done to death. Rich and poor, thief and lord, gentle and simple, attended to see "the hanging", and cracked jokes at the sufferer's expense'. The assemblage of so prodigious a crowd naturally offered excellent opportunities to thieves. Magistrates' offices were later thronged by people who had lost their watches, pocket-books, or purses.[53]

Dying speeches and confessions

Public interest in executions was greatly stimulated by the widespread sale of publications known as 'last dying speeches and confessions'.[54] The confessions were usually obtained by prison officials—and particularly by the Ordinary—who exerted all their influence to induce the delinquent to admit his guilt. These efforts, which were by no means always successful,[55] were continued even at the very scaffold at

in his passage, inquired if his hearse was ready, and then, as old Rowe used to say, was launched into eternity'; *ibid.*, Vol. 1, pp. 345 and 354–355. James Boswell once referred to Akerman, the keeper of Newgate, as his 'esteemed friend'; on which Croker comments: 'Why Mr. Boswell should call the keeper of Newgate his "*esteemed friend*" has puzzled many readers; but besides his natural desire to make the acquaintance of every body who was eminent or remarkable, or even *notorious*, his strange propensity for witnessing executions probably brought him into more immediate intercourse with the keeper of Newgate'; Boswell, *Life of Samuel Johnson* (with notes by J. W. Croker, 1859), Vol. 7, p. 329. According to H. Bleackley, Boswell rode to Tyburn in the same coach with a man to be hanged and persuaded Sir Joshua Reynolds to witness an execution; *Some Distinguished Victims of the Scaffold* (1905), p. VIII. Fox was present at Dodd's execution; see below, note 50 at p. 466; see also pp. 204–205.

52 *A History of Capital Punishment* (no date), p. 44.

53 On this see among others M. D'Archenholz, *A Picture of England* (1790), pp. 187–188 (transl. from French); G. F. A. Wendeborn, *Der Zustand des Staates, etc., in Grossbritannien* (1785), Vol. 2, p. 41; J. T. Smith, *Nollekens and his Times* (ed. by W. Whitten, 1920), Vol. 1, p. 111.

54 For an interesting comment upon this practice see below, Appendix 3, p. 714.

55 For the circumstances of such confessions—and denials—see among others Villette, *The Annals of Newgate* (1776), Vol. 2, p. 185; *ibid.*, Vol. 4, pp. 89–90; *Celebrated Trials* (1825), Vol. 3, pp. 242, 293, 406 and 480.

Tyburn. Thus when the hangman was fastening the rope round the neck of Richard Patch—sentenced for murder—the Rev. Mann, who attended Patch ' for the last time, attempted to draw from him a confession, but with no success. The sheriff then went to him, and entreated him to confess; but he steadfastly refused '.[56] The effect and indeed the purpose of these endeavours were not necessarily praiseworthy. At that time the prestige of the prison chaplain was not very high,[57] a fact which in itself may have accounted for the obstinacy with which so many offenders refused to make a confession, and may have stimulated them to make false statements about themselves and their associates. Another no less important reason, already mentioned, was that since the confessions were later printed and sold in pamphlet form, a suspicion was created that the chaplains were acting from mercenary rather than charitable motives.[58]

[56] *Celebrated Trials* (1825), Vol. 5, p. 588.

[57] A Parliamentary Committee which investigated the state of prisons wrote about the Rev. Bronlow Ford, LL.D., who had been Ordinary of Newgate from 1799 to 1814, that ' beyond his attendance in chapel, and on those who are sentenced to death, Dr. Ford feels but few duties to be attached to his office. He knows nothing of the state of morals in the prison; he never sees any of the prisoners in private; . . . he never knows that any have been sick till he gets a warning to attend their funeral, and does not go to the infirmary, for it is not in his instructions '. When J. T. Smith wished to visit one of the condemned before his execution, he went to see the Ordinary Bronlow Ford at a public-house in Hatton Garden where he was known to reside; he gives the following account of his visit: ' Upon entering the club-room . . . we found the said Doctor most pompously seated in a superb masonic chair, under a stately crimson canopy placed between the windows. The room was clouded with smoke, whiffed to the ceiling, which gave me a better idea of what I had heard of the Black Hole of Calcutta than any place I had seen '; *A Book for a Rainy Day* (ed. by W. Whitten, 1905), pp. 177–178. In a letter which Ford wrote to Jeremy Bentham he professed his genuine interest in prison reform. There is, however, no reason to question the exactness of the information collected by the Parliamentary Committee, and it should be stressed that Ford was typical rather than exceptional among the chaplains of Newgate.

[58] Symptomatic of this is a contemporary pamphlet in which the author describes the last conversation between the prison chaplain and a man about to be hanged. After the latter had declined to confess that he was a Sabbath breaker, a drunkard or a profligate, the enraged Ordinary exclaimed: ' " . . . the only three Topicks I can always enlarge upon, and yet has he the Impudence to say, he hopes to be saved! Sirrah, you must be one of these three, that you must; therefore recollect yourself; set all your Faculties of Remembrance at work, or I shall be at a Loss to say any Thing of you, in my paper ". " Then it's nothing with you to be a Thief ", Cry'd the Criminal, " I am sure I find it otherwise for I am justly Condemn'd for so being ". " Get you out of my sight ", said his Reverence, " such Case hardened Rogues as you would ruin the Sale of my Paper, I'll e'en write you down *Obstinate* "; and so he did: But others afterwards came in, and made him amends by

The 'dying speeches', in which the condemned were allowed to state what they liked, were delivered from the scaffold. If the delinquent did not wish to speak himself, he could hand the text of whatever he wanted to say to the Ordinary, who would read it on his behalf. The nature of these utterances varied considerably. Some delinquents would confess their guilt and warn the crowd to take example from their fate; others took this opportunity once more to proclaim their innocence.[59] Others still would choose to speak to their friends or accomplices, or even to make statements regarding the manner in which they had perpetrated their crimes.[60]

The sale of these publications was very considerable.[61] Thomas Gent, a well-known printer of York, writes in his autobiography that he considerably expanded 'the few dying words' said by Layer before his execution in 1723, and that

more ample Confessions'; this tract is quoted by Ch. Gordon, *The Old Bailey and Newgate* (no date), pp. 107–109. In 1804 one chaplain petitioned Parliament to exempt his 'execution brochure' from the paper tax; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, p. 321. In the British Museum Catalogue there are four columns of titles of accounts of the lives, dying speeches and confessions of various offenders issued by the Rev. Paul Lorrain, who was an Ordinary of Newgate.

[59] Thus, John Doyle, put to death for cutting and destroying a silk loom, declared: 'I john Doyle, do hereby declare as my last dieing words in the presance of my Almighty God that I am as innocent of the fact I am now to die for as the child unboarn; let my blood lay to that wicked man who has purchast it with gold and them notorious wretches who swore it falsely away'; Villette, *The Annals of Newgate* (1776), Vol. 4, p. 298. A similar statement was made by the brothers Perreau; *Celebrated Trials* (1825), Vol. 4, p. 509. According to P. Burke, *The Romance of the Forum*, 2nd ed., no date, p. 294, 'in the confession of Edward Clarke, who was executed at Chelmsford, is the following curious article: "I, Edward Clarke, now in a few hours expecting to die, do sincerely wish, as my last request, that three of my fingers be taken from my hands to be given to my three children as a warning to them, as my fingers were the cause of bringing myself to the gallows, and my children to poverty; and I also request, that E. Brown and two brother prisoners will be so kind as to see it done—they knowing which fingers they are, by their marking them at my wish with ink". This request was complied with'. It has not been possible to ascertain whether this description is exact, but Burke's information on criminals is on the whole very reliable.

[60] Thomas Athoe, sentenced to death for murder, said to the assembled crowd that since his victim had had no hair upon his head to get hold of, he had tied a handkerchief round his neck in two knots; Athoe then 'shewed the spectators, by pointing to his own neck, in what manner he throttled him'; *Celebrated Trials* (1825), Vol. 3, p. 407.

[61] 'You can't conceive the ridiculous rage there is of going to Newgate; and the prints that are published of the malefactors, and the memoirs of their lives and deaths set forth with as much parade as—as—Marshall Turenne's—we have no generals worth making a parallel'; Horace Walpole to Mann, October 18, 1750; *The Letters* (ed. by Mrs. P. Toynbee, 1903), Vol. 3, p. 21.

it 'had a run of sale for about three days successively, which obliged me to keep in my own apartments, the unruly hawkers being ready to pull my press in pieces for the goods'.[62] Referring to the second part of the eighteenth century, Francis Place notes that these speeches were usually printed before the execution and sold in different parts of the town before people had assembled at Tyburn. The price was a half-penny or a penny.[63] How great was the interest in this type of literature may be judged from the fact that according to Angelo, the *Newgate Calendar* 'experienced a ten times greater sale than either the "Spectator", the "Guardian" or the "Rambler"'.[64] This was natural and inevitable for, as W. Pinkerton observes, 'the gallows is the romance of a certain class of society; and, as long as it is an institution of our country, it will have its literature'.[65]

The execution

It was a long-established custom that as the final signal for the hangman to do his duty the prisoner had to drop a

[62] Thomas Gent, *The Life* (1832), pp. 140 and 141.

[63] Francis Place, MSS., 27,826, f. 100. Place further relates that 'the sale of speeches . . . must have been very great, for the number of those who hawked them about was enormous; no one can form a conception either of their number or of the discordant chant, and noise they made. Their number was indeed so great that, in going along the streets, there was no cessation, no interval when the ear was relieved from the sound of their voices'; *ibid.*, ff. 100–101.

A few days after Henry Simms, known as Gentleman Harry, was executed, a notice appeared in the *Daily Advertiser*, announcing that John Thrift, the hangman, is ready to testify on oath that a few minutes before the cap was drawn over Simms' eyes he told him that he had given the account of his life to no one except J. Nicholson, the Printer in Old Bailey. Obviously Thrift's testimony was not disinterested; H. Bleackley, *The Hangmen of England* (1929), p. 78.

[64] *Reminiscences* (1828), Vol. 1, p. 467.

[65] *Notes and Queries* (Jan.–June, 1861), 2nd Ser., Vol. 11, p. 316. He quotes the following title of a pennyworth eight-page pamphlet: '*The Terrible, Unearthly, Soul-stirring Narrative of the Dark, Midnight, Agonising Wanderings and Fearful Prognostications of the supposed Spirit or Ghost of Jas. Mullins. Once a Detective! a Thief! an Informer! a Perjurer! and finally hung for the Murder of Mrs. Emsley, the Old Mizer of Stepney. The Leprichauns and Banshees of Ould Ireland. The first Publication of the Letter Given to the Priest on the Scaffold. This Letter, which was lost by the Priest, contains Mullins's last Thoughts to his Confessor, which are truly extraordinary and Thrilling. The Blood-Stained Hammer. "Give the Hammer to my Son", were almost the last words uttered by James Mullins. What a Terrible Bequest to make! Did the Son commit the Murder or Did he take Part in it? "The Neighbours fell back amazed, the Light went suddenly out, the Priest crossed himself, and knelt and prayed, while the Spirit of James Mullins hovered about the bed". The Haunted Chamber! The*

handkerchief.[66] Almost invariably prisoners behaved very courageously[67] and the apparent indifference with which they faced the execution greatly impressed many foreign observers.[68] The last minutes before the hanging are thus

Haunted Confessional ! The Haunted Grave ! The Satanical Apparition ! The Fearful Thrilling Declaration ! The Great Secret made Public ! Was Mullins a Murderer or not ? '

[66] It was said that when George Selwyn was at the dentist's he gave the signal for drawing a tooth by dropping his handkerchief; Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, p. 266. Mary Blandy, who was put to death for poisoning her father, gave the signal by thrusting out a little book which she held in her hand; H. Bleackley, *Some Distinguished Victims of the Scaffold* (1905), p. 32. Earl Ferrers refused to give the signal.

[67] Sir Thomas Smith remarks: 'In no place shall you see malefactors goe more constantly, more assuredly, and with less lamentation to death, than in England'; *The Common-Welth of England* (1640), p. 196. This work was first published in 1583 under the title *De Republica Anglorum*.

[68] 'Une preuve d'insensibilité, plus forte et plus certaine que toutes ces bravades, c'est le peu d'altération qui paraît sur le visage de quelques-un d'entre eux. On n'y remarque ni crainte, ni pâleur; il ne faut pas moins que toute leur parure, ou la corde au col, pour les distinguer et les faire connaître. J'ai songé quelquefois, d'où leur pouvait venir cette insensibilité, qui me paraît une chose tout à fait singulière; mais je n'ai jamais pu me contenter là-dessus. Je crois bien que les exécutions fréquentes, le nombre de gens qui meurent de compagnie, et les applaudissements des spectateurs, y font quelque chose; le branderin, qu'ils ont soin d'avaler avant que de se mettre en marche, peut aussi contribuer à les étourdir; mais tout cela ne suffirait pas chez d'autres peuples, et il faut qu'il y ait chez celui-ci quelques raisons plus fortes, et qui vont au tempérament'; B. L. Muralt, *Lettres sur les Anglais, 1725* (ed. by Otto von Greyerz, 1897), pp. 52–53. Similarly Lacombe, *Observations sur Londres* (1777), p. 186, writes: 'Les Anglais vont au gibet avec une indifférence qui approche de l'héroisme'. See also M. Misson, *Memoirs and Observations in his Travels over England* (1719), p. 124: 'Their extraordinary Courage looks upon it (death) as a Trifle' (written in 1698, transl. from French); and G. F. A. Wendeborn, *Der Zustand des Staats, etc., in Grossbritannien* (1785), Vol. 2, p. 276. See further F. Gemmelli, who writes: 'Vedrete perciò, non senza gran stupore, un condannato alle forche, girsene appunto, come se andasse a nozze; e i più stretti parenti tirargli poscia i piedi colla più soave indifferenza del Mondo'; *Viaggi per Europa* (1701), Vol. 1, p. 328.

The impression of certain French observers of the seventeenth century was similar. 'On admire leur superbe mépris de la mort'—writes George Ascoli. The same author states that when 'les étrangers assistent à une exécution, l'impassibilité du condamné est toujours pour eux un motif de surprise', and he quotes the following verse composed by Saint-Amant, *L'Albion*, Vol. 2, p. 456:

'Une insensible constance
Les a guidés au trépas,
Ils ont trouvé des appas
En l'horreur de la potence.
A les ouir discourir,
A les voir ainsi périr
D'un air que presque on envie,
On aurait cru que leur vie
N'eût jamais fait que mourir.'

described by Saussure[69]: 'When all the prisoners arrive at their destination they are made to mount on a very wide cart made expressly for the purpose, a cord is passed round their necks and the end fastened to the gibbet, which is not very high. The chaplain who accompanied the condemned men is also on the cart; he makes them pray and sing a few verses of the Psalms. The relatives are permitted to mount the cart and take farewell. When the time is up—that is to say about a quarter of an hour—the chaplains and relations get off the cart, the executioner covers the eyes and faces of the prisoners with their caps, lashes the horses that draw the cart, which slips from under the condemned men's feet, and in this way they remain all hanging together'.[70] According to some

See G. Ascoli, *La Grande-Bretagne devant l'Opinion Française au XVIIe Siècle* (1930), Vol. 1, pp. 435 and 436; see also below, Appendix 3, p. 722.

[69] *A Foreign View of England in the Reigns of George I and George II* (transl. by Mme. van Muyden, 1902), pp. 124–125. This work was first published in 1725.

[70] At first the scaffold at Tyburn consisted simply of a beam placed across the branches of two trees, from which dangled the rope. A ladder, draped with black cloth, was placed against the beam. About ten men could be hanged at a time. Later, triangular gallows were installed; on these gallows at least twenty-four delinquents could be hanged at the same time. This change is first mentioned in the account of the execution of Dr. Atory in 1571. In Shakespeare's *Love's Labour's Lost* (Act IV, sc. 3), occurs the following reference to the triangular gallows:

> 'Thou makest the triumviry, the corner-cap of society,
> The shape of Love's Tyburn, that hangs up simplicity'.

In 1759, the permanent gallows of Tyburn were replaced by movable ones, which were erected on the day of an execution and afterwards taken down; A. Marks, *Tyburn Tree*, pp. 63–65 and 69. The *Whitehall Evening Post* of October 4, 1759, records that 'yesterday morning four malefactors were executed on the new Moving Gallows at Tyburn'. In 1760 Earl Ferrers was also executed on the movable gallows which were sent on in front of the prisoner and erected; J. McMaster, *History of the Royal Parish of St. Martin-in-the-Fields* (1916), p. 319.

A curious instrument strongly resembling the French *guillotine* and called the *Halifax gibbet* was in use in that county until 1650; see Holinshed, *Chronicles of England* (edition of 1807), Vol. 1, p. 312; see also S. Midgely, *Hallifax, and its Gibbet-Law*, a tract published in 1708. Earl Morton was so impressed by the effectiveness of this instrument that he ordered a similar one for Scotland. On June 3, 1587, he was himself executed on it. Lupold von Wedel, who had been travelling in England and Scotland in 1584 and 1585, writes in his journal: 'An instrument was shown to us, consisting of two upright poles, joined together by a third pole fixed horizontally. At the foot of the two poles a board was fixed to keep a man's head or neck tight in a hole, rendering it unable to move. At the top of the two poles was a heavy iron with an edge sharp as an axe. This iron was held by a rope attached to a hook; if the hook was loosened, the iron fell down upon the board below, cutting off the head which was fast in the hole'; 'Journey Through England and Scotland in the Years 1584 and 1585'; *Transactions of the Royal Historical Society* (1895), New Series, Vol. 9, p. 246.

observers the adjusting of the rope round the necks of the condemned lasted nearly a quarter of an hour; others state that it took even longer.[71]

But executions were not always allowed to take their course undisturbed. Thus the *Annual Register* of 1763 relates that a terrible storm 'made such an impression on the ignorant populace assembled to see a criminal executed on Kennington Common that the sheriff was obliged to apply to the secretaries of state for a military force to prevent the rescue, so that it was near eight in the evening before he suffered'.[72] In 1717 a writ was served upon William Marvell, the hangman, while he was accompanying the procession to Tyburn to hang three criminals. The bailiff made it clear that he did not wish to prevent the execution and that he would allow Marvell to perform his duties, provided he would promise to obey the summons later. But the episode caused great general confusion. The hangman was severely wounded and lost consciousness; responding to the demand of the under-sheriff, a bricklayer volunteered to act as hangman, but the crowd immediately turned against him and he too was severely beaten. After waiting for a few hours the authorities decided to postpone the execution and the offenders were escorted back to Newgate. Next day they were reprieved for a week and ultimately their capital sentences were commuted. Four years later one of these reprieved men was hanged for returning from

[71] See, for instance, J. H. Meister, *Letters written during a Residence in England* (1799), p. 61 (written between 1789–1792; transl. from French); and J. E. Zetzner, *Londres et l'Angleterre en 1700* (ed. by R. Reuss, 1905), p. 11.

[72] Vol. 6, Chronicle, p. 96. In 1801 in New South Wales a delinquent was reprieved under the following circumstances: '"Government House, Sydney, April 14, 1801. The regiment to be under arms on Monday next, the 19th inst., at half past nine in the morning, to attend the execution of John Boatswain, private soldier in the New South Wales Corps, sentenced to die by Court Martial for desertion". "April 19, 1801.—Raining in torrents. The execution of the prisoner, as directed by the orders of the 14th inst., on account of the inclemency of the weather is deferred until to-morrow, 20th inst." "April 20.—Still raining in torrents. Execution still further deferred". "April 25.—Favourable circumstances having been reported, the Governor of the Settlement is pleased to extend a reprieve and grant a free pardon to the prisoner John Boatswain, sentenced to death for the unsoldierlike crime of desertion; but the Governor trusts that the awful position in which the wretched man was placed will deter others from following his example. God save the King"'; *Notes and Queries* (January–June, 1882), 6th Ser., Vol. 5, p. 386.

transportation.[73] The *Public Advertiser* of April 20, 1768, writes: 'Turlis, the Common Hangman, was much hurt and bruised by the mob throwing stones at the execution of three malefactors at Kingston'. At the execution in 1776 of the two brothers Perreau for forgery the assembled crowd was most unruly; '. . . with great difficulty an army of constables—three hundred in number—kept a clear space around the scaffold. After the spectacle was over it was found that there had been numerous accidents. A woman was beaten down and pressed to death; a youth was killed by a fall from a coach. One of the stands near the gallows collapsed during the execution and three or four persons lost their lives'.[74] Similar scenes took place during the execution in 1769 of Doyle and Valline, sentenced to death for destroying a silk loom. Bricks, tiles and stones were thrown while the gallows were being erected, and after the execution the sheriff had to address the crowd and to assure them that every proper step had been taken to save the lives of the criminals.[75]

On some occasions the attitude of the assembled people was very hostile to the offender. When Jonathan Wild was to be hanged he was treated with extreme roughness. Instead of the usual signs of pity which were generally shown to common criminals, he was reviled and cursed and pelted with mud and stones.[76] Griffiths relates [77] that when Hannah Dagoe, an Irish woman, was to be hanged, she attacked the hangman and gave him so violent a blow that he was almost knocked down. Tearing off her hat and clothes she distributed them to the assembled crowd, and when ultimately the executioner and his assistants succeeded in getting the rope round her neck she threw herself out of the cart before the signal was given, broke her neck, and died instantly. In contrast, another woman, Elizabeth Jeffries, was hanged unconscious: she fainted just before the rope had been tied up.[78] Often much confusion was caused by the faulty tying or breaking of the rope. Thus

[73] John Meff; see W. Jackson, *Newgate Calendar* (1818), Vol. 1, p. 263.
[74] H. Bleackley, *Some Distinguished Victims of the Scaffold* (1905), pp. 66–67.
[75] Villette, *The Annals of Newgate* (1776), Vol. 4, p. 298.
[76] *Celebrated Trials* (1825), Vol. 4, p. 85.
[77] *The Chronicles of Newgate* (1884), Vol. 1, pp. 270–271.
[78] *Celebrated Trials* (1825), Vol. 4, p. 359.

when Captain Kidd was hanged in 1701, the rope broke and he had to be raised from the ground and hanged again.[79] That such accidents were of frequent occurrence is shown by Wilkinson's comment on Kidd's execution[80]: 'In cases of this distressing nature, and which have often happened to the miserable sufferer, the sheriff ought to be punished. It is his duty to carry the sentence of the law into execution, and there can be no plea for not providing a rope of sufficient strength. In such a case as the last, it is in fact a double execution, inflicting unnecessary torments, both of body and mind, on the already too wretched culprit'.

When the death of the hanged delinquent was not instantaneous, his friends would pull him down by the legs to shorten his agony. Zetzner notes[81] that sometimes they would beat his heart with heavy stones, to make him die quicker. The *Gentleman's Magazine* thus describes the execution of an offender condemned under the Waltham Black Act: 'Monday 26 (July 1736) one, Reynolds, . . . was hanged at Tyburn. He was cut down by the executioner as usual, but as the coffin was fastening, he thrust back the lid, upon which the executioner would have tied him up again, but the mob prevented it, and carried him to a house where he vomited three pints of blood, but on giving him a glass of wine, he died'.[82]

[79] J. Laurence, *A History of Capital Punishment* (no date), pp. 56–57, gives the following description of the execution of David Evans: 'The rope broke, and the unhappy man fell down beneath the gallows, unhurt but completely unnerved. There were loud cries immediately from the crowd who were watching: "Shame! Let him go!" The half-hanged man, staggering to his feet, exclaimed, "I claim my liberty. You have hanged me once, and you have no power or authority to hang me again" . . . "You are greatly mistaken", replied Calcraft (the hangman) firmly. "There is no such law as that—to let a man go if there is an accident and he is not properly hanged. My warrant and my order are to hang you by the neck until you are dead. So up you go, and hang you must until you are dead." Evans was forced up the scaffold by Calcraft and two warders and duly hanged, with protests still on his lips.' At the execution of William Ray for murder 'immediately after the cart drew away, some of William Ray's friends drawing him down to put him out of pain, in a minute's time, or a little more, the rope broke, and he fell to the ground, which occasioned a great deal of confusion, and then the executioner, and some about him, took him up and led him to the cart, and hung him up again, but only a little from the ground, not so high as the others'; Villette, *The Annals of Newgate* (1776), Vol. 2, p. 233.

[80] *The Newgate Calendar* (1816), Vol. 1, note at p. 38.

[81] *Londres et l'Angleterre en 1700* (ed. by R. Reuss, 1905), p. 11.

[82] (1736), Vol. 6, p. 422; see also the execution of John Gow, hanged for piracy in 1729; *Celebrated Trials* (1825), Vol. 3, p. 455.

§ 4. THE HANGMEN [83]

William Andrews quotes a local newspaper for the following account of the execution of two housebreakers in 1788: 'At the tree, the hangman was intoxicated with liquor, and supposing that there were three for execution, was going to put one of the ropes round the parson's neck, as he stood in the cart, and was with much difficulty prevented by the gaoler from so doing'.[84] Influenced by the general atmosphere prevailing at Tyburn, hangmen often behaved like actors on the stage. Thus when William Brunskill, for twelve years a deputy-hangman, became the principal one and on the first day of his new office was called upon to execute seven

[83] Brandon, a seventeenth century hangman for London and Middlesex, was through an error advanced to the rank of Esquire and this title was afterwards transferred to his successors in office. The Sheriffs of London were so well satisfied with the hangman Dennis that in 1785 they presented him with an impressive official robe. However, Dennis found it too inconvenient to wear when performing his duties, and too conspicuous for other occasions, so he sold it to a well-known character of the period.

In London two persons were usually employed—the executioner and his assistant; each had a salary of £50 a year. Calcraft's emoluments (he served the city of London until 1874) were a guinea a week, and an extra guinea for every execution. He also received half-a-crown for every man he flogged and an allowance to provide cats or birch rods. For acting as executioner of Horsemonger Lane Gaol he received a retaining fee of five guineas with the usual guinea for every execution; he was allowed to engage himself elsewhere in the country, where he was paid £10 on each occasion. He was pensioned at the rate of twenty-five shillings a week. When a vacancy occurred, there were many candidates for the office.

Since many provincial towns kept no permanent hangman, the executioner from London was often called upon to perform this task in the provinces, from which he derived additional income. When Sir Richard Philipps was Sheriff of London there happened to be no executions; when the hangman was called upon to whip an offender he refused to do it unless his salary was increased, for, as he explained, 'for many months I have had no job but whipping and that puts nothing in a man's pocket . . . and it wasn't for a hanging job now and then in the country, where there's few in my line, I should likely have been quite ruined. I used to get clothes; and very often, some gentleman would tip me a few guineas for civility, before he was turned off'. On one occasion a gentleman who was about to be executed at Maidstone, wishing to show Calcraft his appreciation, ordered a new suit from his London tailor in which he appeared at his execution, and which he bequeathed to Calcraft; see *Notes and Queries* (Jan.–June 1855), Vol. 11, pp. 95, 252; *ibid.* (July–Dec. 1855), Vol. 12, p. 293; *ibid.* (Jan.–June 1861) 2nd Ser., Vol. 11, pp. 314–315; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, pp. 412–413, 413–414, and 415. On the extraordinary difficulties which the High Sheriff of the County of Flint had to face in 1769 when the man engaged to execute a burglar had deserted, see W. Andrews, *Bygone Punishments* (1931), pp. 21–22.

[84] *Ibid.*, p. 27.

criminals, he performed his task with exemplary efficiency and then advanced to the front of the platform and, with his hand on his breast, made a profound bow to the assembled crowd.[85] Hangmen were allowed to receive money from the offender whom they were about to hang, a practice which sometimes gave rise to undignified scenes.[86]

Many hangmen had several offences on their record and some were executed. Thus Derrick had committed a rape and would have been hanged but for the interposition of the Earl of Essex, whom some years later he was called upon to decapitate. Richard Brandon was committed for bigamy. John Price (1714–1715) served several prison sentences and was ultimately executed at Bunhill Fields for the murder of an old woman.[87] His successor, Pasha Rose, was among the first offenders to be executed at Tyburn. William Marvell (1715–1717) was both an insolvent and fraudulent debtor and an inveterate drunkard, and was afterwards found guilty of a capital larceny; John Thrift (1735–1752) was found guilty of murder; Thomas Turlis (1752–1771) was indicted for a capital larceny and Edward Dennis (1771–1786) took part in the Gordon Riots.[88]

[85] A similar attitude was often displayed by the convicts. When James Carrick came to the place of execution, 'he smiled upon, and made his bows to all he knew. Instead of praying with the rest of the criminals, he employed that time in giggling, taking snuff, and making apish motions to divert himself and the mob': Villette, *The Annals of Newgate* (1776), Vol. 1, p. 110.

[86] Villette relates, for instance, that when Earl Ferrers was to be put to death 'his lordship then (by mistake) gave five guineas to the executioner's assistant; which was immediately after demanded by the master; but the fellow refused to deliver it, and a dispute ensued, which might have discomposed his lordship, had not Mr. Vaillant instantly silenced them'; *The Annals of Newgate* (1776), Vol. 4, p. 141. Macaulay states that when Monmouth was about to be beheaded he said to the executioner: 'Here are six guineas for you. Do not hack me as you did my Lord Russell. I have heard that you struck him three or four times. My servant will give you some more gold if you do the work well'; 'History of England', in *Works* (ed. by Lady Trevelyan, 1866), Vol. 1, p. 487. The practice of presenting gifts to the executioner continued for a long time. In 1826, when Cockerel was about to be hanged for forgery, he turned to the crowd, bowed two or three times and then presented one of the executioners—who was adjusting the rope—with a sovereign; *Notes and Queries* (July–Dec. 1873), 4th Ser., Vol. 12, p. 307.

[87] His body was afterwards hung in chains near Holloway; see on his trial G. T. Wilkinson, *The Newgate Calendar* (1816), Vol. 1, pp. 188–190; see also W. Jackson, *Newgate Calendar* (1818), Vol. 1, p. 239.

[88] It would also appear that yet another executioner employed in London was himself hanged in 1538: 'The Sunday after Bartlemew Day, was one Cratwell, hangman of London, and two persons more hanged at the wrestyling place at the

In their defence it must be said that the influence of their duties, both as hangmen and as the executioners of such other sentences as whipping and standing in the pillory, was bound to be brutalising. In 1731 John Hooper, known as the laughing Jack, was called upon to execute the sentence of cutting both ears, slitting the nostrils and branding the nose, which had been passed on Joseph Crook, *alias* Sir Peter Stranger, found guilty of the forgery of certain deeds of conveyance. 'Dressed in overalls of butcher blue, Jack Hooper came up behind him and severed his (Stranger's) ears with an "incision knife", after which he held them aloft so that the mob could see, and then delivered them to Mr. Watson, a Sheriff's officer. . . . Although he endured his punishment with undaunted courage, the wretched man could not help flinching from the final act of torture. When both his nostrils had been slit with a pair of scissors and the hangman was proceeding to sear his nose, he sprang from his chair at the first touch of the red-hot iron . . .'.[89] Roger Gray, a

backsyde of Clerkenwelle beside London, for robbyng of a bouthe in Barthlomew Fayre; at which execution was about twentie thousand persons, as I myselfe judged'; Hall, *Chronicle*, p. 233; quoted by W. J. Pinks, *The History of Clerkenwell* (ed. by E. J. Wood, 1865), p. 587.

[89] H. Bleackley, *The Hangmen of England* (1929), pp. 61–62. When John Thrift was called upon to behead Lord Kilmarnock he was so much impressed that he fainted. He recovered afterwards but it was noted that when Kilmarnock arrived, Thrift held the axe behind him so that he should not see it. Ultimately he performed his task well, severing the head with a single stroke. But when, immediately afterwards, he had to behead Lord Balmerino, he was again very moved, his arm trembled and his first blow was so weak that the neck was only lacerated and he needed two more strokes to cut the head through; *ibid.*, pp. 82 and 83; a detailed description of this execution is given by W. Hone, *The Every-Day Book* (1827), Vol. 2, pp. 1096–1099. A no less dreadful scene occurred at the execution of the Duke of Monmouth. 'The hangman', writes Macaulay, 'addressed himself to his office. But he had been disconcerted by what the Duke had said (on this see above, note 86 at p. 188). The first blow inflicted only a slight wound. The Duke struggled, rose from the block, and looked reproachfully at the executioner. The head sank down once more. The stroke was repeated again and again, but still the neck was not severed, and the body continued to move. Yells of rage and horror rose from the crowd. Ketch flung down the axe with a curse. "I cannot do it", he said; "my heart fails me." "Take up the axe, man", cried the sheriff. "Fling him over the rails", roared the mob. At length the axe was taken up. Two more blows extinguished the last remains of life; but a knife was used to separate the head from the shoulders. The crowd was wrought to such an ecstasy of rage that the executioner was in danger of being torn in pieces, and was conveyed away under a strong guard'; 'History of England', *Works* (ed. by Lady Trevelyan, 1866), Vol. 1, pp. 487–488. See also Ch. James Fox, *History of the Early Part of the Reign of James the Second* (1808), p. 269.

seventeenth century Exeter hangman, hanged among others his own brother.[90]

§ 5. GROWTH OF ODD CUSTOMS AND SUPERSTITIONS

One of the effects of public executions was to encourage the growth of certain superstitions. The crowd would thus storm the gallows after an execution to touch the body of the hanged. Women were observed to approach the scaffold to be stroked by the hands, still quivering in the agony of death; 'I remarked'—writes Meister—'a young woman, with an appearance of beauty, all pale and trembling, in the arms of the executioner, who submitted to have her bosom uncovered, in the presence of thousands of spectators, and the dead man's hand placed upon it'.[91] Another object of superstition was the rope. For many years it was customary for the hangman to hold a reception after the execution at a tavern in Fleet Street, and there to sell the rope at the rate of sixpence an inch. After Earl Ferrers had been put to death there was a fight between Turlis and his deputy for the rope; and after Corder had been hanged for murdering Maria Marten the scuffle spread to the spectators. After the execution of Colonel Wall in 1802, the hangman was selling the rope at a shilling an

[90] He wrote the following letter to his nephew: 'I am much afflicted to be the conveyancer of such news unto you as cannot be very welcome. Your father died eight days since, but the most generously I ever saw man. I will say this of him everywhere; for I myself trussed him up'; J. Laurence, *A History of the Capital Punishment* (no date), p. 86.

As far as it has been possible to ascertain, four hangmen attained the distinction of having their lives recorded in the *Dictionary of National Biography*; Richard Brandon (died in 1649), II, 1131; John Ketch (died in 1686), XI, 71; William Marwood (1820–1883), XII, 1218; William Calcraft (1800–1879), III, 690. Some interesting information on the hangmen of England is to be found in the fourth chapter of Alfred Marks' *Tyburn Tree*, pp. 44–53, and in John Laurence's *op. cit.*, p. 86 *et seq.* The most comprehensive modern book on this subject is Horace Bleackley's *The Hangmen of England* (1929), which gives the history of all hangmen up to William Marwood (1874–1883). Two articles containing much valuable information on this subject have appeared in *Notes and Queries*: W. Pinkerton, 'Jack Ketch and His Brotherhood' (Jan.–June, 1861), 2nd Ser., Vol. 11, pp. 314–316, and E. F. Rimbault, 'Tyburnian Gleanings', *ibid.*, pp. 445–448.

[91] *Letters written during a Residence in England* (1799), note on p. 62. F. Lacombe, *Observations sur Londres et ses Environs* (1777), p. 186, also refers to the custom: 'Des femmes crédules touchent la corde d'un ou deux pendus, croyant de se guérir de l'épilepcie ou de quelques autres maladies aussi grandes'; for a similar episode see further *Gentleman's Magazine* (1767), Vol. 37, p. 276.

inch at the same time as a woman and a man were selling the 'authentic' rope at a somewhat reduced price in two other districts of London.[92]

The bodies and clothes of executed delinquents were the property of the hangmen, from whom the relatives or friends of the dead could purchase them, if they wished; otherwise the bodies were sold to surgeons to be dissected.[93] The bargaining was often hard and not necessarily peaceful. Scuffles between the surgeons' messengers and the crowd, who resented the practice of dissection, were very frequent. People fought even for the privilege of carrying the bought corpses to parents and friends waiting in coaches and cabs to receive them, for the carriers were well paid for their trouble.[94] Silas Told, who, under the influence of Wesley, took upon himself the thankless mission of bringing spiritual comfort to prisoners, relates that after the execution of John Lancaster no one claimed his body for interment. However, when it became known that the 'surgeons' mob' had secured it and had taken it to Paddington for dissection, a party of sailors recovered the body and carried it in state through Islington and Hounsditch; when they became tired they dropped it on the doorstep of an old woman, who recognised in it the body of her own son.[95] After the execution of Richard Turpin the people whom he had selected to be his mourners took all possible care to secure his body, which they deposited in a grave. The next day some persons were discovered to be moving the body, 'and the mob having got scent where it was carried to, and suspecting it was to be anatomised, went to a garden in which it was to be deposited, and brought away the body through the streets

[92] J. T. Smith, *A Book for a Rainy Day* (ed. by W. Whitten, 1905), p. 180.

[93] The dissections were public and drew large crowds of spectators. At first they took place at Barber-Surgeons' Hall and afterwards in Hick's Hall.

[94] C. de Saussure, *A Foreign View of England in the Reigns of George I and George II* (transl. by Mme. Van Muyden, 1902), p. 125; W. B. Boulton, *The Amusements of Old London* (1901), Vol. 2, pp. 248–249. In *The Hangmen of England* (1929), pp. 74–75. H. Bleackley writes: 'An unseemly scuffle, which frequently became a fierce battle, always took place when the felons were cut down from the Triple Tree. The friends of the dead man fought to save them from dissection, the emissaries of the Surgeons strove to seize their lawful prey, while 'Jack Ketch' was determined to keep the clothes of his victims. In addition, there were many turbulent free-lances, who tried to snatch a body to sell on their own. Usually the corpses were stripped naked at the foot of the gallows, and almost all the combatants had a broken head'.

[95] A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, p. 119.

of the city in a sort of triumph, almost naked, being only laid on a board covered with some straw, and carried on four men's shoulders, and buried it in the same grave . . .'.[96] Even the most hardened offenders were frightened by the possibility of their bodies being sent for dissection.[97]

In some cases the bodies of hanged offenders were laid at the doors of their prosecutors. In 1763 the body of Cornelius Saunders, executed for stealing fifty pounds from Mrs. White's house in Lamb Street, was 'carried and laid before her door; where great numbers of people assembling, they at last grew so outrageous, that a guard of soldiers was sent for to stop their proceedings; notwithstanding which, they forced open the door, fetched out all the salmon-tubs, most of the household furniture, piled them on a heap and set fire to them; and to prevent the guards from extinguishing the flames, pelted them off with stones, and would not disperse till the whole was consumed'.[98]

While such incidents must have had an intimidating effect on prospective prosecutors, 10 & 11 Will. 3, c. 23, s. 2,[99] introduced what is known as the 'Tyburn Ticket', the purpose of which was to encourage people to bring offenders to justice. This statute enacted that anyone who apprehended a person accused of any of the offences specified would—on the conviction of the offender—be entitled to a free certificate from the judge or justices exempting him from holding any office of the parish and ward where the crime had been committed. If several persons helped to bring an offender to trial, and a dispute arose as to their respective rights to the possession of such a certificate, the judges or justices were to '. . . direct and appoint the said Certificate into so many Shares, to be

[96] Villette, *The Annals of Newgate* (1776), Vol. 3, p. 26.

[97] Villette records that Vincent Davis, sentenced to death for murder, 'sent many letters to all his former friends and acquaintances to form a company, and prevent the surgeons in their designs upon his body; . . . so great were his apprehensions that he should be anatomised, that as I was told, he desired and wished he might be hanged in chains, to prevent it, and with that view affronted the court of justice'; *ibid.*, Vol. 1, pp. 281–282; see also *Celebrated Trials* (1825), Vol. 3, p. 412. Griffiths doubts whether this fear was general. On hanging in chains see below, pp. 213–220.

[98] *Annual Register* (1763), Vol. 6, Chronicle, p. 96.

[99] (1699), 'An Act for the better apprehending, prosecuting and punishing of Felons that commit Burglary, House-breaking, or Robbery in Shops, Warehouses, Coach-houses or Stables, or that steal Horses'.

divided amongst the Persons therein concerned '. The certificate was to be enrolled by the Clerk of the Peace of the County in which it had been granted, the fee for such enrolment being fixed at one shilling.[1] The holder of the certificate might sell it for any price to any other person, provided that he had not previously availed himself of the privilege to which its possession entitled him. Each certificate could be sold only once, the transfer being made by way of an endorsement. ' Tyburn Tickets ' were being issued throughout the eighteenth and even at the beginning of the nineteenth centuries. They were highly valued and sometimes fetched very high prices. The *Stamford Mercury* of March 27, 1818, relates that ' last week a Tyburn Ticket was sold in Manchester for £280 '. This was, however, a very exceptional price, the more usual value of the ticket being from about £12 to £30 or £40. This singular institution was abolished in 1818 by 58 Geo. 3, c. 70,[2] but it is recorded by an eye-witness that in 1856 Mr. Pratt, an armourer of Bond Street, claimed and obtained exemption from serving on a jury by reason of his having a Tyburn

If a person was killed in the course of apprehending an offender, the former's executors or administrators were entitled to obtain the certificate without paying the fee.

[2] Even as late as 1816 a witness giving evidence before the Committee on the state of the police in the Metropolis urged its retention; see ' Report on the State of Police in the Metropolis ' (1816), 510, p. 175; *Parl. Papers* (1816), Vol. 5. ' The Tyburn-tickets ', he said, ' in some parishes are at present of some trifling value, in others they are of no value whatever: I think they will be made of very great value, and great benefit to the public, and without any sort of expense to the government. The plan that I should propose regarding Tyburn-tickets is this: in the generality of parishes at present it is of no value; for instead of the officers wishing to be out of office, they are all trying, for some reason or other, to get into office, and that makes them of no value; but I should submit, whether this would meet with the opinion of the Committee is another question; if the Tyburn-ticket were appointed, by this Act of Parliament to come solely to the apprehender, and to add to it another little privilege, which might be granted, independent of exempting them from parochial duties, to exempt any person holding that ticket from serving as a soldier or a sailor at sea, I am persuaded that would make any person, when there was a cry of "stop thief ", run out; . . .'

A year later, however, the abolition of the Tyburn Ticket was recommended by the ' Second Report on Rewards and Convictions ': ' There is another species of reward which your Committee would equally wish to do away with, namely, that which is technically called a Tyburn Ticket. . . . This mode of remuneration has all the bad consequences of the Parliamentary Rewards by money, as the ticket is generally sold . . . and indeed it may be considered in some respects as worse, it having all the effect of a money reward without its name '; (1817), 484, p. 324; *Parl. Papers* (1817), Vol. 7.

Ticket. It appears that the judge did not recollect that the Act of William III had been repealed.[3]

§ 6. ATTEMPTS AT THE REVIVAL OF HANGED OFFENDERS

Owing to the primitive method of carrying out executions it was in some cases possible to bring the hanged offender back to life. Hangmen were often bribed and induced to help the friends of the offender to carry out the rescue. Although criminals were sentenced to be hanged by the neck until they were dead, it was often left to the discretion of the hangman to decide when the man *was* dead. Thus by tying and placing the rope in a particular way,[4] or by cutting it down sooner than usual, the hangman could render the subsequent revival of the condemned a comparatively easy matter. The carrying out of these subterfuges was facilitated by the fact that gallows were usually erected on an open space on the ground, with the friends of the victim crowded around to assist the executioner and to guard against possible interference.

According to a correspondent in the *Notes and Queries*,[5] known cases of such *semi*-hanging ' are not a few, and if those which are unknown, on account of the secret having been well kept, were made public, the list, I believe, would contain some scores of names. At one time, indeed, it was the regular

[3] Apart from the two statutes and the two Reports which have been quoted, see on this subject *Notes and Queries* (July–Dec. 1858), 2nd Ser., Vol. 6, p. 529; *ibid.* (Jan.–June, 1859), 2nd Ser., Vol. 7, p. 55; *ibid.* (Jan.–June, 1861), Vol. 11, pp. 395–396 and pp. 437–438, where the original ticket and ' Form of Transfer of Certificate ' are reproduced; *ibid.* (July–Dec., 1861), 2nd Ser., Vol. 12, p. 57. See further: John Timbs, *Curiosities of London* (2nd ed. 1868), p. 809; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, p. 30; A. Smith, *History of the Lives, etc., of Highwaymen* (ed. by A. L. Hayward, 1926), p. XIX.

[4] On the attempt to rescue Dr. Dodd see below, pp. 466–467. W. Pinkerton thinks that several instances of resuscitation after hanging were made possible by the knot having been placed at the back or at the front of the neck, instead of at one side or the other. The popular prejudice was in favour of the left side; the following passage occurs in a pamphlet published in 1676 and entitled *A Warning for House-keepers, or a Discovery of all Sorts of Thieves and Robbers*: A thief's *mort*, or female companion, becoming unreasonably virtuous will ' hear of nothing but matrimony, a wedding-ring, and a priest '; but the thief, in reply, says ' the priest has no business with us but at the cart, and no other ring ought to be thought of but that under the left ear '; *Notes and Queries* (Jan.–June, 1861), 2nd Ser., Vol. 11, p. 314.

[5] (July–Dec., 1856), 2nd Ser., Vol. 2, p. 73.

practice for the friends of a victim of the law to make every possible preparation for his *semi*-hanging and his subsequent resuscitation'.[6] These practices were virtually brought to an end by the introduction of the drop.[7]

§ 7. SUICIDE OF OFFENDERS UNDER SENTENCE OF DEATH

If an offender on whom the death sentence had been passed committed suicide while awaiting execution, a stake was driven

[6] It appears that the body of Ann Green, executed in 1650 for murder, was carried to the anatomy school in Christ Church, Oxford. When the corpse was unpacked it evinced some signs of vitality, and under the care of the anatomy reader and his assistant was returned to life; G. V. Cox, *Recollections of Oxford* (1870), p. 23. Cox adds that this episode led to 'some attempts at wit' and quotes the following verse:—

'Ann Green was a slippery quean,
In vain did the jury detect her;
She cheated Jack Ketch, and then the vile wretch
'Scap'd the knife of the learned dissector.'

On this case see also E. W. Brayley, *Londiniana* (1829), Vol. 2, pp. 36–37. The same author quotes from the minute books of the Company of Surgeons a curious order dated July 13, 1587, which clearly indicates that there had been a number of cases of resuscitation of bodies conveyed to the Surgeons' Hall for dissection; *ibid.*, p. 36.

G. V. Cox, *op. cit.*, note 2, at p. 23, relates that the well known surgeon Hunter had once revived an offender sent to him for dissection, since when this offender had looked upon Hunter as *in parentis loco*, as the author of his renewed existence, and had regularly applied to him for financial aid. One day the surgeon received from Newgate another body in which he recognised the same man, executed a second time for a second capital offence. The case of a hanged woman brought to life by Sir William Petty, an eminent surgeon in Queen Anne's time, is quoted by A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, p. 280. J. Brasbridge quotes the case of a man who was hanged at Tyburn and whose body was purchased for dissection by a London surgeon. He revived when about to come under the dissecting knife. The surgeon concealed him in his house and later helped him to go to America. The revived offender amassed there a considerable fortune which he left to his benefactor; *The Fruits of Experience* (1824), pp. 272–273. According to James Smith, in 1782 Sir William Blizard revived a housebreaker, John Haynes, executed at Tyburn, whose body was sent to him for dissection. He was anxious to discover what were Haynes' sensations at the moment of suspension but was not successful in his inquiry; *Memoirs, Letters and Comic Miscellanies* (1840), Vol. 1, pp. 187–189.

Much interesting and reliable information on revival after hanging is to be found in *Notes and Queries* (Jan.–June, 1854), Vol. 9, pp. 174, 280–282, 453–454; (July–Dec., 1854), Vol. 10, p. 233; (Jan.–June, 1856), 2nd Ser., Vol. 1, p. 490; (July–Dec., 1856), 2nd Ser., Vol. 2, p. 73; (Jan.–June, 1861), 2nd Ser., Vol. 11, pp. 260, 338, 394, 478; (July–Dec., 1861), 2nd Ser., Vol. 12, p. 275; (Jan.–June, 1862), 3rd Ser., Vol. 1, p. 344; (July–Dec., 1862), 3rd Ser., Vol. 2, p. 313. A story of resuscitation after hanging is the subject of Southey's

[7] See on this below, p. 201 *et seq.*

through his body and he was then buried at a dark hour at the intersection point of four roads. In 1755 a bookseller named Barlow, who had murdered one of his children, killed himself while in prison. His body was handed over to his friends who quietly interred it; but when this fact was brought to the knowledge of the Lord Mayor, he ordered the body to be disinterred, to have a stake driven through it and to be thrown into a hole near a cross-roads at the upper end of Moorfields.[8]

According to Professor Westermarck the practice of cross-roads burial was due to a superstitious belief that at such

ballad, 'Roprecht the Robber'; see *Poetical Works* (1838), Vol. 6, p. 245 *et seq.*

A number of remarkable cases of revival of executed offenders is also quoted by A. Marks, *Tyburn Tree*, pp. 221–226.

G. T. Wilkinson, *The Newgate Calendar* (1816), Vol. 1, pp. 394–397, quotes the case of Margaret Dixon (1728): After hanging for the usual time, the body was cut down and put into a coffin for carriage to the place of interment. When the man in charge of the coffin stopped in a village for a drink, he saw the lid of the coffin move, and eventually the woman sat up. She was afterwards put to bed and the next day walked home. According to Scottish law a person against whom the judgment of the court had been executed was totally exculpated. She was not prosecuted again, but a bill was filed against the sheriff for omitting to fulfil the law. Dixon's husband married her again, for according to Scottish law a marriage was dissolved by the execution of the convicted party, and she lived for another twenty-five years. For further similar cases see also E. W. Brayley, *Londiniana* (1829), Vol. 2, pp. 33–36; *Gentleman's Magazine* (Nov. 1740), Vol. 10, p. 570, and *ibid.* (1767), Vol. 37, p. 90; *London Magazine* (Nov., 1740), p. 560.

In *A Famous Forgery* (1865), p. 245, P. Fitzgerald reproduces an extract from the *Dublin University Magazine* which describes the hanging of a country lad for sheep-stealing: '. . . After the prescribed time the criminal was cut down and delivered to his friends for interment. They made the usual attempt at reviving him. . . The man recovered, retaining no outward marks of what had happened beyond a slight distortion of the neck'.

[8] In 1784 John Wesley wrote to Pitt urging him to check suicide by hanging the bodies of those who were guilty of it in chains; Lecky, *History of England* (1904), Vol. III, pp. 139–140. On this see also below, note 54 at p. 217.

According to John Ashton, 'the last burial of a suicide in London, at a cross-road, was in June, 1823, when a man, named Griffiths, was buried about half-past one a.m., at the junction of Eaton Street, Grosvenor Place, and the King's Road, but no stake was driven through the body'; *The Dawn of the 19th Century in England* (1886), Vol. 2, p. 283. But a correspondent in *The Times* relates that he witnessed the following scene about 1825. A man who had been sentenced to death for murder had committed suicide in prison by cutting his throat with a razor. Next morning his body was brought out from Newgate in a cart, and after the hangman had exhibited to the assembled crowd a small model gallows, with a razor hanging therefrom, the dead offender was thrown into a hole in the presence of the Sheriffs and City authorities. A stake was driven through the body, and a quantity of lime thrown over it; *Notes and Queries* (May–Dec., 1850), Vol. 2, p. 248.

For a contemporary criticism of this practice, see Thomas Chevalier,

places the malign influence of the bodies would be diffused and rendered harmless.[9] The stake was driven through the body to prevent the ghost of the dead from returning to earth.[10] The places of such burials did not fail to become objects of morbid and imaginary beliefs.[11] According to Stephen there seems to be no legal authority for the custom of burying self-murderers at cross-roads with a stake driven through their bodies. 'Probably, like the custom of gibbeting, which certainly existed long before the statute 25 Geo. 2, c. 37, it originated, without any legal warrant, in circumstances now forgotten'.[12] It would appear, however, that the practice of driving in a stake was sometimes abandoned. In the case of Edmund Cheesborough, who was sentenced to death in 1732 for forgery but who committed suicide the night before the execution, the body was buried at the cross-roads at Islington, but a stake had not been driven through it.[13]

Sometimes the body of a convicted offender who had committed suicide was shown to the public. When Lawrence Jones, ordered for execution in 1793, had taken his life, his body was 'extended upon a plank on the top of an open cart,

Remarks on Suicide (1824), p. 7; he calls it 'a solecism in human legislation' and suggests that '. . . a prohibition of all religious ceremonies on the interment of such as are really and on sufficient evidence proved to be self-*murderers*, or privately delivering the body for dissection, as is done in the cases of persons who murder others, is perhaps the utmost which a wise government should decree'.

[9] *Moral Ideas* (1908), Vol. 2, p. 256. But it is also contended that they were buried at a cross-roads because the latter formed a cross or crucifix and therefore made the place only second in sanctity to a churchyard; *Notes and Queries* (Jan.–June, 1852), Vol. 5, p. 356.

[10] G. Ives, *History of Penal Methods* (1914), p. 287. In remoter times the treatment accorded to those who committed suicide was much more ruthless. Thus H. Arnot states that in Scotland, in cases of witch prosecutions, 'if an unfortunate woman, trembling at a citation for witchcraft, ended her sufferings by her own hands, she was dragged from her house at a horse's tail, and buried under the gallows'; *Criminal Trials in Scotland* (1785), pp. 368–369. In the Diary of Robert Birrel, Burgess of Edinburgh, there is the following entry: '1598, Feb. 20. The 20 day of Februar, Thomas Dobie drounit himself in the Quarrel holes besyde the Abbay,—and upone the morne, he wes harlit throw the toune backward, and therafter hangit on the gallows'; *Notes and Queries* (Jan.–June, 1852), Vol. 5, p. 272.

[11] It was often contended that the tree which happened to be near such a spot had sprung from the stake which had been driven through the body of the self-murderer; *Notes and Queries* (July–Dec., 1851), Vol. 4, pp. 212–213 and pp. 329–330.

[12] *H. C. L.*, Vol. 3, p. 105; this practice was abolished in 1823 by 4 Geo. 4, c. 52.

[13] Villette, *The Annals of Newgate* (1776), Vol. 2, p. 152.

in his clothes, and fettered '.[14] This was not an isolated episode. In 1811 John Williams, a particularly ruthless criminal who had murdered two families and a shop-boy,[15] committed suicide in prison while awaiting trial. The magistrate had an interview with the Secretary for the Home Department in order to consider whether the usual practice of burying the body at the cross-roads might be departed from in this instance. It was decided that the body should be exhibited to public view in the same neighbourhood in which Williams had committed his crimes. In conformity with this decision the following procession moved off from the watch-house: ' Several hundred constables, with their staves, clearing the way. The newly-formed patrol, with drawn cutlasses. Another body of constables. Parish officers of St. George's, St. Paul's, and Shadwell, on horseback. Peace-officers, on horseback. Constables. The high constable of the County of Middlesex, on horseback. *The body of Williams*, extended at full length on an inclined platform, erected on a cart, about four feet high at the head, and gradually sloping towards the horse, giving a full view of the body, which was dressed in blue trousers and a white and blue striped waistcoat, but without a coat, as when found in the cell. On the left side of the head the fatal maul, and on the right the ripping-chisel, with which the murders were perpetrated, were exposed to view. The countenance of Williams was ghastly in the extreme, and the whole had an appearance too horrible for description. A strong body of constables brought up the rear '.[16] The procession stopped twice, each time for a quarter of an hour, at the two houses formerly inhabited by Williams' victims. All the shops in the district were shut, the windows were full of people, and an immense crowd followed the procession. Finally the body was taken from the platform, lowered into the grave, a stake was driven through it and the pit was then covered.

Owing both to the very insufficient control of the traffic between Newgate and the outside world and to the unreliability of the prison staff, suicides of convicts under

[14] A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, pp. 232–233.

[15] Williams' crimes inspired de Quincey to write his well-known essay *On Murder Considered as One of the Fine Arts*.

[16] A. Knapp and W. Baldwin, *The Newgate Calendar* (1828), Vol. 4, p. 58.

sentence of death were then frequent. In the case of an unsuccessful suicide, little regard was paid to the delinquent's physical state. Thus in one instance when the keeper went to the cell of an offender to bring him out to his execution, he 'found him about expiring, having with a razor cut his left arm'. Although extremely weak and unable to stand, he was taken to Tyburn and executed.[17]

The *London Magazine* of March 10, 1735, reports that on that day thirteen persons were executed at Tyburn, one of whom had died in Newgate shortly before the execution but was none the less hanged in chains with the others; it seems most unlikely, however, that this should have been a general practice.

§ 8. USUAL PLACES OF EXECUTION IN AND AROUND LONDON

Tyburn was the most important, but not the only, place appointed for public executions.[18] Others were Newgate, Putney and Kennington Common, St. Thomas a Watering

[17] Villette, *The Annals of Newgate* (1776), Vol. 4, p. 134. Edward Bird, found guilty of murder, was ordered for execution on February 23, 1719; on the preceding night 'he took a dose of poison, but that not operating as he had expected, he stabbed himself in several places. Yet, however, he lived till the morning, when he was taken to Tyburn, in a mourning coach, attended by his mother, and the ordinary of Newgate'; G. T. Wilkinson, *The Newgate Calendar* (1816), Vol. 1, p. 192.

[18] According to A. Marks, Tyburn was first assigned as a place of execution in 1108. The first record of an execution which he was able to trace relates to 1177. The same author calculates that during the 650 years from its establishment as a place of execution to its abolition, about fifty thousand persons at least, were put to death there; *Tyburn Tree* (no date), pp. 71, 72 and 75–78.

When, in 1769, Doyle and Valline were capitally convicted, the sentence passed on them was that they should be taken from the prison to the usual place of execution. The Recorder's warrant for the execution directed that they should be hanged at the most convenient place near Bethnal Green Church. This change was directed by the King and a long correspondence followed between the sheriffs and the Secretary of State as to whether the King had the power to do this. The two men were respited in order that the opinion of the judges might be taken. They resolved that the King had the power to fix the place of execution and the execution was accordingly carried out at Bethnal Green; *ibid.*, p. 255; see further the case of *Doyle and Valline* (1769), 1 Leach 67.

On the antiquity of Tyburn as a place of execution and its exact location see the interesting correspondence in the following volumes of *Notes and Queries*: (Jan.–June, 1857), 2nd Ser., Vol. 3, pp. 90 and 92; (July–Dec., 1858), 2nd Ser., Vol. 6, pp. 402–403; (Jan.–June, 1860), 2nd Ser., Vol. 9, pp. 400, 471 and 514; (July–Dec., 1860), 2nd Ser., Vol. 10, pp. 197–198; (Jan.–June, 1873), 4th Ser., Vol. 11, p. 347.

on the Old Kent Road, Execution Dock (East Wapping) [19] and Smithfield. How these places had affected the general appearance of the metropolis may be gathered from the following description based on contemporary evidence: 'It was certainly not without reason that an eminent modern writer branded the capital and ten miles round, as it existed in the eighteenth century, with the title of the "City of the Gallows" . . . No matter by what approach the stranger then entered London, he had the fact of the stringent severity of English criminal law most painfully impressed upon him by a sight of the gallows. If he entered the metropolis by its northern suburbs he would have passed Finchley Common, and have beheld not one, but perhaps five or six gibbets standing at a short distance from each other. If he travelled outside or inside a stage-coach that ran through the western quarter of the metropolis to Holborn or Piccadilly he passed within sight of the notorious gallows at Tyburn. If, hailing from some foreign shore, he sailed up the River Thames to the port of London, his gaze would have been certain to have fallen on some of the skeletons of those who had paid with their lives the penalty of mutiny or piracy on the high seas, suspended in chains from numerous gibbets erected in the marshes below Purfleet on the Essex side and Woolwich on the other. If he traversed on foot any of the numerous heaths or commons in the vicinity of the metropolis, he would, unless possessed of unusually strong nerves, never fail to be terrified by the sudden creaking and clanking of the chains in which the corpse of some gibbeted highwayman or foot-pad was slowly rotting away'.[20]

[19] This was the usual place for executing pirates. The scaffold was placed so close to the river that when pirates were hanged, their feet were washed by the tide. The custom was to leave the bodies suspended until three tides had overflowed them; Ch. Knight, *London* (revised by E. Walford, no date), Vol. 3, pp. 50–51. The procession from Newgate to Wapping was public.

[20] W. C. Sydney, *England and the English in the Eighteenth Century* (1892), Vol. 2, p. 277. As has been mentioned already, sometimes offenders were executed elsewhere, either near the place of their crime or at a cross-roads. A. Andrews, *The Eighteenth Century* (1856), pp. 269–270, quotes the following instances: On August 21, 1735, Macrae, James, Emerson, and Sellon, and, in 1758, James White and his brother, were executed on Kennington-common; on March 7, 1733, Sarah Malcolm, in Fleet-street; on September 14, 1741, James Hall, at the end of Catherine-street, in the Strand; in 1760, Patrick M'Carthy was hanged at Bow-street, in Covent garden; in 1767, Williamson was hanged in Chiswell-street, Finsbury; Theodore Gardelle, for murdering his landlady, was hanged opposite the end of Panton-street, in the Haymarket; and another

§ 9. ABOLITION OF THE PROCESSION TO TYBURN: INTRODUCTION OF THE DROP

It is obvious that public executions as carried out in eighteenth century England could not fail to have a most demoralising effect. Far from achieving their primary purpose, which was to enhance the deterrent influence of the death penalty,[21] they 'became the parent, and not the destroyer of crime'.[22]

Towards the close of the century, the evil consequences of some aspects of public executions became so apparent that few were inclined to support Dr. Johnson in his defence of the system.[23] In 1783 the place of execution was transferred from Tyburn to an open space in front of Newgate prison, where the first execution took place on December 9 of that year. In a letter to Croker, Sir Peter Laurie writes[24] that this change 'from Tyburn to Newgate was made at the instance of the Sheriffs, Sir Barnard Turner and Thomas Skinner, in consequence of the mischiefs which arose from the long parade of criminals from Newgate to Tyburn, and not from "the fury of innovation" as Dr. Johnson has it'.

The sheriffs' main argument in favour of this reform was that as the result of the shocking circumstances which attended the conveyance of offenders from the prison to the place of execution 'all the ends of public justice (are) defeated; all the

murderer in Old-street, St. Luke's. Andrews concludes by saying: 'Nay, the gallows, was set up before your own door in every part of the town'. De Custine, who travelled in England and Scotland in 1830, notes that 'Au-delà de Greenwich, on rencontre trois où quatre gibets où l'on voit avec horreur des corps agités par le vent', and adds that whatever opinion one might entertain on this subject, '. . . il me parait impossible de n'être pas révolté de la barbarie d'un pareil spectacle a l'entrée de la capitale du royaume'; *Memoirs et voyages* (1830), p. 116.

21 On this see above, p. 165.

22 'Report from the Select Committee on Capital Punishment' (1930), 15, p. 12; in *Parl. Papers* (1930–31), Vol. 6, p. xv. For a contemporary criticism see also B. Mandeville, *An Inquiry into the Causes of the Frequent Executions at Tyburn* (1725), pp. 36–37, who writes that 'our publick Executions are become Decoys, that draw in the Necessitous, and, in effect, as cruel as frequent Pardons; instead of giving Warning, they are exemplary the wrong Way, and encourage where they should deter'.

23 Below, p. 338.

24 *The Croker Papers* (ed. by L. J. Jennings, 1885), Vol. 3, pp. 15–16. Sir Peter Laurie (1778–1861), a Sheriff and afterwards Lord Mayor of London, was a very active promoter of various schemes of social advancement. He was a good Magistrate. It was largely owing to his endeavours that the meetings of the Court of Magistrates as well as of Aldermen became public. He published two interesting tracts on the prison system; *D. N. B.*, XI, 651.

effects of example, the terrors of death, the shame of punishment, are all lost'. Despite their efforts, the authorities were unable to maintain order and decorum; the dirty cart in which the condemned were conveyed was surrounded by 'a sordid assemblage of the lowest among the vulgar', inclined to ridicule rather than pity. 'Numbers soon thicken into a crowd of followers, . . . till on reaching the fatal tree it becomes a riotous mob, and their wantonness of speech brakes forth in profane jokes, swearing, and blasphemy.' No attention was paid to the convict's dying speech, 'an exhortation to shun a vicious life, addressed to thieves actually engaged in picking pockets'. It should be noted that the sheriffs remained convinced of the deterrent value of public executions. Their reform aimed at maintaining the essentials of the system, while at the same time eliminating the disorderly and undignified practices which had been allowed to grow up round it. In order to make the ceremony a solemn and terrifying occasion they also proposed that apart from discontinuing the procession to Tyburn, the scaffold in front of Newgate prison should be 'hung with black . . . and no other persons . . . permitted to ascend it than the necessary officers of justice, the clergyman, and the criminal'.[25] The crowd should be kept at a proper distance and during the whole time of the execution a funeral bell should toll in Newgate. They hoped that these changes would have beneficial effects both on the spectators and on the offenders in prison. To feel the heavy hand of justice so near the place of their confinement 'must necessarily become a useful lesson of duty and obedience, and a strong admonition to repentance'.[26]

Another change then introduced in the method of carrying out death sentences was the adoption of the drop. It has already been noted that when offenders were hanged from carts, death was not always instantaneous.[27] The hangman

[25] For a description of the new scaffold see the *Gentleman's Magazine* (December, 1783), Vol. 53 (2), p. 990.

[26] A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, pp. 282–284. Griffiths incorrectly states that these reforms were introduced in 1784. Though the sheriffs' proposal was adopted, not all capital sentences were thenceforth executed in front of Newgate. Murderers and notorious robbers were sometimes hanged near the place of their crime; furthermore, as late as 1812, the execution dock on the banks of the Thames was still in use.

[27] Above, pp. 186 and 194–195.

or relatives often had to pull a hanged delinquent down by the legs to end his agony; often, too, efforts were made to bring him back to life.[28] The introduction of the drop made executions much more effective and also more humane. The inventor of this device[29] is not known. The drop was first used in the execution of Earl Ferrers in 1760, but was not adopted as the general mode of execution until 1783.[30] It was then that the new drop, covered with black, was used to execute the ten offenders who were the first to be put to death in front of Newgate. Though at that date the drop was still a very primitive construction, it was continually improved upon; the new drop set up at the Northampton County Gaol in 1818 was described by the governor as adequate for the hanging of twelve persons 'comfortably'.[31]

[28] Above, pp. 194–195.

[29] 'They were small collapsible platforms, seldom more than a foot high, and placed on the top of the general scaffold. The mechanism by which they were operated was one of the crudest. The small square of planking on which the malefactor stood was supported by one or more beams of wood, to which ropes were tied. When all was ready the executioner retired beneath the scaffold, and, on the word being given, pulled the ropes, which dragged away the props and the drop fell'; J. Laurence, *A History of Capital Punishment* (no date), p. 45.

[30] Sir Peter Laurie to Croker: *The Croker Papers* (ed. by L. J. Jennings, 1885), Vol. 3, p. 15. The construction used for the execution of Earl Ferrers is thus described by a contemporary writer: 'The new scaffold consisted of a wide platform across which extended a stout beam, supported by tall posts. Beneath the cross-beams there was a little raised stage which could be lowered at will, leaving the criminal suspended. All was covered with black baize and there were black silk cushions to kneel upon during prayers. When the signal was given the raised stage sank a few inches, but the mechanism was faulty and it only went far enough for the toes of the hanging man to touch it, so that Ferrers was slowly strangled'; quoted by J. Laurence, *op. cit.*, p. 45. The *Annual Register* records that for a few seconds 'his lordship made some struggles against the attacks of death, but was soon eased of all pain by the pressure of the executioner'; (1760), Vol. 3 (Characters), p. 47.

[31] The drop constructed in 1828 for the execution of Thurtell, who murdered William Weare, 'was ingeniously erected to the purpose for which it was intended and was calculated to terminate the existence of the unhappy culprit in the shortest possible period. There was a temporary platform with a falling leaf, supported by bolts, and upon this the prisoner was to be placed. The bolts were fixed in such a manner as to be removed in an instant, and as instantaneously the victim of his own crime would be launched into eternity. Above this platform was a cross-beam to which the fatal cord was to be affixed. The whole was solidly and compactly made, and capable of being taken asunder and removed in a very short time. . . . The platform was approached by a short flight of steps, which led directly from the door to the prison. The boards and all the other machinery being painted black, presented a very gloomy appearance'; quoted by J. Laurence, *A History of Capital Punishment* (no date), pp. 46–47.

The removal of the place of execution from Tyburn to the immediate vicinity of Newgate prison was salutary in as much as it made 'the performance shorter' and diminished 'the area of display'.[32] But the importance of this reform was certainly misjudged by its promoters. The crowd which gathered in front of Newgate was neither less numerous nor better behaved than that which used to assemble at Tyburn. When Holloway and Haggerty were to be executed in 1807 for a murder which they had committed five years earlier, the excitement in London was so great that about 40,000 people assembled near Newgate. The pressure was so heavy that many of the spectators endeavoured to withdraw, but their attempts only increased the general confusion. Several women fell down and were trampled to death. In the ensuing panic more people lost their lives beneath the feet of the crowd or through suffocation. When the two criminals were cut down and the gallows removed, nearly one hundred dead and dying lay about.[33] At the execution of Fauntleroy in 1824 no less than 100,000 persons assembled. Every window and roof was occupied and all the approaches to the prison were blocked. At Courvoisier's execution in 1840 as much as £2 was paid for a window. Sir W. Watkin Wynn hired a room for the night and morning at a public-house to the south of the drop and stayed there with a large party of friends; in an adjoining house, which belonged to an undertaker, Lord Alfred Paget took up residence with several friends. Many ladies were present.[34]

[32] A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, p. 232.

[33] *Ibid.*, pp. 242–243.

[34] *Ibid.*, p. 245 *et seq.* On this occasion the outside public was admitted to the Newgate chapel on the day the condemned sermon was preached. Cards were issued to so many people that several hours before the beginning of the service all the approaches to the prison gate were blocked by ticket-holders. Among the congregation were Lord Adolphus FitzClarence, Lord Coventry, Lord Paget, Lord Bruce, several Members of the House of Commons and a number of ladies.

The following example of the morbid interest in executions displayed even by the upper classes is related by de la Coste: 'Je courois à pied les artistes et les boutiques; je rencontrai un jeune lord de ma connaissance; nous nous arrêtâmes; et après quelques compliments, quelques questions réciproques sur les nouvelles du jour, il me dit: *Je vous quitte, if faut que je me rende à Newgates.—A Newgates? Eh! bon Dieu, qu'allez-vous faire-là?—Voir jouer la machine nouvellement inventée pour pendre.*—Je le regardai fixement; ses yeux bleus, ses cheveux blonds, les contours arrondis de son visage, ses joues rosées, la blancheur de son tein, le timbre de sa voix, tout en lui indiquoit une

Thus it appears that despite the elimination of the Tyburn procession and the changes introduced in the lay-out and mechanism of the gallows, the execution of capital sentences gained little in dignity or solemnity.

ame douce. Je lui dis avec étonnement: *Quoi, Milord! vous allez voir pendre!* —*Oui*, me répondit-il, avec simplesse; *si vous voulez y venir, je vous offre une place; mon valet-de-chambre a été me louer une fenêtre . . .*'; *Voyage Philosophique d'Angleterre fait en* 1783 *et* 1784 (1786), Vol. 1, p. 44.

CHAPTER 7

AGGRAVATED FORMS OF THE DEATH PENALTY

§ 1. THE PUNISHMENT OF MURDER : 25 GEO. 2, C. 37 (1752)

THE purpose of this Act, entitled 'An Act for better preventing the horrid Crime of Murder', is thus described in the preamble: 'Whereas the horrid Crime of Murder has of late been more frequently perpetrated than formerly and particularly in and near the Metropolis of this Kingdom, contrary to the known Humanity and natural Genius of the *British* Nation: And whereas it is thereby become necessary, that some further Terror and peculiar Mark of Infamy be added to the Punishment of Death, now by Law inflicted on such as shall be guilty of the said heinous Offence; . . .'[1] The substance of the Act may be summed up as follows: (a) By section 3 the sentence was to be pronounced in open court immediately after the conviction, unless the court were to decide, for some special reasons, to postpone the pronouncement. Apart from the usual judgment of death, the sentence was to stipulate the time of the execution 'and the Marks of Infamy directed for such Offenders'.[2] (b) The execution was to take place two days after the sentence had been passed, unless that day happened to be a Sunday, in which case it was to be deferred until the following Monday. By section 4, the judge was empowered to stay the execution for any reasonable cause, as well as to relax restraints imposed by the Act and mentioned under (c), 'Regard being always had to the true Intent and Purpose of this Act'. (c) During the period between the conviction and execution the murderer was to be confined in a separate cell and no person, except the gaolers and his servants, was to have access to him without a licence

[1] By 32 Hen. 8, c. 42, s. 2 (1540), surgeons were each year granted four bodies of executed offenders for 'Anatomies'; this privilege was subsequently extended.

[2] For these marks of infamy see below, point (d).

issued by the judge or sheriff. Section 8 further stipulated that during his period he was to be kept on a diet of bread and water only, except for the sacrament, or medicines administered by a professional man.[3] (d) The body of the murderer was to be delivered to surgeons for dissection.[4] (e) The judge was empowered to direct that after the execution the murderer's body should be hung in chains. But while this was left to the discretion of the court,[5] the Act laid down that in no case whatever should the body of any murderer be buried until it had been dissected. Gaolers who evaded the provisions of this Act were to be punished by the forfeiture of their office and a fine of £20; those rescuing or attempting to rescue a murderer when in prison, on the way to the place of execution or during the execution, were to be guilty of felony and suffer death without benefit of clergy; those rescuing the body after execution were to be transported for seven years. All those convicted of murder were to forfeit their lands and goods as from the time when death was inflicted.

The extent to which dissection was regarded as an essential part of the sentence is well illustrated by the interesting decision in *R.* v. *Fletcher*.[6] The prisoner was tried and convicted before Chambre, J., at the Hereford Spring Assizes on an indictment for the murder of her bastard child. Sentence of death was passed, but that part of it which related to dissection of the body happened to be omitted. After the court had adjourned, the omission was noticed and the calendar, in which the dissection of the body was mentioned as being part of the sentence, was taken to the judge, who signed it. Since, however, it was doubted whether the previous omission by the judge of this part of the sentence could thus be considered to have been rectified, the execution was

[3] On the practice prevalent before this law was passed see above, pp. 166–168.

[4] For unsuccessful attempts to extend this provision also to other offences see below, pp. 476–479.

[5] In 1752 doubts had arisen as to whether the judgments of dissection and hanging in chains might not be given alternatively. In the case of *Swan and Jefferys* it was held that according to the Act only dissecting should be made part of the judgment, and that the hanging in chains after execution should be left to the discretion of the court. Also that the judgment for dissecting and that relating to the time of execution ought to be pronounced in cases of petty treason, though murder only was mentioned by the Act, except in the case of women; Foster, *Crown Law* (1792), p. 107.

[6] (1803), Russ. & Ry. 58.

respited and the case referred to the judges. The difference of opinion on this point was considerable. Lord Ellenborough, Lord Alvanley, Macdonald, C.B., Heath, J., Rooke, J., and Chambre, J., held that the omission in the sentence as pronounced in the court was not material. Before the statute had been passed, they argued, 'the body of the criminal was at the King's disposal, the statute only directed how it should be disposed of in all cases of murder'. Hotham, B., Grose, J., Thomson, B., Lawrence, J., Le Blanc, J., and Graham, B., held on the contrary that this particular stipulation constituted an *additional* punishment and that it was therefore essential for it to be expressed in court. In support they quoted the cases of *Swan and Jefferys*,[7] *R.* v. *Walcott*,[8] and *R.* v. *Tucker*.[9] All agreed, however, that the omission in the passing of the sentence would have been remedied if the judge had returned to the court after the adjournment, had ordered the prisoner to be brought up and had then passed the proper judgment. In view of the difference of opinion which existed among them, they decided to recommend that the prisoner be pardoned on condition she was transported.

The provision stipulating that the murderer's body was to be dissected was incorporated in the Act in order to intensify the deterrent effect of capital punishment; it was generally believed at that time that offenders were much affected by the possibility of being dissected after execution,[10] which belief may also account for the practice of exposing the body to public view after dissection.[11] The new law had been largely inspired by Henry Fielding.[12] It will be seen that Fielding was most anxious to abolish both the processions to Tyburn and public executions.[13] He was aware, however, that such

[7] Foster, *Crown Law* (1792), p. 107.

[8] (1695), Carth. 348.

[9] (1694), Carth. 317.

[10] See on this point above, p. 192.

[11] On the public exposure of Lord Ferrers' body after dissection at Surgeons' Hall see the *Annual Register* (1760), Vol. 3 (Characters), p. 47.

[12] Professor W. L. Cross notes that the preamble to the Act was a summary of the first paragraph of H. Fielding's tract *Examples of the Interposition of Providence* (1752); *The History of Henry Fielding* (1918), Vol. 2, p. 280. On this tract see *ibid.*, pp. 269–271.

[13] Below, pp. 411–413. In the *Covent Garden Journal*, March 28, 1752, Fielding notes that it was rumoured the previous day that three offenders had been executed in Newgate; 'the horror which this report spread among the lower people is astonishing'. Two days later a paper reported that for a whole week 'no felon of any kind hath been brought before Mr. Fielding'.

drastic proposals had but little chance of being adopted and so suggested a number of smaller changes which, while upholding the public character of executions, would yet eliminate some of the most glaring deficiencies of the system. He thus proposed that executions of criminals should follow their conviction with the least possible delay, and that their regimen while under sentence of death should be made more rigorous. Both these suggestions were embodied in 25 Geo. 2, c. 37. The *London Magazine* relates that Thomas Wilford, the first offender to be sentenced to be executed in accordance with the stipulations of the new Act, 'was taken from the bar weeping and in great agonies, lamenting his sad fate'.[14] The new system certainly contrasted most favourably with the old.[15]

§ 2. BURNING OF WOMEN FOUND GUILTY OF HIGH OR PETTY TREASON

This method of executing women found guilty of high or petty treason was conceived as a mitigation of the elaborate procedure, including disembowelling and quartering,[16] to which men convicted of these crimes were then subjected.[17] The crime of the great majority of women sentenced to death by burning for petty treason [18] consisted either in having murdered their husband, usually by poisoning,[19] or—which was very

[14] (July, 1752), Vol. 21, pp. 333–334.

[15] 25 Geo. 2, c. 37, was repealed by 9 Geo. 4, c. 31 (1828), which, however, re-enacted—with some alterations—its main provisions. The clause relating to the very short interval between the sentence and the execution was repealed in 1836 by 6 & 7 Will. 4, c. 30, as a precaution against a possible execution of offenders who may be convicted upon an erroneous evidence. It is interesting to note that nearly thirty years earlier Dr. S. Parr criticised this provision of the Act of George 2 on the same grounds; *Characters of the Late Charles James Fox* (1809), Vol. 2, note, at p. 468; see also 'Second Report on Criminal Law' (1836), 343, p. 38; *Parl. Papers* (1836), Vol. 36, p. 183 at p. 224.

[16] See on this below, pp. 220–221.

[17] Referring to the burning of women Blackstone writes that it was to be explained by '. . . the decency due to the sex' which 'forbids the exposing and publicly mangling their bodies . . .'; 4 Comm. 93.

[18] Petty treason was abolished by 9 Geo. 4, c. 31, s. 2.

[19] In 1735 at Northampton, Mary Fawson was sentenced to be burnt for poisoning her husband, and at Chelmsford the same sentence was passed on Margaret Onion; *London Magazine* (July, 1735), pp. 390 and 451. In March, 1738, the same sentence was pronounced and carried out on Mary Troke, at Winchester,

common—in having instigated and helped a third person to do so.[20] Those sentenced for high treason were guilty either of a political offence, or else of counterfeiting, impairing or uttering forged coin, or of an allied offence.[21] According to Macaulay[22] the last woman to suffer death in England for any political offence was Elizabeth Gaunt. She was sentenced to be burnt alive in 1685 for harbouring Burton, who had been involved in the Monmouth rebellion but later gave himself up and was the principal witness against her. Elizabeth Gaunt was a Baptist who had devoted her life to charities, and it was generally expected that she would be pardoned. Burnet relates that '*Pen* the Quaker . . . saw her die. She laid the straw about her for burning her speedily; and behaved herself in such a manner, that all the spectators, melted in tears '.[23]

This method of execution appeared particularly atrocious when applied to women found guilty of coinage offences. In 1777, for instance, a fourteen-year-old girl was sentenced to be burnt for hiding some white-washed farthings at her master's instigation. The faggots were ready, and she would have been burnt were it not for the casual interference of Lord Weymouth[24]; the reprieve arrived at the last moment.

for poisoning her mistress. She was sixteen years old; *Notes and Queries* (Jan.–June, 1855), Vol. 11, p. 373.

A well-known case of the murder of a husband by a third party under the instigation and with the assistance of the wife is that of Catherine Hayes, executed at Tyburn in 1726; see, for instance, A. Knapp and W. Baldwin, *The Newgate Calendar* (1824), Vol. 1, p. 257 *et seq.* Thackeray's *Catherine: A story*, is based on this murder. Four years earlier, in 1722, Eleanor Elsom was condemned at Lincoln for the same offence; W. Andrews, *Bygone Punishments* (1931), p. 92; in 1739, also for this crime, Susannah Broom was drawn on a hurdle and burnt at Tyburn; *Notes and Queries* (Jan.–June, 1855), Vol. 11, p. 373. The aggravated form of the death penalty for this offence applied to women only. When a husband had murdered his wife he was liable to be executed by hanging.

[20] In petty treason, abetting, procuring or counselling carried the same punishments as the murder itself. This type of crime is known in criminal psychology as 'crime à deux'; it has been brilliantly examined by the Italian criminologist Scipio Sighele in *La Coppia Criminale* (1908).

[21] Below, Appendix 1, pp. 612–617 and 652–653.

[22] 'History of England', *The Works* (ed. by Lady Trevelyan, 1866), Vol. 1, p. 519.

[23] Burnet, *History of His Own Time* (1753), Vol. 3, p. 46.

[24] Sir William Meredith, *Speech in the House of Commons*, May 13, 1777 (reprinted as Pamphlet No. 1 by the 'Society for the Diffusion of Information on the Subject of Capital Punishments', 1831), p. 3; see also W. Andrews, *Bygone Punishments* (2nd ed., 1931), pp. 94–95, who quotes this sentence from

In 1721 Barbara Spencer was burnt at Tyburn for coining [25]; the same sentence was executed on Isabella Condon in 1779,[26] on Phœbe Harris in 1786 [27] and on Christian Murphy, *alias* Bowman in 1789.[28] William Andrews thus describes the execution of Eleanor Elsom, who was burnt in 1722 [29]: 'She was clothed in a cloth, "made like a shift", saturated with tar, and her limbs were also smeared with the same inflammable substance, while a tarred bonnet had been placed on her head. She was brought out of the prison bare-foot, and being put on a hurdle, was drawn on a sledge to the place of execution near the gallows. Upon arrival, some time was passed in prayer, after which the executioner placed her on a tarr barrel, a height of three feet, against the stake. A rope ran through a pulley in the stake, and was placed around her neck, she herself fixing it with her hands. Three irons also held her body to the stake, and the rope being pulled tight, the tar barrel was taken aside and the fire lighted. . . . She was probably dead before the fire reached her, as the executioner pulled upon the rope several times whilst the irons were being fixed'. The crowd on such occasions was enormous.[30] When Phœbe Harris was burnt in 1786 in front of Newgate, twenty thousand spectators were present.[31] Their behaviour

the *Quarterly Review*: 'a mere accident saved the nation from this crime and this national disgrace'.

25 A. Marks, *Tyburn Tree* (no date), p. 230.

26 *Notes and Queries* (May–Dec., 1850), Vol. 2, p. 51.

27 *Gentleman's Magazine* (1786), Vol. 56 (1), p. 524.

28 *Ibid.* (1789), Vol. 59 (1), p. 272. A correspondent writing to *Notes and Queries* in 1850 relates that in 1790 he 'heard sentence passed in the Criminal Court, in the Old Bailey, upon other persons convicted of coining: one of them was a female. The sentence upon her was that she shall be "drawn to the place of execution, and there burnt with fire till she was dead"'; (May–Dec., 1850), Vol. 2, p. 261.

29 *Bygone Punishments* (2nd ed., 1931), p. 92.

30 Children sitting on their fathers' shoulders were also there to witness the execution; *Notes and Queries* (May–Dec., 1850), Vol. 2, p. 6.

31 The circumstances attending her burning were as follows: 'About a quarter of an hour after the platform had dropped the female convicted was led by two officers of justice from Newgate to a stake fixed in the ground about midway between the scaffold and the pump. The stake was about eleven feet high, and near the top of it was inserted a curved piece of iron, to which the end of the halter was tied. The prisoner stood on a low stool, which, after the Ordinary had prayed with her a short time, being taken away, she was suspended by the neck (her feet being scarcely more than twelve or fourteen inches from the pavement). Soon after the signs of life had ceased two cart-loads of faggots were placed round her and set on fire; the flames presently

was not always dignified. Referring to the execution of Barbara Spencer in 1721, Villette relates that 'she was very desirous of praying, and complained of the dirt and stones thrown by the mob behind her, which prevented her thinking sedately on futurity. One time she was quite beat down by them'.[32]

Before this punishment was abolished it had been considerably mitigated in practice. Thus although by law women were to be *drawn* to the stake, they were mostly driven there on a sledge or hurdle. And secondly, although according to the law they were to be burnt alive, they were usually strangled before the flames had reached them.[33] Despite these considerable mitigations, however, public feeling against this form of death penalty was growing. An interesting illustration of this trend is provided by the execution in 1789 of Christian Murphy, *alias* Bowman. After she had been strangled, the logs of wood around her were piled so high that she was completely covered.[34]

A year later, on May 10, 1790, Sir Benjamin Hammet moved for leave to bring in a Bill to alter the law on this subject.[35] In his speech [36] he said that although a sheriff who

burning the halter the convict fell a few inches, and was then sustained by an iron chain passed over her chest and affixed to the stake. Some scattered remains of the body were perceptible in the fire at half-past ten o'clock'; W. C. Sydney, *England and the English in the Eighteenth Century* (2nd ed., 1892), Vol. 2, pp. 300–301.

[32] *Annals of Newgate* (1776), Vol. 1, p. 35.

[33] 'The humanity of the English nation', writes Blackstone, 'has authorised, by a tacit consent, an almost general mitigation of such parts of those judgments, as savours of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn: and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling' (4 Comm. 376–377). One such accident occurred during the execution of Catherine Hayes. When the executioner pulled the rope intending to strangle her, the fire reached his hands and he was forced to desist; A. Marks, *The Tyburn Tree* (no date), pp. 235–236. But according to J. Timbs she was burnt alive because the indignant crowd would not suffer the hangman to strangle her, as usual, before the fire was alight; *Curiosities of London* (1868), p. 810.

[34] H. Bleackley, *The Hangmen of England* (1929), pp. 138–139; see also an eye-witness's description in *Notes and Queries* (May-Dec., 1850), Vol. 2, pp. 260–261.

[35] *Journals of the House of Commons* (1790), Vol. 45, p. 454. For an earlier unsuccessful attempt to alter the law on this subject see below, pp. 476–477.

[36] This speech is not recorded in *Parliamentary Debates* and it has been impossible to ascertain whether it was followed by any debate in either House. The extracts here reproduced are taken from a note published in *Notes and Queries* (1850), Vol. 2, pp. 260–261.

did not execute the sentence of burning alive was liable to be prosecuted, there was not a man in England who would carry it into effect, and described the law as it then stood as a savage remnant of Norman policy. He obtained leave to bring in his Bill, and 30 Geo. 3, c. 48 was passed in the same session. This statute, entitled ' An Act for discontinuing the Judgment which has been required by Law to be given against Women convicted of certain Crimes, and substituting another Judgment in lieu thereof ', laid down that in all cases of high or petty treason women were to be sentenced to be drawn and hanged. In petty treason women were liable to the same judgment with regard to dissection and the time of execution as was directed by 25 Geo. 2, c. 37 in respect of murder.[37]

§ 8. HANGING IN CHAINS

According to the Rev. J. Charles Cox, the gibbeting or hanging in chains of bodies of executed offenders ' was a coarse custom very generally prevalent in medieval England. Some early assize rolls of the fourteenth century pertaining to Derbyshire . . . give abundant proof of it being a usual habit in the county at that period '.[38] That gibbeting must have been frequent even in much later times may be inferred from the fact that old road books and guides often mention both gallows and gibbets as road marks. Thus the following

[37] On this Act see above, pp. 206–209. But 30 Geo. 3, c. 48 (1790), stipulated in section 4 that women convicted of high or petty treason '. . . being so attainted of such Crimes respectively, shall be subject and liable to such and the like Forfeitures, and Corruption of Blood, as they severally would have been in case they had been severally attainted of the like Crimes before the passing of this Act'.

[38] *Three Centuries of Derbyshire Annals* (1890), Vol. 2, p. 43. Hume quotes the case of George Tillery, convicted of murder on July 30, 1630, who was ordered ' to hang yr aftir in ane irone cheinze, quhile he rot away, to the terrour and exampell of utheris '; *Commentaries on the Law of Scotland respecting Crimes* (1844), Vol. 2, p. 482. On February 15, 1688, Philip Standsfield, found guilty of treason, was sentenced to be taken ' to the Mercat Cross of Edinburgh; and there, betwixt two and four o'clock in the afternoon, to be hanged on a gibbet till he be dead, and his tongue to be cut out and burned upon a scaffold, and his right hand to be cut off and affixt on the East Port of Haddington, and his Body to be carried to the Gallowlee betwixt Leith and Edinburgh, and there to be hanged in chains . . .'; *The Tryal of Philipp Standsfield, son to Sir James Standsfield of Newmilus, for the murder of his father, and other crimes libel'd against him* (1688); quoted by *Notes and Queries* (Jan.–June, 1873), 4th Ser., Vol. 11, pp. 413–414.

passages occur in Ogilby's *Roads of England*,[39] a work first published in 1673 and which continued to re-appear up to 1717: 'By the Gallows and Three Windmills, enter the suburbs of *York*.'—'Beyond the suburbs (Durham), a small ascent, between the Gallows and *Crokehal*.'—'Pass thro' *Hare street*, . . . and at 18'4 part of *Epping*-Forest, a Gallows to the left.'—'Pass by *Pen-menis*-Hall, and at 250'4 *Hildravaght* Mill both on the Left, and Ascend a small Hill, a Gibbet on the Right.'—'Leave *Frampton*, *Wilberton*, and *Sherbeck*, on the Right, and by a Gibbet on the Left, over a Stone Bridge cross etc.'—'From *Nottingham* ascend a Hill, and pass by a Gallows.'[40]

Although instances are quoted of offenders having been hung in chains alive and left to die from starvation or exposure,[41] no such punishment had ever been appointed by

[39] *Itinerarium Angliae: or a Book of the Roads of England and Wales* (1712), pp. 15, 18, 38, 48, 69 and 91.

[40] A. Hartshorne, *Hanging in Chains* (1891), p. 24, observes that Shakespeare's numerous allusions to gibbets show how common they were in his time.

[41] In *Chronicles of England* (ed. of 1807), Vol. 1, p. 311, Holinshed writes: 'In wilfull murther, doone either upon pretended malice, or in anie notable robberie, he is either hanged alive in chaines néere the place where the fact was committed (or else upon compassion taken first strangled with a rope) and so continueth till his bones consume to nothing. . . . when wilfull manslaughter is perpetrated, beside hanging, the offender hath his right hand commonlie striken off before or néere unto the place where the act was done . . .'

Some interesting information on this subject is to be found in *Notes and Queries*. One correspondent quotes an extract from a contemporary newspaper stating that in 1805 an offender was chained alive in Durham, and asks whether 'there is any foundation for so horrible a story, and was "gibbeting alive", *i.e.*, starving to death, ever a punishment known to English law?'; (July—Dec., 1872), 4th Ser., Vol. 10, p. 332. Other correspondents quote the cases of Andrew Milles (sometimes spelled Millus or Mills) who was sentenced in 1683 and of John Whitfield, sentenced in 1777. Both these offenders were reputed to have been hung in chains while still alive but there is no reliable information to confirm these stories. Milles was executed for murdering the three children of a farmer by whom he had been employed. He was gibbeted near the scene of his crime and it was rumoured that a girl fed him for several days with milk which she passed between the bars of the iron cage in which he had been enclosed. Moreover, on a monument erected in memory of the three murdered children, it was stated that Mills had been 'hung in chains', but not that he had been executed. According to J. J. Dodd, a local historian who repudiates this story, the word 'executed' had been removed from the inscription by an old eccentric innkeeper of the neighbourhood; *The History of the Urban District of Spennymoor* (1897), pp. 41 and 43. John Whitfield, a notorious highwayman, is reputed to have hung for several days in agony until he was shot by a mail-coachman moved by his sufferings. While stating these facts H. T. Wake adds that 'this affair I noted down from hearsay, when I lived at Wetheral in 1860'; *Notes and Queries* (Jan.–June, 1873), 4th Ser., Vol. 11, p. 83 W. Andrews remarks that 'almost every district in England has its strange story of a man hanging alive in chains'; *Old-Time Punishments* (1890), p. 223.

statute [42] nor, it seems certain, had it ever been applied in the course of the eighteenth century.[43] But hanging in chains after execution was frequently administered.[44] Not appointed by any statute until 1752,[45] it was first permitted by 25 Geo. 2, c. 37, passed in that year,[46] in the case of offenders found guilty of murder.[47] From then on, the courts made more frequent use of this additional penalty. Its purpose—like that of public executions—was to increase the deterrent effect of capital punishment; to achieve it, the process of executing the capital sentence was, as it were, prolonged beyond the death of the delinquent.

In 1792 Buller, J., is reputed to have said when delivering the verdict in the trial of one Spence Broughton that ' in order to deter others from offending in the like manner, it was necessary that his (Broughton's) punishment should not cease at the place of execution; that his body should be afterwards suspended betwixt heaven and earth, as unworthy of either, to be buffeted about by the winds and storms '.[48] As far as can be ascertained from contemporary evidence, offenders who were unmoved by the sentence of death by hanging were terrified at the idea that their bodies might be dissected, and still more so that they might be hung in chains. This is confirmed by contemporary foreign observers. The Swiss nobleman, de

[42] Boiling to death offenders guilty of murder by poisoning was introduced in 1530 by a statute passed during the reign of Henry VIII, and was afterwards repealed by another Act passed in 1547 in the reign of Edward VI; see on this below, note 24 at pp. 238–239.

[43] A. Hartshorne, *Hanging in Chains* (1891), pp. 98–99; *Notes and Queries* (July–Dec., 1872), 4th Ser., Vol. 10, pp. 382–383 and p. 459; and (Jan.–June, 1873), 4th Ser., Vol. 11, p. 83.

[44] In some rare instances hanging in chains was added to the punishment for high treason; A. Hartshorne, *op. cit.*, p. 17.

[45] Blackstone, 4 Comm. 202. See also A. Hartshorne, *op. cit.*, p. 14, who rightly states: ' In the numerous enactments concerning the administration of the criminal law, from the " Statute of Westminster the First " in 1275, to the Act of George II in 1752, no cognisance is taken of the hanging of bodies of criminals in chains. Such a treatment of the carcass was, like the rack, rather an engine of state than of law '.

[46] On this Act see above, pp. 206–209.

[47] Pursuant to the power given by that statute the judge issued a special order to the sheriff. Immediately after the passing of the Act, doubts had arisen as to whether hanging in chains might be made part of the judgment; this was decided in the negative; 18 St.Tr. 1201–1202. See also Foster, *Crown Law* (1792), p. 107.

[48] *Criminal Chronology of York Castle* (1867), p. 123.

Saussure, writes that 'the lower classes do not consider it a great disgrace simply to be hanged, but have a great horror of the hanging in chains, and the shame of it is terrible for the relatives of the condemned'.[49]

Various steps were taken to emphasise the degrading character of this penalty. The bodies were hung on a gibbet, an instrument specially designed for this purpose.[50] In cases of murder the instrument with which the offender had performed his crime was sometimes placed in his hands.[51] The gibbets were usually erected as near as possible to the place of the crime, or in the sight of the offender's own home, or on some very exposed place.[52] Efforts were also made to preserve the chained body for as long a period as possible. The usual method was to saturate it with tar before its suspension. Robert Blair reports that when the head of Winter, sentenced in 1791 for murder, had rotted away on the gibbet, it was replaced by a wooden one.[53]

Measures were taken to prevent the removal of the chained body or at least to make this very difficult; it was thus customary to stud the post of the gibbet with thousands of nails.[54] Blackstone holds that hanging in chains was practised

[49] *A Foreign View of England in the Reigns of George I and George II* (transl. by Van Muyden, 1902), pp. 126–127.

[50] W. Andrews mentions the case of Corbet, a rat-catcher and chimney-sweep, who entered the house of Richard Holt through the chimney and murdered him in his bedroom. He was condemned in 1773 to be hanged and gibbeted, and the gibbet served as a gallows; *Bygone Punishments* (1931), p. 51. This was an exceptional instance, however, which ran against the accepted practice.

[51] This was done in 1799 in the case of William Yeadon, who murdered a mother and her son with a hedge-stake.

[52] William Levin, sentenced to death and ordered to be gibbeted in 1788, was hung in chains on the most elevated part of Helsby Tor, about eight miles from Chester, from where the hanging body was visible to the whole county, most parts of Lancashire, Flintshire, Denbighshire, Shropshire, and Derbyshire. Gibbets were made as high as possible. The body of William Jobling, executed in Durham in 1832 for the murder of a magistrate, was suspended on a gibbet twenty-one feet high. The expenses of gibbeting were heavy. The cost of gibbeting Anthony Lingard in 1815 was £85 4s. 1d.; in addition, ten guineas were charged by the gaoler for conveying the body from Derby to Wardlow; R. Blair and J. Ch. Cox, 'Hanging in Chains'; *The Antiquary* (November, 1890), Vol. 22, p. 214.

[53] R. Blair and J. Ch. Cox, *ibid.*, pp. 212–213.

[54] Twelve thousand nails were driven into the gibbet erected on Kingmoor on which Adam Graham was hung in 1747; A. Hartshorne, *Hanging in Chains* (1891), p. 66. When a criminal was sentenced to death and ordered to be hung in chains, a blacksmith would visit the condemned man in his cell

not only as a terrifying example, but also because it was 'a comfortable sight to the relations and friends of the deceased '.[55] An illustration of such an attitude is to be found in *State Trials*. When James Hall pleaded guilty in 1741 to murdering his master John Penny, the murdered man's brother, the Rev. Dr. Penny, chaplain to the Duke of Newcastle, appealed to the court before the sentence was passed to make an order for James Hall to be hung in chains.[56] Usually only the bodies of murderers and the more notorious thieves or highwaymen were hung in chains; the bodies of women were not so exposed.[57]

some time before the execution and take the necessary measurements for the ironwork in which he was to be suspended. The operation performed on the gibbet was called fixing in irons. It is interesting to note that John Wesley was in favour of hanging in chains persons who had committed suicide. A proposal to this effect appeared in the *General Evening Post* of July 31, 1790, and in a letter to that newspaper Wesley supported it. It has not been possible to trace Wesley's letter, but the *Morning Herald* of Sept. 10, 1790, writes: 'The pious John Wesley has proposed a remedy for *suicide*, by *gibbeting* the unhappy victim of despondency. Would not a total extirpation of the gloomy and absurd tenets of Methodism be much more conducive to that purpose?' See also above, note 8 at p. 196, and *Notes and Queries* (July-Dec., 1873), 4th Ser., Vol. 12, pp. 126 and 197.

[55] 4 Comm. 202.

[56] 18 St.Tr., note at pp. 1201–1202. Owing to the fact that gibbeting was not a part of the judgment, this application met with some difficulties. Sir John Strange, who was then the Recorder of London, told the relations that the court never made any order in such cases and that they must apply to the King, the body being at His Majesty's disposal. The King was then at Hanover, and the relations accordingly appealed by petition to the Council of Regency. They were informed by the clerk that the Council never made any order in such cases and that the court who tried the offender should have done it. The Rev. Penny had an interview on this matter with the Archbishop of Canterbury and the Duke of Newcastle, who were members of the Council of Regency and upon their intervention an order was made for hanging the murderer in chains; but it was stated that this was directed on the petition of the relations of the deceased. Hall was executed at the end of Catherine Street, in the Strand, on Sept. 14, 1741, and hung in chains at Shepherd's Bush, beyond Kensington Gravel-pits, on the Acton road, in Middlesex. See also *R.* v. *Hall* (1741), 1 Leach 21. On the details of Hall's crime see G. T. Wilkinson, *The Newgate Calendar* (no date), Vol. 2, pp. 39–43.

[57] Hanging in chains was included in the punishment for one of the last crimes inspired by a belief in witchcraft. An old woman, Ruth Osborn, asked John Butterfield, a dairyman living near Long Marston, for some butter-milk which he refused, saying he had not enough for his hogs; thereupon the woman told him that the Pretender would have him as well as his hogs. When several of Butterfield's calves fell ill soon afterwards, and he himself had fits, he came to the conclusion that he had been bewitched. He consulted a wise woman from Northamptonshire who confirmed him in his belief and set a guard of six armed men to watch his house night and day. This had no effect however, and the following proclamation was made on market day at Winslow,

Difficult as it is to assess exactly the deterrent value of this measure, there can be little doubt that the gibbet had always been the centre of much unhealthy attraction. The day appointed for a hanging in chains—like that of a procession to Tyburn—was a public event and vast crowds assembled to witness the event [58]; even weeks and months later people would gather round the gibbet.[59] In one instance at least when a gibbet had been removed, 'some of the papers of the day complained of the people of London being deprived of their amusements, in not being able to enjoy the view of these pirates'.[60] Rumours of offenders having been gibbeted alive were often in circulation,[61] and from time to time superstitious beliefs became prevalent in the efficacy of the gibbet as a charm against various pains.[62]

Towards the close of the eighteenth century signs of public uneasiness about this penalty began to appear. In some instances, out of 'a tender touch of feeling', the head of the

Leighton-Buzzard and Hemel Hempstead: 'This is to give notice that on Monday next, a man and woman are to be publicly ducked at Tring, for their crimes'.

On the appointed day, Ruth Osborn and her husband sought sanctuary in the church, but the crowd dragged them out from the vestry. They were tied, wrapped in sheets and dragged by ropes through a pond. The woman died on the spot and her husband a few days later. Colley, a chimney sweep, who had been responsible for their death was tried at Hertford Assizes before Sir William Lee and found guilty of murder. He was sent back to the scene of the crime under an escort of one hundred and eighty men, seven officers and one trumpeter, was executed, and his body hung in chains where it remained suspended for a number of years; for a note on this case see the *Gentleman's Magazine* (April, 1751), Vol. 21, p. 186; a more detailed account is given by Lewis Evans in 'Witchcraft in Hertfordshire'; *Bygone Hertfordshire* (ed. by W. Andrews, 1898), pp. 225–229.

[58] When Spence Broughton was to be hung in chains hundreds of people visited the spot to view the post, and the common was like a fair; *Criminal Chronology of York Castle* (1867), pp. 125 and 126.

[59] After Lewis Avershaw was gibbeted for murder in 1795 on Wimbledon Common, 'for several months, thousands of the London populace passed their Sundays near the spot, as if consecrated by the remains of a hero'; *Celebrated Trials* (1825), Vol. 5, p. 368. On the Sunday following the execution London was like a deserted city; hundreds of thousands went out to see him hanging in chains; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 1, note at p. 270. Southey notes that when William Howe was gibbeted in Stourbridge 'more than 100,000 persons came to see him hanging in chains; and a kind of wake continued for some weeks for ale and gingerbread'; *Common-Place Book* (ed. by J. W. Warter, 1851), 4th Ser., p. 354; see also below, note 66 at p. 219.

[60] *Notes and Queries* (Jan.–June, 1874), 5th Ser., Vol. 1, p. 35.

[61] W. Andrews, *Old-Time Punishments* (1890), pp. 225–226; also above, note 41 at p. 214.

[62] J. J. Dodd, *The History of the Urban District of Spennymoor* (1897), p. 42.

offender ordered to be gibbeted was tied up in a white cloth [63]; in others, the bodies were removed from the gibbets.[64] In certain districts the inhabitants were known also to petition against the erection of gibbets near their homes. None the less this measure continued to be administered both in the country and in London until its repeal in 1834.[65] In 1812 William Howe was hanged and gibbeted for murder.[66] A large crowd witnessed the suspension of the body. After hanging for twelve months he was taken down by two Stourbridge doctors, who made a skeleton out of his bones but left the dried flesh at the gibbet; this was found one day hidden under the gorse bushes. The gibbet continued to stand for many years. Another offender gibbeted in chains at about the same time was Anthony Lingard, sentenced to death for murder at the Derby Assizes in 1815. Three years later E. Rhodes wrote in the *Peak Scenery, or the Derbyshire Tourist* [67]: 'As we passed along the road to Tideswell, . . . at a little distance on the left of the road, we observed a man suspended on a gibbet, but newly erected'. That gibbet was demolished in 1826 by order of the magistrates, and Lingard's remains buried on the spot.

The last man to be gibbeted in England was James Cook, a twenty-two-year-old bookbinder, who murdered a London tradesman. His body was hung in chains in Leicester in

[63] A. Hartshorne, *Hanging in Chains* (1891), p. 91. Occasionally the bodies were hung in sacks; *ibid.*, p. 74.

[64] A. M. Sharp, *The History of Ufton Court* (1892), p. 195. Sometimes the body was removed by the associates of the hanged man or by his relatives; this practice must have been widespread, for the *Annual Register* of 1763 reports that 'all the gibbets on the Edgware road, on which many malefactors hung in chains, were cut down by persons unknown'; Vol. 6 (Chronicle), p. 67. In 1779 the body of John Spencer, which had been suspended on a gibbet for a few weeks, was shot through by a sergeant who happened to pass that way; the sergeant was tried by a court-martial and reduced to the ranks.

[65] 'In the first quarter of the present century, though the bleached skulls and blackened quarters of political offenders no longer were displayed on city gates, many a strip of green waste by the roadside, and many a gorse-covered common had its gibbet, from which swung in the breeze the clanking and creaking iron hoops encasing the grim and ghastly remains of what had been a man'; T. Frost, 'The Last Gibbet', *Bygone Leicestershire* (ed. by W. Andrews, 1892), p. 194.

[66] See the anonymous tract *Stafford Lent Assizes/1813/The Trial/of/William Howe,/alias/John Wood/for the/Wilful Murder/of/Mr. Benjamin Robins/of Dunsley, near Stourbridge/on the 18th December, 1812.*

[67] (1824), pp. 70 and 71. This book was first published in 1818.

August, 1832. Thirty thousand people witnessed his execution and twenty thousand are said to have been present ' when the body of the murderer, dressed as he had been at the trial, and encased in iron hoops, braced together by transverse pieces of iron, was brought from the gaol in a cart, and suspended from the lofty gibbet '.[68] Shortly afterwards the body was removed by order of the Under-Secretary of State.[69] Gibbeting was abolished by 4 & 5 Will. 4, c. 26, ss. 1 and 2, passed in 1834.[70]

§ 4. EXECUTION FOR HIGH TREASON

The system of punishment for high treason was very complex.[71] Thus an offender found guilty of this crime was (1) to be drawn to the gallows[72]; (2) to be hanged by the neck and then cut down alive; (3) his bowels were to be taken out[73];

[68] T. Frost, 'The Last Gibbet', *Bygone Leicestershire* (ed. by W. Andrews, 1892), pp. 202–203.

[69] The gibbeting in August, 1832, of William Jobling, a Jarrow collier, who had murdered one of the owners of the colliery is sometimes quoted as the last instance of the infliction of this measure. This mistake is to be explained by the fact that there was an interval of only a few days between the hanging in chains of Jobling and of Cook. Jobling's gibbet was taken down on the 31st of the same month by some Jarrow colliers, and the body buried in a corner of the local churchyard.

[70] As it has been stated above, note 15 at p. 209, 25 Geo. 2, c. 37 was repealed by 9 Geo. 4, c. 31 (1828), which, however, re-enacted—with some alterations—the provision of the former Act relating to dissection or gibbeting (ss. 4 and 5). 2 & 3 Will. 4, c. 75 s. 16 (1832), which abolished the practice of dissection, still allowed the courts to order the body of the executed offender to be hung in chains.

[71] Blackstone, 4 Comm. 92; East 1 P.C. 137, § 70.

[72] In more remote times drawing had a multiple meaning. In the majority of cases it was understood as dragging to the place of execution, where hanging, disembowelling and quartering followed. But sometimes it meant dragging till the sufferer was torn to pieces, or tugging by horses going in opposite directions. The first, most common method was in certain instances aggravated by sharp stones having been placed on the road along which the offender, stripped to his shirt and with his arms tied behind his back, was dragged. In time it became the custom to put the offender on an ox-hide, which later gave place to the hurdle and this in its turn to the sledge.

The entry of the judgment in cases of treason usually stated that the offender should be drawn to the place of execution without any stipulation as to the method of drawing, but in the case of *James Boucher*, Holt, C.J., said: ' That you be conveyed from hence to Newgate, the prison from whence you came, and from thence you are to be drawn upon a hurdle to Tyburn '; (1704), 14 St.Tr. 987. Similarly in the case of *Sir Walter Raleigh*, Popham, C.J., said: ' . . . and from thence you shall be drawn upon a hurdle through the open streets to the place of execution . . . '; (1603), 2 St.Tr. 31.

[73] The part of the sentence relating to the cutting off of privy members was usually not pronounced. In the above-quoted sentence pronounced on James

(4) they were to be burnt in his presence, while he was still alive [74]; (5) his head was to be cut off [75]; (6) his body was to be divided into four parts; (7) his head and quarters were to be at the King's disposal.[76]

Coke—who fully approved of this system and even quoted the Bible in its support [77]—thus justifies each part of it [78]:

> 'The conclusion shall be from the admirable clemency and moderation of the king, in that howsoever these traitors have

Boucher it was said however '. . . and while you are alive to be cut down, your privy members to be cut off . . . and burnt in your view'; 14 St.Tr. 987–988; later it was decided to omit these words in the entry of the judgment and Holt, C.J., said that they were not in any deeds he had seen except those dealing with regicides; on this point see *R.* v. *Tucker* (1693), 4 Mod. 162, 163. The words ' . . . and your privy members cut off, and thrown into fire before your eyes . . . ' were part of the judgment pronounced in the above quoted case of *Sir Walter Raleigh*.

[74] For a case in which after the offender had been executed the judgment was reversed on the ground that it omitted to say that the bowels of the prisoner shall be taken out and burned before his eyes while he is still alive, see *Walcott's Case* (1683), 9 St.Tr. 560–570.

[75] Usually the hangman, holding it up to the crowd, said : ' Behold the head of a traitor '. Sometimes the heart was shown in the same manner.

[76] The heads and the quartered parts of the body were often exposed on the city gates and in London, on London Bridge, or upon Westminster Hall; in some cases the heads were stuck upon pikes fixed on a market place. In a tract published in 1724 by ' B. L. of Twickenham ' and devoted to the description of Newgate prison, the author mentions that near to the Debtor's Hall there was a place with a large fire and grate which was known as Jack Ketch's kitchen, ' because it is the place in which that honest fellow boils the quarters of such men as have been executed for treason '.

Thomas Ellwood (1639–1713), a Quaker and a friend of Milton (*D.N.B.*, VI, 721), who was in Newgate at the beginning of the reign of Charles II, relates in his book *The History of the Life of Thomas Ellwood written by his own hand* (ed. of 1906), pp. 157–158: ' When we came first into *Newgate*, there lay (in a little By-place like a Closet, near the Room where we were Lodged) the Quartered Bodies of three men, who had been Executed some Days before, for a real or pretended Plot; . . . and the Reason why their Quarters lay so long there was, the Relations were all that while Petitioning to have leave to bury them: which at length, with much ado, was obtained for the Quarters, but not for the Heads, which were Ordered to be set up in some Part of the City. I saw the Heads when they were brought up to be Boyled. The Hangman fetch'd them in a dirty Dust Basket, out of some By-Place, and setting them down among the Felons, he and they made Sport with them. They took them by the Hair, Flouting, Jeering, and Laughing at them: and then giving them some ill names, box'd them on the Ears and Cheeks. Which done, the Hangman put them into his Kettle, and parboyl'd them with *Bay-Salt* and *Cummin-Seed*: that to keep them from Putrefaction, and this to Keep of the Fowls from seizing on them. The whole Sight (as well as that of the Bloody Quarters first, and this of the Heads afterwards) was both frightful and loathsome, and begat an Abhorrence in my Nature '. This book was first published in 1714.

[77] 3 Inst. 210.

[78] 2 St.Tr. 184. Coke was then Attorney-General.

exceeded all others their predecessors in mischief, and so "Crescente malitia, crescere dobuit et paena"; yet neither will the king exceed the usual punishment of law, nor invent any new torture or torment for them; but is graciously pleased to afford them as well an ordinary course of trial, as an ordinary punishment, much inferior to their offence. And surely worthy of observation is the punishment by law provided and appointed for High-Treason, which we call *crimen laesae majestatis*. For first after a traitor hath had his just trial and is convicted and attainted, he shall have his judgment to be drawn to the place of execution from his prison as being not worthy any more to tread upon the face of the earth whereof he was made: also for that he hath been retrograde to nature, therefore is he drawn backward at a horse-tail. And whereas God hath made the head of man the highest and most supreme part, as being his chief grace and ornament," *Pronaque cum spectent animalia caetera terram os homini sublime dedit*"; he must be drawn with his head declining downward, and lying so near the ground as may be, being thought unfit to take the benefit of the common air. For which cause also he shall be strangled, being hanged up by the neck between heaven and earth, as deemed unworthy of both, or either; as likewise, that the eyes of men may behold, and their hearts condemn him. Then he is to be cut down alive, and to have his privy parts cut off and burnt before his face as being unworthily begotten, and unfit to leave any generation after him. His bowels and inlay'd parts taken out and burnt, who inwardly had conceived and harboured in his heart such horrible treason. After, to have his head cut off, which had imagined the mischief. And lastly his body to be quartered, and the quarters set up in some high and eminent place, to the view and detestation of men, and to become a prey for the fowls of the air. And this is a reward due to traitors, whose hearts be hardened: For that it is physic of state and government, to let out corrupt blood from the heart.'

The horrors of such proceedings are well illustrated by the following description of the execution of Edward Abington and his associates, found guilty of high treason in 1586[79]: 'Ballard was first executed. He was cut down and bowelled with great cruelty while he was alive. Babington beheld Ballard's Execution without being in the least daunted: whilst the rest turned away their faces, and fell to prayers upon their knees. Babington being taken down from the gallows alive too, and

[79] 1 St.Tr. 1158.

ready to be cut up, he cried aloud several times in Latin, *Parce mihi, Domine Jesu!* Spare me. O Lord Jesus! Savage broke the rope, and fell down from the gallows, and was presently seized on by the executioner, his privities cut off, and his bowels taken out, while he was alive. Barnwell, Titchbourne, Tilney and Abington were executed with equal cruelty '.[80]

While the law remained unaltered, the more cruel parts of it fell steadily into disuse. Blackstone notes that ' usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement '.[81] Other parts of the sentence were also mitigated, although Hale emphatically stresses that ' the execution . . . is to be done pursuant to the judgment ', that ' the sheriff may not alter the execution, if he doth, it is felony, and so we say murder '[82]; and finally that ' it should seem that every execution, which is not pursuant to the judgment, is unwarrantable '.[83] The King's power to change the method of execution was closely scrutinised on two occasions. In the case of Lord Stafford, found guilty of high treason, the King ordered the Lord Chancellor to issue a writ of execution under the Great Seal according to which Stafford was to be beheaded. The sheriffs referred the matter to the House of Lords as well as to the House of Commons, and were assured that they might act in accordance with the King's writ.[84] ' In felony ', states Bacon, ' the corporal punishment is by hanging, and it is doubtful whether the king may turn it into beheading in the case of a peer or other person of dignity '; but since in treason the beheading is part of the judgment, the King may pardon

[80] When in 1660 Harrison was cut down alive from the gallows and his body opened, he raised himself up, gave the executioner a blow on the ear and saw his bowels thrown into the fire; 5 St.Tr. 1237.

[81] 4 Comm. 92. This extenuation took place long before Blackstone's time, for it is noted by Hale 1 P.C. 382.

[82] 2 P.C. 411.

[83] 1 P.C. 501, note (*d*).

[84] *Journals of the House of Lords* (1675–1681), Vol. 13, Dec. 21, 1680, p. 724; *Journals of the House of Commons* (1667–1687), Vol. 9, Dec. 23, 1680, p. 692; see also the House of Commons' debate on the King's power to alter the method of execution; *Parl. Hist.* (1660–1688), Vol. 4, pp. 1260–1261.

the rest.[85] In the case of Lady Alice Lisle, found guilty of high treason, the King ordered that instead of being burnt alive she should be beheaded.[86] This decision constituted a material alteration of the judgment and its legality was questioned by Coke.[87]

Foster took a less strict view of this matter. He held that the distinction '. . . between a total alteration and a remission of part of the judgment will not wholly solve the difficulty, if any difficulty there be; though a practical solution may sometimes serve to save appearance. But this matter seemeth to lie in a very narrow compass. The King cannot by his prerogative vary the execution, so as *to aggravate the punishment beyond the intention of the law.* Thus far the rule, that the King cannot alter the judgment is true: but it doth not follow from thence, that he, who *undoubtedly can wholly pardon the offender,* cannot mitigate his punishment with regard to the pain or infamy of it. Will it be said, that because the crown cannot go beyond the letter of the law *in point of rigour,* its mercy is likewise so bounded? By no means; for the law proceedeth in both cases with a perfect

[85] 'Preparation for the Union of Laws'; *The Works* (ed. by Spedding, Ellis and Heath, 1879), Vol. 7, p. 739. On this point see also D. Hume, *History of Great Britain* (1757), Vol. 2, p. 328; and James Fox, *History of the Early Part of the Reign of James the Second* (1808), p. 41. Hume writes that later on when Lord Russel was condemned for high treason the King, while remitting the more ignominious parts of the sentence to beheading, remarked: 'My Lord Russel shall find, that I am possessed of that prerogative, which, in the case of Lord Stafford, he thought fit to deny me'; *op. cit.*, p. 360.

[86] 11 St.Tr. 379. The sentence of beheading was unknown to English law. But cases have occurred when it has been inflicted by order of the Crown on offenders found guilty of felony, who therefore by law ought to have been put to death by hanging, and more especially on delinquents happening to be persons of distinction, such as peers of the realm. See, for instance, the trial and execution of the Duke of Somerset, found guilty in 1550 of felony, the initial charge of high treason having been dropped; 1 St.Tr. 510; and that of Mervin Lord Audley, found guilty of rape and sodomy; (1631), 3 St.Tr. 402.

[87] 'In case of high treason, because beheading is parcell of the judgment, the king may pardon all the residue of the execution except that: for seeing the king may pardon the whole execution, he may pardon any part, or all, saving part, ... ' but 'if a man being attainted of felony, be beheaded, it is no execution of the judgment, because the judgment is, that he be hanged, untill he be dead. In this case the judgment doth belong to the judge, and he cannot alter it, the execution belongs to the sheriff, etc. and he cannot alter it. And if the execution might be altered in this case, from hanging to beheading, by the same reason it might be altered to burning, stoning to death, etc. To conclude this point, *Judicandum est legibus, non exemplis,* and *judicium est juris dictum, et executio est executio juris secundum judicium*'; Coke 3 Inst. 52 and 212.

uniformity of sentiment and motive. The benignity of the law hath set bounds to the prerogative in one case, and the same benignity hath left it free and unconfined in the other '.[88]

The majority of executions were much more humane than the law would seem to warrant.[89] Yet as long as the law remained unaltered the possibility of the sentence being put fully into effect always remained.[90] As W. C. Sydney remarks, 'the mere business of hanging . . . was but the preliminary stage of the executioner's task: the second, and by far the most important, stage consisted in mauling, tearing, lacerating, quartering, and, in fact, heaping every conceivable insult upon the poor lifeless corpse '.[91] A particularly striking example of such proceedings is provided by the execution of the sentence for high treason passed in 1817 on Jeremiah

[88] *Crown Law* (1792), p. 269. In an interesting letter of April 5, 1814, Romilly wrote to Dr. Samuel Parr: 'It has always appeared to me absurd, when the beheading in the sentence against traitors was only to take place after the convict was put to death, to say that the King, by remitting part of the sentence, could order that the convict should be beheaded alive'; *The Works of Samuel Parr*, LL.D. (ed. by J. Johnston, 1828), Vol. 7 (Correspondence), p. 215.

[89] When James O'Coigley was hanged on June 7, 1798, for high treason, his body remained suspended for about twelve minutes; he was then taken down, and his head cut off by a surgeon and held up by the executioner who exclaimed: 'This is the head of a Traitor'. But immediately afterwards both head and body were put into a coffin and buried at the foot of the gallows, the rest of the sentence having been remitted. A white night-cap was drawn over his face when he was about to be hanged; G. T. Wilkinson, *The Newgate Calendar* (no date), Vol. 2, p. 570. For other instances of mitigation see the execution of Algernon Sidney (1683); Dame Alice Lisle (1685)—in her case her head and body were delivered to her relations to be interred as they saw fit; Robert Watt (1794); Cornelius Grogan and his associates (1798); all reported in *Celebrated Trials* (1825), Vol. 3, pp. 71 and 133 and *ibid.*, Vol. 5, pp. 284 and 396.

[90] A. Luders, the author of an acute study *On Constructive Treason*, was against the mitigation of the sentence for treason by the courts, the Crown or the sheriffs: '. . . It would be more to the honour of our Laws, and would relieve its ministers from a breach of duty, and the Crown from a burthen, to ordain the same absolutely by a new statute'; see 'Of the Judgement in High Treason', *Tracts on Various Subjects in the Law and History* (1810), p. 172. For certain changes introduced in 1814 on Romilly's initiative see below, pp. 519–520.

[91] *England and the English in the Eighteenth Century* (2nd ed., 1892), Vol. 2, p. 288. In the case of *Despard* and his associates, found guilty of high treason in 1803, some parts of the sentence were remitted but it was directed that all the offenders should be drawn on a hurdle. Since the execution was to take place in front of the prison, the hurdle was introduced into the prison yard, and the condemned men entered it in batches of two at a time at the door of the staircase leading to their cell. The vehicle thus made four trips across the yard; 28 St.Tr. 346, 528. Colonel Despard was accorded the

Brandreth, William Turner and Isaac Ludlam.[92] This execution is only briefly mentioned by the *Annual Register*,[93] but the Rev. Charles Cox gives a detailed and trustworthy account of it[94]:—

> 'On November 1st, the Prince Regent signed the warrant for the execution of these three misguided peasants, remitting that part of the sentence that related to quartering, but ordering the hanging, drawing and beheading. . . . Two axes were ordered of Bamford, a smith of Derby. . . . On the morning of Friday, November 7th, the three prisoners received the Sacrament. . . . The hurdle or sledge was then brought within the gaol; . . . A horse was attached to it, and each of the three condemned men was dragged round the gaol-yard, their hands being held to prevent their being jolted off. . . . They hung from the gallows for half-an-hour. On the platform, in front of the gallows, was placed the block and two sacks of sawdust, and on a bench two axes, two sharp knives, and a basket. . . . The body of Brandreth was first taken down from the gallows, and placed face downwards on the block. The executioner, a muscular Derbyshire coal miner, . . . was masked, and his name kept a profound secret. Brandreth's neck received only one stroke, but it was not clean done, and the assistant (also masked) finished it off with a knife. Then the executioner laid hold of the head by the hair, and holding it at arm's length, to the left, to the right, and in front of the scaffold, called out three times—"Behold the head of the traitor, Jeremiah Brandreth". The other two were served in like manner. . . . The scaffold was surrounded by a great force of cavalry with drawn swords, and several companies of infantry were also present. The space in front of the gaol was densely packed with spectators. "When the first stroke of the axe was heard, there was a burst of horror from the crowd", says

privilege of being in the hurdle by himself, and when the vehicle returned after its third journey to take him he remarked: 'Ha, ha! what nonsensical mummery is this?'; *Notes and Queries* (Jan.–June, 1880), 6th Ser., Vol. 1, pp. 431–432; *European Magazine* (March, 1803), Vol. 43, p. 209. See also the description of the execution of Francis Townley in 1746; 18 St.Tr. 351: and that of the execution of Francis Henry De la Motte in 1781; *Gentleman's Magazine* (1781), Vol. 51, pp. 341–342.

92 32 St.Tr. 755 *et seq.* For a full account of the trial see also W. B. Gurney, *The Trials of Jeremiah Brandreth, William Turner, Isaak Ludlam, George Weightman and Others* (1817), 2 Vols. This painful affair—inspired by the machinations of Oliver—constitutes one of the most tragic political trials in the annals of English justice.

93 (1817), Vol. 59 (General History), p. 102.

94 *Three Centuries of Derbyshire Annals* (1890), Vol. 2, pp. 41–42.

an eye witness, writing to the *Examiner*, " and the instant the head was exhibited there was a terrifying shriek set up, and the multitude ran violently in all directions, as if under the influence of a sudden frenzy ".' [95]

[95] The Rev. T. Mozley relates in his *Reminiscences, chiefly of Oriel College and the Oxford Movement* (2nd. ed., 1882), Vol. 1, pp. 191–192: ' At that hideous spectacle the whole crowd, with a confused cry of horror, reeled and staggered back several yards, surging against the opposite houses. My father came home sick and faint. For many days after the small shop windows contained coarse and vivid representations of the scene. We had a memento of the execution always in sight '. They were all buried the same night in one grave in the churchyard of St. Werburgh, without any religious ceremony.

It appears that Shelley was present at that execution. In a pamphlet *We pity the plumage, but forget the dying bird. An address to the people on the death of the Princess Charlotte*, which he issued under the pseudonym ' The Hermit of Marlow ', Shelley describes the event in some detail and with much indignation. The pamphlet was first issued in 1817 and reprinted in 1843; *Prose Works* (ed. by H. B. Forman, 1880), Vol 2, p. 97 *et seq.*

PART III

LEADING CURRENTS OF THOUGHT ON THE PRINCIPLES OF PUNISHMENT IN THE EIGHTEENTH CENTURY

Chapter 8

THE DOCTRINE OF MAXIMUM SEVERITY

§ 1. THE DEATH PENALTY CONSIDERED TOO MILD A PUNISHMENT FOR CERTAIN OFFENCES

The penalties for murder, robbery and housebreaking proposed in the tract 'Hanging, Not Punishment Enough'

ACCORDING to one line of contemporary thought on penal matters the eighteenth century criminal law was insufficiently severe to afford adequate protection against crime. Death, which as has been seen was then the appointed penalty for a large—and growing—number of offences,[1] was considered too mild a punishment for a great many of them.

> 'Tis a Rule in Civil Law, and Reason, *That the Punishment should not exceed the Fault.* If Death then be due to a Man, who surreptitiously steals the Value of Five Shillings (as it is made by a late Statute) surely *He* who puts me in fear of my Life, and breaks the King's Peace, and it may be, murthers me at last, and burns my House, deserves another sort of Censure; and if the one must die, the other should be made to *feel himself die.*
>
> For as the benefit of the Clergy is of late taken from Pick-Pockets, so they are *now* in the Eye of the Law upon the same foot with Murtherers, High-way Men, and House-breakers. Their Crimes are certainly unequal by the Laws of God, and the consent of Nations; Why then should not their Punishment be so too?
>
> Besides, the frequent Repetitions of the same Crimes, even in defiance of the present Laws in being, is a just ground of enacting somewhat more terrible; and indeed seems to challenge and require it.
>
> Further still; at the *last great day* doubtless there will be degrees of Torment, proportionable to Men's guilt and sin here; and I can see no reason why we may not imitate the Divine justice, and inflict an Animadversion suitable to such enormous Offenders.'

[1] See above, pp. 3–5.

This doctrine of enhanced severity was expounded in two remarkable tracts published early in the eighteenth century. The above quotation is from the first, an anonymous pamphlet issued in 1701 under the significant title *Hanging, Not Punishment Enough.*[2] During the lifetime of its author several new capital statutes were passed[3]; the administration of criminal justice was still very stringent and more than fifty per cent. of offenders sentenced to death were executed.[4] Yet, although as he acknowledges in the preface, 'there have been very frequent Convictions, and Executions' of robbers and housebreakers, 'new ones rise in their places, and their number seems not in the least diminished'. This apparent ineffectiveness of the existing laws was a source of anxiety not only to him, but also to many of his contemporaries. He rejects as inadequate a number of projects then under consideration which aimed at securing better protection against crime. One was to send offenders as slaves to barbaric countries and to exchange some of them for honest men. According to another, they were to be branded in the forehead and condemned to life-long hard labour at home. The latter scheme he considers impracticable, mainly because it was contrary to the compassionate nature of the English people who were unlikely to remain indifferent to the sufferings of men so condemned, and 'their being constantly seen in so sad a condition would draw too great an Odium on the Government'.[5] Besides, the chances of such prisoners escaping would be very high and they would therefore constitute a permanent danger to society.

The anonymous author of this tract then brings forward

[2] The full title of this tract is *Hanging, Not Punishment Enough. For Murtherers, High-way Men, and House-Breakers. Offered to the Consideration of the Two Houses of Parliament* (London, 1701). The author, whose name is undisclosed and cannot be identified, was obviously a well-educated man with a good knowledge of the system of criminal justice. The quotation is from p. 4. This pamphlet was reprinted in 1812.

[3] For instance 3 W. & M. c. 9, ss. 1 and 2; 8 & 9 Will. 3, c. 26, ss. 1, 4 and 6; 10 & 11 Will. 3, c. 23, s. 1; 11 & 12 Will. 3, c. 7, ss. 8, 9 and 10.

[4] See above, p. 149. In the years 1699–1701 out of 166 offenders capitally convicted on the Home Circuit, eighty-seven were executed; Appendix No. 6 to the 'Report from the Select Committee on Criminal Laws' (1819), 585, *Parl. Papers* (1819), Vol. 8, p. 1, at p. 165.

[5] On the recurrence of this view see below, note 19 at pp. 387–388 and pp. 422–423.

his own remedy. Observing that offenders sentenced to death seldom show any apprehension of their approaching execution, he suggests that robbers who were also murderers, as well as what he calls 'night incendiaries', should be subjected to one of the aggravated forms of capital punishment, such as breaking on the wheel, whipping to death, hanging in chains alive and starving 'where the Pains of Death would be so often repeated before they would expire'.[6] It is interesting to note that though he suggests that recourse should be had to such drastic measures, he was aware of the many issues involved in the problem of the death penalty. Thus he recognises that inhuman punishments are contrary to the spirit of Christianity and in disaccord with the progress of civilisation; that the penalty of death is 'the *last* Refuge', to be avoided as far as possible; that it is a moot point whether a man ought to be deprived of his life for an economic offence; that the prolonged duration of some penalties might—in some cases—constitute a more effective deterrent than death; and that at least some offenders might be reformed and readapted to honest life, in which cases it would be to the advantage of the community to spare their lives. Yet he repeatedly insists that the adoption of his proposals is unavoidable if the progress of crime is to be checked. 'My design is not', he writes, 'that Man's blood *should* be shed, but that it should *not*'. His extreme penalties would be so much dreaded that '. . . for *Five* Men Condemned and Executed *now*, you would hardly have *one then*'.[7] He knew that his project would be opposed on humanitarian

[6] In general he defends what he calls 'sanguinary laws' on the ground that they are 'not *chiefly* intended to punish the present Criminal, but to hinder others from being so; and on that account Punishments in the Learned Languages are called *Examples*, as being design'd to be such to all mankind'; *Hanging, Not Punishment Enough*, p. 5.

[7] *Ibid.*, p. 7. And in another passage he states: 'I know that Torments so unusual and unknown to us may at first surprise us, and appear unreasonable; but I hope easily to get over that difficulty, and make it appear upon Examination, that *that* will be the more probable way to secure us from our fears of them, and the means of preserving great numbers of them, who now yearly by an easie Death are taken off at the Gallows. For to Men so far corrupted in their Principles and Practices . . . no Argument will be so cogent, as Pain in an intense degree; and a few such Examples made, will be so terrifying, that I persuade myself it would be a Law but seldom put in Execution'; p. 8.

grounds, but saw no other way to provide security for traffic and commerce.[8]

Other reforms proposed in the same tract

In addition to this main proposal he brings forward a number of other suggestions worthy of brief comment. Their common aim was to make the administration of criminal law more rigorous and exemplary. He thus suggests that receivers of stolen goods should be punished in the same manner as those found guilty of theft, which meant that in a considerable number of cases their offence would be made capital.[9] He was emphatically in favour of maintaining the royal prerogative of mercy, but thought that it should be restricted to exceptional cases only. He thought further that the courts should be in a position to order restitution to the injured party whenever the convicted offender had any goods or chattels. The lack of appropriate provisions to this effect was in his view one of the main reasons why private arrangements were so frequently made between offenders and their victims, and consequently, why acquittals for want of evidence were also frequent. As he puts it, 'a Man will be apt to ask, what concern it is to *him* in particular, if a Criminal be brought to justice, if *he* must be a loser by it? But when the Publick and Private Interest go hand in hand, there is more hope of success, and Men will proceed cheerfully '.[10] Finally he pleads for the shortening of the period of detention of offenders committed for trial on capital charges. He objects to the practice of keeping such offenders in county gaols for three and even six months, urging more frequent gaol-deliveries. During their detention they should be confined in separate cells, thus adding

[8] ' My Opinion is, That our present Laws that relate to Murtherers, High-way Men, and House-Breakers, are too favourable, and insufficient for the End they are intended. I fear not to say *too favourable*, even tho' they extend to Death; since *that* Death the Law enjoyns, is found unable to deter 'em '; *ibid.*, p. 1.

[9] ' . . . In Morality and Reason they are equally guilty with Thieves ', and if they were to be punished with the same severity ' . . . this would be to strike at *One* Branch of the Root of this Wickedness. For doubtless such Villainies are carried on by a Confederacy, and they are *all* instruments and subservient one to another, so that if any one part be effectually suppressed, the *Whole* will fall '; *ibid.*, p. 9.

[10] *Ibid.*, p. 10.

to the severity of their punishment as well as preventing the moral contamination of other offenders.[11] After conviction they should be allowed no food except bread and water, and should not be permitted to proceed to their execution in bright clothes 'as they sometimes do like Men that triumph'; but should wear a sort of uniform, preferably black.[12] These proposals relating to the detention of offenders under sentence of death and to executions were later taken up by Henry Fielding, and were ultimately incorporated in the law modifying the punishment for murder.[13]

Aggravated forms of the death penalty suggested by George Ollyffe

A forcible pamphlet such as *Hanging, Not Punishment Enough* is a remarkable document in English penal literature. Written at a time when capital statutes were already very numerous, it questions the deterrent value of the ordinary death penalty and advocates the imposition of certain aggravated forms of it for certain offences, thus vividly testifying to the then firmly entrenched belief in extreme intimidation as the only effective remedy for crime. An even more extreme project was outlined in another pamphlet which George Ollyffe published some thirty years later.[14] In the interim, criminal law, far from being relaxed, had been made even more stringent. A considerable number of capital non-clergyable offences had been

[11] He also holds that the whole prison system was in urgent need of reform. 'I have', he writes in his preface, 'in this Paper taken but little notice of the Scandalous Wickedness and Corruption of Prisons and None of their Keepers; which was not done by omission or ignorance, of the mischief that arises from those infamous Places and Men. They are now known to be the Sanctuaries of Villains, from whence their Emissaries are dispatch'd, and a regular and settled Correspondence is said to be fix'd and carried on, through the whole Fraternity of Rogues in *England*. This is a Grievance too great to be spoken of by and by, and under another Head; this requires a Particular Treatise by itself, and this cries aloud for a Regulation and Reformation from the Power and Wisdom of the Parliament, for no less Power and Wisdom than that of a Parliament can Regulate and Reform them.'

[12] *Ibid.*, p. 18. A hundred years later Jeremy Bentham proposed a black dress for hangmen as a means of making executions more impressive; see below, note 6 at pp. 383–384.

[13] Above, pp. 206–207.

[14] George Ollyffe, M.A., *An Essay Humbly Offer'd, for an Act of Parliament to prevent Capital Crimes, and the Loss of many Lives, and to Promote a desirable Improvement and Blessing in the Nation* (1731).

added to those already on the Statute Book.[15] Also, the incidence of executions was still high.[16] According to Ollyffe, however, the Legislature had shown commendable moderation ' in allotting the several Punishments, so as to be as sparing as possible of Criminal Lives, and as tender even in the greatest Executions as can be consistent with the loss of Life, without enacting greater Extremity of Severity therein, which other Nations have been forced to have recourse too '.[17]

The apparent indifference with which offenders were facing execution, together with the increase of crime, convinced Ollyffe that criminal law in this country was still too lenient. His proposals are based on a double principle of first, ' adding, where there be the greatest Crimes, greater Severity in the Execution ', and secondly, ' ordering and disposing of such as have begun or are liable to offend, before they are involved in the greatest Guilt '.[18] The quickness with which offenders sentenced to death were put out of their agony weakened, in his view, the deterrent effect of that punishment.[19] He disagrees with those who held that nothing more than death could be inflicted. ' 'Tis well known ', he writes, ' there are some kinds of Death more sharp and terrifying than others. As there have been in every Nation, thro' the various Ages of Mankind, different Methods of Execution; so it has been always judged in the use of the *Sword* of Justice for the *Terror of evil Doers*, the particular manner of its Application has been left to Man's Wisdom to determine, as may best answer the

[15] The following were the main capital statutes enacted during the reign of Queen Anne: 1 Ann. St. 2, c. 9, s. 4; 5 Ann. c. 31, s. 5; 6 Ann. c. 7, s. 10; 9 Ann. c. 11, ss. 26, 36 and 44; 9 Ann. c. 16, s. 1; 10 Ann. c. 19, s. 97; 12 Ann. St. 1, c. 7, ss. 1 and 3; 12 Ann. St. 2, c. 9, s. 4; 12 Ann. St. 2, c. 18, s. 5. The following were the main capital statutes added during the reign of George I: 1 Geo. 1, c. 5, s. 1; 1 Geo. 1, St. 2, c. 5, ss. 4 and 5; 4 Geo. 1, c. 11, ss. 2, 4 and 7; 6 Geo. 1, c. 18, s. 13; 6 Geo. 1, c. 21, s. 60; 6 Geo. 1, c. 23, s. 5; 8 Geo. 1, c. 24, ss. 1, 3 and 4; 11 Geo. 1, c. 29, s. 6; 12 Geo. 1, c. 34, s. 7. And 2 Geo. 2, c. 25, ss. 1 and 2, passed immediately before the publication of Ollyffe's *Essay*.

[16] The coefficient was at that time substantially the same as when *Hanging, Not Punishment Enough* appeared. Thus in 1729–1731 out of eighteen offenders capitally convicted in London, twelve were put to death; see the already quoted *Report on Criminal Laws* (1819), 585, p. 149.

[17] *Op. cit.*, p. 5.

[18] *Ibid.*, p. 6.

[19] Cesare Beccaria held similar views on this subject, but his ultimate conclusions were different; below, p. 285.

end thereof'.[20] The hanging of offenders alive on gibbets till they starve to death he discards as contrary to the humanitarian feelings of the English people, who would not tolerate such a penalty. The first method of execution which he commends is breaking upon the wheel, 'by which the Criminals run through ten thousand of the most exquisite Agonies, as there are Moments in the several hours and days during the unconceivable Torture of their bruised, broken, and disjointed Limbs to the last Period'. Some offenders could further be removed from the wheel while still alive and suspended on gibbets erected at some distance from the usual places of execution, so that their cries would not disturb too many people, but would yet be heard by some. The second is hanging not in the usual manner, but by 'twisting a little Cord hard about their (offenders') Arms or Legs, which would particularly affect the Nerves and Sinews and the more sensible Parts to produce the keenest Anguish; under which, as there would be some time before they will expire, they will suffer the Pain of many Deaths in one'.[21]

Like the author of the earlier tract, Ollyffe defends his proposals on the ground both of their humanity and their effectiveness in preventing crime. The terror which these aggravated forms of the death penalty would inevitably inspire would be so great that 'instead of a thousand Lives now cut off in the common way of Execution, there may not be near a twentieth part of the Number according to this Scheme'. He strongly urges the adoption of these methods of execution for a great number of offences or, should that be impossible, at least for 'the Crimes of the first Magnitude, as that of Murther, firing of Houses, etc.'[22]

His other proposals for increasing the severity of the law

Ollyffe's other proposals are inspired by the same faith in extreme severity as the only means of preventing crime and include the branding of all offenders sentenced to transportation or to penal detention at home. Since the previous

[20] G. Ollyffe, *op. cit.*, p. 6.

[21] He then describes in detail the precautions to be taken in order to prevent the removal of offenders placed on such gibbets 'with their Limbs broken'; pp. 8–9.

[22] *Ibid.*, p. 11.

practice of burning on the hand or face could easily be effaced, he suggests that a slit should be burnt in one or other of their ears, according to whether they were to be transported or kept at home. This—he writes—would well answer ' the purpose of Terror '.[23] The offenders who were to be detained in the country should all be put to hard labour on some public work. Vagrants who were able to work should be transported to plantations and if possible made slaves. Those unable to work, should be returned to their parishes or be detained in specially set up institutions. Their freedom of movement should be drastically curtailed and made dependent on the possession of a certificate stating among other things the purpose of their journey. Any attempt to counterfeit such a certificate should be punished with transportation or death.

These proposals were in many respects much more extreme than those of the author of *Hanging, Not Punishment Enough*, who—as will be remembered—urged a drastic measure of prison reform, and only favoured an aggravated form of the death penalty in respect to three categories of criminals. But notwithstanding the difference in the degree of emphasis, both Ollyffe and the earlier writer were the exponents of an essentially identical penal doctrine. That to be effective criminal law must be extremely severe and must impose capital punishment for a very great number of offences was at that time a commonplace which the two authors did not challenge. But since the frequent infliction of the death penalty did not seem to have any beneficial effect, crime being still on the increase, it was for them a sign that more terrible punishments should be inflicted. Hence the proposals to execute by breaking on the wheel, flogging to death, chaining alive and starving to death, and so forth. It is clear that during the lifetime of these two authors it began to be realised that some reform of criminal law was called for; but the system which they devised was utterly foreign to the spirit of the English people and so foredoomed to failure.[24]

[23] *Ibid.*, pp. 12–13.

[24] By an Act of 1530, 22 Hen. 8, c. 9, poisoning was made high treason to be punished by boiling to death. The statute was enacted to meet the crime committed by a cook, employed by the Bishop of Rochester, whose name is variously given as *Rose*, *Roose*, *Cooke*, or *Rouse*. Rose had poisoned soup prepared for the Bishop, his family and the poor of the parish who were fed

§ 2. A PLEA FOR STRICT ENFORCEMENT OF ALL CAPITAL STATUTES

Madan on the object of punishment

During the years that followed the publication of Ollyffe's *Essay to Prevent Capital Crimes*, penal policy based on capital punishment was fully upheld by the Legislature. The Waltham Black Act, originally intended as a provisional measure, was prolonged on several occasions and ultimately made permanent,[25] while at the same time numerous new capital offences were created.[26] Thus when the Rev. Martin

by the Bishop. A number of persons were taken seriously ill and some died. The full text of this Act is to be found in Rastall's edition of *Statutes at Large*; Ruffhead's and Raithby's editions give only a very abbreviated version. Rose was publicly boiled to death at Smithfield; according to Eden, he was boiled in the same pot into which he threw the poison; *Principles of Penal Law* (2nd ed., 1771), p. 271. Barrington submits that the idea of this punishment might have been suggested by the fact that he had been a cook; *Observations on the More Ancient Statutes* (3rd ed., 1769), p. 466. 22 Hen. 8, c. 9 was afterwards applied on a number of occasions. Thus one offender was boiled to death in 1531 in the market place at King's Lynn and another in 1542 at Smithfield; W. Andrews, *Bygone Punishments* (2nd ed., 1931), pp. 97–98; *Notes and Queries* (Jan.–June, 1852), Vol. 5, pp. 112 and 355. The Act of Henry VIII was not allowed to remain in force for very long. It was repealed by 1 Edw. 6, c. 12, ss. 2 and 13 (1547), by which poisoning ceased to be high treason and was to be punished as any other murder. Coke relates that 22 Hen. 8, c. 9 was repealed because 'this act was too severe to live long . . .'; 3 Inst. 48. If this was the feeling at so remote a period, the country could hardly be expected to be willing in the middle of the eighteenth century to adopt the various forms of aggravated death penalty advocated both by the author of *Hanging, Not Punishment Enough* and by Ollyffe. It is true that the burning to death of women found guilty of certain offences, the system of execution appointed for high treason and hanging in chains, were all still tolerated. But before the eighteenth century drew to its close the first of these was abolished (see above, p. 213), the form of execution for high treason was very materially mitigated in practice, while hanging in chains was inflicted as an additional measure only sporadically, mostly for murder, and not as Ollyffe suggested in order to expose offenders previously broken on the wheel until they died on such gibbets, but in respect to criminals who had already been put to death by hanging; see above, pp. 214–215. It may be noted here that in a pamphlet published in 1821 J. T. Barber Beaumont (Justice of the Peace for Middlesex and Westminster) suggested the adoption of such penalties as death with previous amputation of the hands, amputation of offending members and branding; *An Essay on Criminal Jurisprudence*, etc. (1821), pp. 16–18.

[25] Above p. 77.

[26] The following are the leading statutes imposing capital punishment enacted since the publication of Ollyffe's *Essay*. Enacted during the reign of George II: 5 Geo. 2, c. 30, s. 1; 6 Geo. 2, c. 37, ss. 5 and 6; 7 Geo. 2, c. 22, s. 1; 8 Geo. 2, c. 20, s. 1; 9 Geo. 2, c. 30, s. 1; 14 Geo. 2, c. 6, s. 1; 15 Geo. 2, c. 13, ss. 11 and 12; 15 Geo. 2, c. 28, s. 1; 15 Geo. 2, c. 34, s. 1; 16 Geo. 2, c. 15, s. 1; 18 Geo. 2, c. 27, ss. 1 and 2; 19 Geo. 2, c. 34, ss. 1 and 2; 20 Geo. 2, c. 52, s. 12; 22 Geo. 2, c. 33, ss. 2 and

Madan published his *Thoughts on Executive Justice* [27] in 1785, the number of capital non-clergyable offences was very large.[28] With this trend in legislation Madan fully agreed,[29] holding that punishments ought to be inflicted not so much with a view to the offence already committed, for the past cannot be recalled, nor the least advantage accrue to the injured party, but with a view to preventing future crimes. Prevention is 'the great end of all legal severity: nay, the exerting that severity, by making examples of the *guilty*, has no other intention but to deter others. . . . If this were not the case, all punishment would be nugatory, and therefore cruel'.[30] By basing his doctrine on this principle, Madan explicitly dismisses as of no great consequence the question of whether or not the severity of a penalty were proportionate to the gravity of the offence. In its stead he accepts the logical consequence

29; 22 Geo. 2, c. 33, s. 2, art. 28; 24 Geo. 2, c. 45, s. 1; 25 Geo. 2, c. 37, s. 9; 26 Geo. 2, c. 6, ss. 1, 2, 3, 10, 17 and 18; 26 Geo. 2, c. 19, s. 1; 26 Geo. 2, c. 33, ss. 8, 9, 16, 17 and 18; 27 Geo. 2, c. 15, s. 1; 27 Geo. 2, c. 16, s. 1; 29 Geo. 2, c. 12, s. 21; 29 Geo. 2, c. 17, ss. 1 and 4; 31 Geo. 2, c. 10, ss. 24 and 29; 31 Geo. 2, c. 22, s. 78; 31 Geo. 2, c. 42, s. 4; 32 Geo. 2, c. 14, s. 9; 33 Geo. 2, c. 3, s. 156. Enacted during the reign of George III up to 1785 when Madan pubished his book: 3 Geo. 3, c. 16, s. 6; 4 Geo. 3, c. 25, s. 15; 4 Geo. 3, c. 37, s. 26; 5 Geo. 3, c. 25, ss. 17 and 18; 6 Geo. 3, c. 28, s. 15; 7 Geo. 3, c. 43, s. 18; 7 Geo. 3, c. 50, ss. 1, 2 and 3; 8 Geo. 3, c. 15, s. 1; 9 Geo. 3, c. 29, ss. 1, 2 and 4; 9 Geo. 3, c. 30, s. 6; 12 Geo. 3, c. 24, s. 1; 12 Geo. 3, c. 47, s. 1; 13 Geo. 3, c. 79, s. 1; 13 Geo. 3, c. 84, s. 42; 14 Geo. 3, c. 72, ss. 8 and 10; 16 Geo. 3, c. 34, ss. 15 and 35; 16 Geo. 3, c. 43, s. 15; 17 Geo. 3, c. 50, s. 25; 18 Geo. 3, c. 18, s. 1; 19 Geo. 3, c. 66, s. 8; 19 Geo. 3, c. 74, s. 65; 20 Geo. 3, c. 28, ss. 3 and 6; 21 Geo. 3, c. 56, s. 9; 22 Geo. 3, c. 2, s. 162; 22 Geo. 3, c. 5, s. 1; 22 Geo. 3, c. 8, s. 33; 22 Geo. 3, c. 33, s. 6; 22 Geo. 3, c. 40, ss. 1, 2 and 3; 23 Geo. 3, c. 70, s. 9; 24 Geo. 3, Sess. 2, c. 47, ss. 11 and 13; 24 Geo. 3, Sess. 2, c. 53, s. 16; 24 Geo. 3, Sess. 2, c. 56, s. 4; 25 Geo. 3, c. 48, s. 10; 25 Geo. 3, c. 59, s. 11; 25 Geo. 3, c. 72, s. 17; 25 Geo. 3, c. 80, s. 30.

[27] *Thoughts on Executive Justice, with Respect to Our Criminal Laws, Particularly on the Circuits. Dedicated to the Judges of Assize; And recommended to the Perusal of All Magistrates; And to All Persons who are liable to serve on Crown Juries*; By a sincere Well-wisher to the Public.

[28] On various estimates of the number of such offences see above, pp. 3–4.

[29] Capital laws were—he thought—'. . . admirably calculated to meet with, oppose, and crush those violences and disorders'; and elsewhere he writes: '. . . however it may be fashionable with many, to find great fault with the number and severity of these (penal laws), yet I think it our happiness, that, as crimes have arisen, there have been laws made to repress them; nor do I conceive, that any man can reasonably find fault with this, except indeed if it be the villain who is the object of them, and who certainly would wish to be free and exempt from all restraint whatever'; *Thoughts on Executive Justice* (1785), pp. 2–3 and 7–8.

[30] *Ibid.*, p. 12.

of his doctrine, namely that since the value of a penalty depends solely on the degree of fear it is likely to generate in the minds of potential wrong-doers, then capital punishment must be superior to any other penal measure. 'The terror of the example'—he claims—'is the only thing proposed, and one man is sacrificed to the preservation of thousands'.[31]

His views on the administration of capital statutes

As has been pointed out, Madan wrote at a time when the number of capital offences was already very great. Yet crime was increasing.[32] The cause of this apparent paradox lay, Madan thought, in deficiencies not of the laws but of their administration, which caused punishments, stern as they were, to fail of their purpose because they were not certain.[33] To enact capital laws is not enough; if crime is to be prevented, it is essential that they should always be put into effect. In England, he contends, 'punishment has been rendered so *uncertain*, or rather the suspension of it so *certain*, as to prevent the operation of the laws'.[34]

It has been seen[35] that the extreme severity of criminal laws was greatly mitigated by their merciful administration and by the extensive use made of the royal prerogative of mercy. Moreover, the process of a gradual relaxation of the law—or, to use Madan's words, of 'the suspension' of capital laws—was gaining momentum. What Madan urged, however, was not a return to the much higher incidence of executions of the early eighteenth century, but the full enforcement of all capital statutes. He was convinced that 'to enact a law, and not to enforce the execution of it, is against all reason'.[36] It

[31] *Ibid.*, p. 121.

[32] Madan took a very serious view of the state of crime. He contended that all forms of delinquency had reached alarming proportions, endangering the security and prosperity of the country. The same views were held by the author of *Hanging, Not Punishment Enough*, and by G. Ollyffe, as well as by Henry Fielding, below, p. 405.

[33] The principle of the certainty of punishment as the most effective deterrent to crime was evolved by penal reformers; see below, pp. 281–283, 304 and 330–331. But, to quote Professor Coleman Phillipson, Madan 'makes a sinister use of the doctrines in advocating an unrestrained execution of the sanguinary law as it then existed'; *Three Criminal Law Reformers* (1923), p. 91.

[34] *Thoughts on Executive Justice*, p. 34.

[35] Above, Chaps. 3 and 4.

[36] *Op. cit.*, p. 132.

will be seen later[37] that other apologists of capital punishment held different views. They relied on the deterrent effect of a suspended threat; but to Madan the non-enforcement of capital punishment was arbitrary and unconstitutional, tending to upset the balance between the Legislature and the Executive. 'The law says they *shall be hanged*; those who are to put this law in execution, say—they shall *not*. In short, the *sic volo* of the legislature, is absolutely controlled by the *sic nolo* of a Judge.'[38] When strictly enforced, capital laws propagate fear, thus preventing the commission of offences; when put into effect only on certain unpredictable occasions, they lose their value as an effective deterrent and therefore also their social justification. 'How monstrous is it to take men's lives away under pretence of example', he writes, 'and yet do this with such a partiality, as to destroy the very end of their sufferings, by so far weakening the force of that example, as to render it void and of none effect!'[39]

Madan was not opposed to the royal prerogative of mercy provided that its use was confined to a few exceptional cases only, and he particularly insisted that the power of judges to reprieve capitally convicted offenders should be strictly limited to the following instances: (a) Prejudice and malice on the part of the jury; (b) contradiction of evidence; (c) doubt of the law on which life may depend, such as the vague wording of a statute or a doubtful construction; (d) the emergence — after the conviction — of facts conclusively proving the innocence of the condemned; and finally (e) cases where the offence, though within the letter of the law, is not within its apparent meaning and intent.[40] He reproaches the judges for

[37] Below, p. 256.

[38] *Op. cit.*, note on pp. 42–43. According to Madan the chances of impunity in sheep- and horse-stealing were forty to one in favour of the offender.

[39] *Ibid.*, p. 52. In another passage Madan contends that men are being drawn in 'to commit capital offences under a notion of *impunity* . . .'; p. 81. This is an obvious exaggeration. It should be remembered first that in respect to such capital offences as murder or forgery, the incidence of executions was high. Secondly, far from being ordered in a haphazard and arbitrary manner, executions were—on the whole—carried out more often in respect to very serious, than to less serious offences. Finally it is by no means proven that when only partially enforced, capital punishment was useless as a measure of intimidation.

[40] Madan mentions this last circumstance not in *Thoughts on Executive Justice* but in a later tract entitled *Appendix to Thoughts on Executive Justice* (1785),

not putting capital statutes fully into operation. '. . . Those, whose duty and office it is to administer these laws have now, for many years, been preferring their own *feelings* as *men*, to the duty which they owe to the public as *magistrates*.'[41]

The controversy caused by Madan's doctrine

Madan's opinions on public matters could not be expected to carry much weight,[42] yet so great was the importance attached to the question of criminal law and its administration that *Thoughts on Executive Justice* evoked instantaneous and widespread interest.[43] A second edition was issued within a few months of the first. A year later Madan's thesis was attacked by Sir Samuel Romilly in an eloquent pamphlet entitled *Observations on a Late Publication, Intituled, Thoughts on*

below, pp. 246–247. As an illustration he quotes the case of a poor man who, having seen a piece of bacon in a window of a house in his village, returned to the house after dark, broke the pane of glass, put in his hand and stole the bacon. Madan agrees with the judge who reprieved the man '. . . as wisely determining in his own mind, that such a paltry offence as this, though in strictness made capital by the letter of the law, could never fall within the intention of capital punishment'; *ibid.*, pp. 31–33.

[41] *Ibid.*, pp. 13–14. Though professing his deepest esteem for the judges as lawyers and men, Madan goes so far as to say that instead of preventing crimes by enforcing capital laws, the judges are 'little better than accessories before the fact to the daily commission of them'; p. 68. Elsewhere he says: 'To rob those laws of their effect, by a careless, partial, or inadequate administration of them, is a breach of trust of the most dangerous and mischievous kind . . .'; p. 87.

[42] Madan was born in 1726 and died in 1790. He was the elder son of Colonel Martin Madan, M.P. and of Judith, daughter of Judge Spencer Cowper, aunt of the poet Cowper and herself a writer. He matriculated at Christ Church, Oxford, graduating B.A. in 1746. Two years later he was called to the bar. When in London he became a member of a club which his biographer in the *D.N.B.* describes as 'recklessly convivial'. Apparently he had once been commissioned by the club to attend Wesley's sermon, in order to imitate him later for the entertainment of the company. But Madan was so much impressed by Wesley's preaching that he abandoned his associates and took Orders. He was a very successful and impressive preacher. In 1780 he published a work entitled *Thelyphthora* in which he advocated polygamy, attempting to prove that it is in accordance with Christianity. This publication aroused much indignation; Madan had to resign his chaplaincy of the Lock Hospital and to retire into private life; *D.N.B.* XII, 732; see also Campbell, *Lives of the Lord Chancellors* (4th ed., 1857), Vol. 7, p. 145. The list of his various publications comprises twenty-four items. Much interesting information on Madan and his family background is to be found in *The Life and Times of Selina Countess of Huntingdon* (1844), Vol. 1, pp. 165–167, 400, 418–420.

[43] Madan dedicated his *Thoughts* to the judges of the assizes; he sent a copy to each of the twelve judges.

Executive Justice, which he published anonymously.[44] The main tenets of Romilly's penal doctrine—which he only fully developed in his parliamentary speeches some twenty years later[45]—are stated in this small work. Elsewhere Romilly writes that Madan's tract was 'very much read, and certainly was followed by the sacrifice of many lives, by the useless sacrifice of them; for though some of the judges, and the government, for a time, adopted his reasoning, it was but for a short time that they adopted it; and, indeed, a long perseverance in such a sanguinary system was impossible. Lord Ellenborough, who seems to consider himself as bound to defend the conduct of all judges, whether living or dead, has lately, in the House of Lords, in his usual way of unqualified and vehement assertion, declared that it was false that this book had any effect, whatever, upon either judges or ministers. To this assertion I have only to oppose these plain facts: in the year 1783, . . . before the work was published, there were executed in London only fifty-three malefactors; in 1785, . . . after it was published, there were executed ninety-seven: and it was recently after the publication of this book that was exhibited a spectacle unseen in London for a long course of years before, the execution of nearly twenty criminals at a time'.[46]

The figures quoted by Romilly are exact, but too much reliance should not be put upon them. A year later—in 1786—the incidence of executions in London fell to less than

[44] (1786); on this tract see below, pp. 316–318.

[45] Below, pp. 322–331.

[46] *Memoirs* (ed. by his sons, 1840), Vol. 1, p. 89. Referring to Madan's book during a debate in the House of Lords in 1811 Lord Ellenborough said: 'It has been scandalously and without a shadow of proof asserted, that a very celebrated pamphlet published in the year 1785, and ascribed to Mr. Madan, had produced an effect on the minds of the judges, and that the number of executions for two years succeeding the publication was much greater than before in consequence of that impression. Of the falsehood of such a charge, I entertained no doubt when I first saw it stated; but I have since put the question to all the judges on my bench, and have been still more fully satisfied by their answers of the truth of my former opinion'; quoted by Basil Montagu, *The Opinions of Different Authors upon the Punishment of Death* (1813), Vol. 3, p. 271. In the same speech Lord Ellenborough also denied the truth of Madan's assertion that jurymen and witnesses showed great clemency in capital trials. 'For myself', he added, 'I have seldom met with any such cases'; *ibid.*, p. 270. These remarks are not recorded in *Parliamentary Debates*.

one in two, fifty executed out of 127 sentenced to death, while in 1787 it was again very high: ninety-two executed out of 113 sentenced to death.[47] These figures are therefore no proof that Madan's tract had any durable influence on the administration of criminal justice, though the possibility of some short-lived influence cannot be altogether dismissed. On the other hand, there is much circumstantial evidence to prove that the great majority of the judges disapproved of Madan's views. Capital statutes continued to be administered mercifully, reprieves to be numerous[48] and royal pardons to be granted very frequently, almost always on the recommendation of the judges.[49]

An explicit rejection of Madan's doctrine by one of the judges is to be found in Sir Richard Perryn's *Charge given to the Grand Jury for the county of Sussex at the Lent Assizes 1785*.[50] In it Perryn states that 'the lenity of the judges, and the frequency of reprieves and pardons had been assigned, by some, as reasons for the increase of robberies'; he 'was induced to mention this, on account of a late publication, in which the learned author had laid it down . . . that, except where the evidence was not satisfactory, and in some other instances mentioned in the book, judges ought to execute all they convict'. To accept this course would be tantamount to 'making our laws like the laws of Draco, which, from their severity, were said to be written in blood'. He contends further that the great number of capital laws which were allowed to accumulate on the Statute Book proved 'that the

[47] Compiled on the basis of the table given above, p. 147.

[48] See for instance Appendix No. 12 to the above quoted *Report on Criminal Laws* (1819), 585, p. 194 *et seq.*, giving an account of persons committed for trial, tried, and convicted respectively, of capital offences on the Norfolk Circuit from 1767 to 1819; distinguishing also when they were tried, the offences of which they were convicted, and whether they were reprieved or left for execution. For returns relating to other districts see other Appendices, *ibid.*

[49] See above, pp. 97 and 112–114.

[50] Sir Richard Perryn (1723–1803) matriculated at Queen's College, Oxford, but took no degree; he began to study law at Lincoln's Inn and was called to the Bar in 1747 by the society of the Inner Temple. He began his practice in the Court of Chancery. In 1770 he became vice-chamberlain of Chester, was made King's Counsel and a bencher of the Inner Temple. In 1776 he was appointed Baron of the Exchequer and was knighted. He retired from the Bench in 1799; E. Foss, *The Judges of England* (1864), Vol. 8, p. 356, and *D.N.B.*, XV, 926.

Legislature trusted to the discretion of the *Judges* as to their execution '.

His reply to critics

To these criticisms Madan replied in a short tract based on Sir Richard Perryn's *Charge*,[51] in which he re-stated the thesis previously expounded in his *Thoughts*. While agreeing with Perryn that when administering capital laws the judges have to use discretionary power, since the Legislature could not foresee every circumstance which might appear in the course of a trial, he insists that the spirit and intent of the laws should be observed in every case. He also reaffirms his conviction that the effect of frequent reprieves is to bring to, rather than save offenders from, the gallows. He disagrees with Perryn that some of the laws are sanguinary [52] and insists that all should always be fully enforced.

It should be added that although in both tracts Madan repeatedly mentions the need for preventing crime, he takes a very narrow view of the problem. Thus in the *Appendix* [53] he sums up his opinion in the following syllogisms:

> That system of police is the least likely to prevent crimes, which holds forth an *uncertainty* of punishment.
> But our present system of police holds forth an *uncertainty* of punishment.
> Therefore, our present system of police is least likely to prevent crimes.
>
> II
>
> That system, etc., is the most *merciful* which is the most likely to prevent the commission of capital offences.
> But that system which holds forth a *certainty* of punishment, is the most likely to prevent the commission of capital offences.
> Therefore, that system, etc., is the most merciful.'

[51] *Appendix to Thoughts on Executive Justice, etc. occasioned by a Charge given to the Grand Jury for the County of Sussex, at the Lent Assizes 1785, by the Hon. Sir Richard Perryn, Knt. One of the Barons of His Majesty's Court of Exchequer* (1785).

[52] ' The word *sanguinary* carries with it a very dreadful meaning, like its plain—*English synonym—bloody*:—it brings sensations into the mind of the most terrible nature; and, when applied to Laws, it imparts, that they are arbitrary and cruel, like the Laws of *Draco*. . . . A Law may be *severe*, without deserving the name of *sanguinary*; and though the *former* may be justly applied to some of our penal statutes, yet the *latter* never can '; *ibid.*, pp. 54–55.

[53] pp. 5–6.

He finds nothing in the English system of justice which would call for a reform. Such vital problems as the state of prisons, secondary punishments, or the treatment of juvenile offenders are not mentioned at all.[54] The only two proposals which he submits are first, that capital sentences should be enforced in all cases of offenders returning from transportation[55]; and secondly, that the testimony of accomplices, though unsupported by any other proof, should be admitted.[56] The existing police system could not—in his view—be improved upon.[57] While acknowledging that juries, magistrates and even prosecutors tend knowingly to restrict the operation of certain statutes imposing capital punishment, he treats them rather as mischievous conspirators and makes no attempt to inquire into their reasons.[58] He admits that it might perhaps be better to make some laws less severe rather than not to enforce them at all, but adds that he personally doubts 'whether any other human system could equal the present, for the suppression of public injury, supposing the law as it now stands were punctually executed'.[59]

Although Madan's proposals are less extreme than those of Ollyffe or the author of *Hanging, Not Punishment Enough*,[60] their avowed aim was to make the administration of criminal

[54] It will be remembered that G. Ollyffe, who wrote his *Essay* more than fifty years earlier, urged some measure of prison reform; see on this above, note 11 at p. 235.

[55] *Thoughts on Executive Justice*, p. 78.

[56] *Ibid.*, p. 151 *et seq.* This suggestion raised important issues of criminal procedure. It has been debated at various times and will be examined at greater length in a subsequent volume of this *History*. In the already quoted pamphlet Sir Samuel Romilly strongly objects to the adoption of such a practice; *Observations on Executive Justice*, pp. 115–128. The other minor reforms which Madan proposes are: to facilitate the identification of offenders by bringing them to trial in the same clothes in which they had been apprehended; to pass the death sentence on each delinquent separately, and not to defer doing so until the end of the Assizes; *op. cit.*, pp. 147–150, and 82–84.

[57] *Ibid.*, pp. 125–126; see also p. 127.

[58] The implications of this trend were also overlooked by Henry Fielding; see on this below, pp. 413–414. According to Madan the various measures which Fielding proposed in his *Inquiry into the late Increase of Robbers* (1751) were insufficient, for as he puts it, 'our disorder is got to such an height, that no palliatives will now avail; there must be an end of the *police* itself, unless the laws give it their support; and this can only be done by a strict and faithful discharge of duty, in those who are called into the high offices of magistracy . . .'; *Thoughts on Executive Justice*, p. 79.

[59] *Ibid.*, pp. 133–134.

[60] See above, pp. 231–234 and 235–237.

law more stringent; in reality, however, it was becoming progressively more lenient. At the time when *Thoughts on Executive Justice* were published, about two-thirds of all offenders capitally convicted in London and Middlesex were put to death; in the last three years of Madan's life (1788–1790) this ratio was reduced to about one in three; in the last three years of the eighteenth century (1797–1799) it decreased further to approximately one in four.[61] The thesis so forcibly expounded by Madan was clearly contrary to the current trend of public opinion.[62]

§ 8. PALEY'S THEORY OF DETERRENCE

Paley on the object of punishment

The ideological premises of a criminal legislation based on capital punishment were fully developed in a masterly exposition by William Paley in a chapter of his well-known *Principles of Moral and Political Philosophy*.[63] It is impossible to overestimate the importance of this book, which for many years exercised a potent influence on the trend of

[61] See table at p. 147, above.

[62] See for instance below, pp. 336–350.

[63] Book VI, Chap. 9 ' Of Crimes and Punishments '. Chap. 8 of this book is devoted to the administration of justice in general. *Principles of Moral and Political Philosophy* was first published in 1785 (Madan's *Thoughts on Executive Justice* appeared in the same year), but the substance of the book had been given in college lectures in Cambridge from ten to twenty years earlier; T. R. Birks, *Modern Utilitarianism* (1874), p. 4. The life of Paley is described with great minuteness, though not always with judicious discrimination, by G. W. Meadley, *Memoirs of William Paley, D.D.* (2nd. ed., 1810); see also a short biography by Paley's son, the Rev. Edmund Paley in Vol. 1 of *The Works of William Paley, D.D. with Additional Sermons* (ed. by the Rev. E. Paley, 1825), 7 vols. The excellent note in the *D.N.B.* XV, 101, is by Leslie Stephen.

Paley was born in 1743 and died in 1805. He had always been interested in penal matters. As a boy of sixteen he attended the trial at York of Eugene Aram, who was sentenced to death and hanged for a murder committed fourteen years earlier. These proceedings left a strong impression on Paley. (That remarkable trial is fully related by G. T. Wilkinson in *The Newgate Calendar*, Vol. 2, pp. 370–385; Aram's skilful defence caused Paley to observe that he got himself hanged by his own cleverness.) Also in later years Paley regularly attended trials at the Old Bailey, thereby gaining some knowledge of criminal law and procedure. He often discussed legal matters with his friend Sir John Wilson (who became a judge of the Common Pleas), with the son of Bishop Law, the future Chief Justice of England, with Lord Ellenborough and with members of the Bar on the Northern Circuit. Paley was appointed a Justice of the Peace but was not

English criminal legislation.[64] Paley was not an original thinker,[65] yet the remarkable lucidity and conciseness with which he presented his arguments, combined with his sound appreciation of certain indisputable facts peculiar to the social and political conditions prevailing in eighteenth-century England, went far to ensure the exceptional success of his book.

very successful in that capacity, for, according to his biographers, he proved ' irascible '.

The various chapters of his *Principles* relating to legal questions fully confirm Lord Neaves' opinion that ' Paley all his life had a fondness for studying judicial procedure, and there can be no doubt that . . . he would have become an eminent lawyer if he had embraced the legal profession '; *A Lecture on the Character and Writings of William Paley, D.D.* (1873), p. 8. See also the interesting article of G. G. Alexander in which Paley's legal concepts are examined at greater length: ' Archdeacon Paley as a Jurist ', *Journal of the Society of Comparative Legislation* (1918), (N.S.) Vol. 18, p. 66.

64 It should be noted that the title ' Of Crimes and Punishments '—the title of Chap. 9 of Paley's *Principles*—is identical with that of the famous book *Dei Delitti e delle Pene* which Beccaria published (anonymously) at Leghorn in 1764; on Beccaria see below, pp. 277–286. According to Coleman Phillipson, *Three Criminal Law Reformers* (1923), p. 11, it first appeared in an English translation (together with Voltaire's *Commentary*) in 1768), but M. T. Maestro, *Voltaire and Beccaria as Reformers of Criminal Law* (1942), p. 70, maintains that Beccaria's book was rendered into English in 1767 and appeared that year in London and Dublin simultaneously. It is difficult to ascertain whether Paley read it for, as he acknowledges himself, it was not his habit to quote works of other authors. In his *Principles* he scarcely quotes any one except Ferguson or Rutherford, but acknowledges his great debt to Abraham Tucker. Though he nowhere refers to Blackstone he most probably read the *Commentaries*, and must therefore, at least indirectly, have been acquainted with Beccaria's penal doctrine. In view of the absence of any references in his works, even when he was borrowing almost verbatim from other authors, Paley was on a number of occasions accused of plagiarism.

65 According to Sir James Fitzjames Stephen, Paley's *Principles of Moral and Political Philosophy* ' . . . is nothing or little more than an adaptation of one limb of Tucker's book, and is cast, as all Paley's books are cast, in a far less satisfactory mould '; *Horae Sabbaticae* (1892), 3rd Ser., p. 71. Leslie Stephen describes Paley as primarily ' a condenser and a compiler ', and states that in the *Principles* ' he has simply given a compact statement of what may be called the orthodox theory '; *History of English Thought in the Eighteenth Century* (repr. of 1927), Vol. 2, p. 121. But they both unreservedly praise the lucidity, the arrangement and the convincing force of Paley's work. W. Whewell emphasises that his mind ' had altogether a practical and not a metaphysical turn ' and that ' he had no taste and therefore . . . little aptitude, for metaphysical disquisitions '; *Lectures on the History of Moral Philosophy* (1862), pp. 170 and 169. Richard Whately, Archbishop of Dublin, describes his style as ' remarkably clear and forcible, very simple, with an air of earnestness; generally devoid of ornament, and often homely; but occasionally rising into a manly and powerful eloquence '; *Dr. Paley's Works, A Lecture* (1859), p. 6. Even Austin, though he bitterly attacks Paley (see on this below, p. 255, note 81, calls him a ' celebrated ' writer and acknowledges his clear and just understanding; *Lectures on Jurisprudence* (5th ed., repr. of 1929), Vol. 1, p. 135.

The object of all punishment is, Paley holds, not the satisfaction of justice but the prevention of crime. He accepts the logical consequence of this principle by asserting that were not the impunity of offenders dangerous to society, their offences could well be left unpunished. Such problems as retribution and the adjustment of punishment to guilt, he ignores. 'The crime must be prevented by some means or other', he writes, 'and consequently, whatever means appear necessary to this end, whether they be proportionable to the guilt of the criminal or not, are adopted rightly, because they are adopted upon the principle which alone justifies the infliction of punishment at all.'[66] Factors to be taken into account in determining with what degree of severity any given crime should be punished are the facility with which it can be committed, the difficulty of its detection and the danger it presents to the community. Thus, privately stealing in a shop ought to be punished more severely than privately stealing in a dwelling-house, despite the lack of difference in the 'moral quality' of the two offences. Similarly a breach of trust, which can usually be prevented by the exercise of due caution in selecting persons to be trusted, and by limiting the extent of the trust or requiring a sufficient security for its faithful discharge, should be punished less rigorously—if at

[66] *Principles of Moral and Political Philosophy* (1817), p. 407. All ensuing quotations are taken from this edition of Paley's work. He does acknowledge that according to divine justice and the precepts of religion, punishment ought to be made proportionate to guilt, but maintains that the dispensation of penal justice in society cannot be grounded on the same principle, for as he puts it, 'a Being whose knowledge penetrates every concealment, from the operation of whose will no art or flight can escape, and in whose hands punishment is sure; such a Being may conduct the moral government of his creation, in the best and wisest manner, by pronouncing a law that every crime shall finally receive a punishment proportioned to the guilt which it contains, abstracted from any foreign consideration whatever; . . . . But when the care of the public safety is entrusted to men, whose authority over their fellow-creatures is limited by defects of power and knowledge; from whose utmost vigilance and sagacity the greatest offenders often lie hid; whose wisest provisions and speediest pursuit may be eluded by artifice or concealment; a different necessity, a new rule of proceeding, results from the very imperfection of their faculties. In their hands, the uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors'; *ibid.*, pp. 409–410. See also his sermon 'Different Degrees of Future Rewards and Punishments': *The Works* (ed. by the Rev. E. Paley, 1825), Vol. 7, pp. 399–400.

all—than other frauds; on the other hand, theft by a servant in his master's dwelling-house or shop should be punished most severely, since in such cases a large measure of confidence is unavoidable.

Consistently with this point of view, Paley unreservedly supports capital punishment for sheep- and horse-stealing, as well as for stealing cloth from tenters or bleaching grounds, not because these crimes 'are in their nature more heinous than many simple felonies which are punished by imprisonment or transportation, but because the property, being more exposed, requires the terror of capital punishment to protect it'.[67] Similarly, the difficulty of detecting such an offence as writing threatening letters is adduced as the reason for appointing a very severe punishment for it. The same considerations induced Paley to support 21 Jac. 1, c. 27, which appointed capital punishment for the murder of bastard children by their mothers,[68] and 8 & 9 Will. 3, c. 26,[69] by which both the possession of any instrument for coining, and coining itself, were punished with death.[70]

Paley's postulate that each punishment should also be related to the degree of danger inherent in each crime, while sound in principle, requires a detailed and judicious assessment of the danger and an accordingly careful classification of offences. For Paley, however, almost all offences were equally dangerous. In the class 'injuries effected by terror and violence' he includes burglary and breaking into dwelling-houses by night; frauds and injuries effected without the use of force; perjury and a great many minor offences against

[67] *Principles*, p. 408.

[68] This Act disregarded the principle of the presumption of innocence; see below, pp. 431–433.

[69] On this Act see below, p. 653.

[70] According to Paley these provisions facilitated the conviction of criminals, thus making punishment more certain, which 'is of more consequence than the severity'; *op. cit.*, p. 425. It should not be assumed, however, that Paley's doctrine was in any way similar to that of Beccaria. In his essay *A Vindication of Dr. Paley's Theory of Morals* (1830), note at pp. 12–13, the Rev. L. Wainewright contends that '. . . so able and liberal a writer as the Marquis Beccaria . . . coincides with Paley in many of his opinions . . .'. This view is not well founded, for although there certainly was between them a measure of agreement on secondary matters, they differed fundamentally on principles. On Beccaria and his doctrine see below, pp. 277–286.

property which—according to him—could be committed ' with ease ', or the detection of which was difficult.[71]

Apology of the established system

This reasoning led Paley unreservedly to accept capital punishment as the most effective means of preventing crime.[72] He fully approves of the English system of laws and justifies it by three main considerations, which may respectively be described as political, economic and penitentiary. First, the people of this country enjoy a high measure of personal freedom and are not subject to the numerous administrative regulations so often made use of by foreign States.[73] Secondly, the large size of so many English towns is conducive to crime; it makes the detection of offenders very difficult and is propitious to the formation of gangs and confederacies, which enhance the social danger of delinquency by giving it an organised and professional character.[74] Thirdly, the amendment of delinquents, which is one of the principal objects of secondary penalties, can seldom be achieved. Paley, it is important to note, almost unreservedly adheres to what may be called the doctrine of absolute incorrigibility. ' From every species of punishment that has hitherto been devised ', he writes, ' from

[71] *Op. cit.*, pp. 415–418; for two offences explicitly stated not to warrant the infliction of capital punishment see below, p. 256.

[72] *Ibid.*, p. 421. In support of this assumption he writes that probably ' many of those who are executed, would, if they were delivered at the point of death, retain such a remembrance of their sensations, as might preserve them, unless urged by extreme want, from relapsing into their former crimes '; though he adds that ' this is an experiment that, from its nature, cannot be repeated often '; *ibid.*

[73] Among these Paley quotes the detention of suspected persons without proof of their guilt; the duty of masters of families, when required by the authorities, to give an account of strangers and friends with whom they are in communication; the obligation of every person to supply a magistrate with detailed information as to his or her mode of life and means of subsistence; the apprehension of persons on the ground of their idleness or vagrancy; the confinement of persons to certain districts under administrative supervision; the possession of passports by all who enter or leave the country; and finally the existence of large military and police forces endowed with vast powers of detaining suspected persons. ' These expedients ', states Paley, ' although arbitrary and rigorous, are many of them effectual; and in proportion as they render the commission or concealment of crimes more difficult, they subtract from the necessity of severe punishment '; *ibid.*, p. 419.

[74] *Ibid.*, p. 420.

imprisonment and exile, from pain and infamy, malefactors return more hardened in their crimes, and more instructed.'[75]

Even the views of those early eighteenth-century writers who thought that aggravated forms of the death penalty should be introduced for certain offences,[76] did not appear unacceptable to Paley. He recognises that barbarous spectacles of human agony harden and deprave public feelings, but suggests that 'if a mode of execution could be devised which would augment the horror of the punishment, without offending or impairing the public sensibility by cruel or unseemly exhibitions of death, it might add something to the efficacy of the example; and by being reserved for a few atrocious crimes, might also enlarge the scale of punishment; an addition to which seems wanting. . .'. He seems to have been attracted by the proposal to cast murderers into a den of wild animals, for as he puts it, they would thus perish 'in a manner dreadful to the imagination, yet concealed from the view'.[77]

Referring to the English system of criminal justice Paley states that the problem of capital punishment may be solved in either of two ways: by appointing it for a limited number of offences and inflicting it invariably, or by appointing it for a great many more but inflicting it only occasionally, as a matter of example. He disapproves of the former method

[75] *Ibid.*, pp. 420–421. Transportation is a 'slight punishment' because it is inflicted upon persons of no property, no reputation, no regular means of subsistence; places the delinquent in a situation which is not worse than that in which he was at the time when he committed the crime; is unseen by others and therefore cannot adequately perform its preventive function. As regards penal detention, Paley suggests the adoption of solitary confinement, leaving it to experience to decide whether it ought to be combined with some sort of work. He further adds that he would 'measure the confinement, not by duration of time, but by quantity of work, in order to excite industry, and to render it more voluntary'; *ibid.*, p. 422. Professor Thorsten Sellin rightly points out that this proposal has all the characteristics of an indeterminate sentence, thus correcting the generally held view that the concept of an indeterminate sentence was first conceived in 1832 by Richard Whately, Drummond Professor of Political Economy at Oxford; 'Paley on the Time Sentence', *Journal of the American Institute of Criminal Law and Criminology* (1931–32), Vol. 22, p. 264.

Paley also stresses that the State has a duty to secure the maintenance of all who are willing to work, suggesting the establishment of a State system of after-care of discharged prisoners, based on their dispersal throughout the country, and the employment of men on public roads and of women in parishes under the control of overseers.

[76] See above, pp. 231–238.

[77] *Principles*, p. 424.

on the ground that the decision as to whether or not capital punishment should be inflicted often depends on circumstances difficult to foresee and to define with the necessary precision. English laws were framed in accordance with the latter and, in his view, much sounder principle [78]:—

> 'By the number of statutes creating capital offences, it (English law) sweeps into the net every crime which, under any possible circumstances, may merit the punishment of death; but, when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations of whose crimes render them fit examples of public justice. By this expedient, few actually suffer death, whilst the dread and danger of it hang over the crimes of many. The tenderness of the law cannot be taken advantage of. The life of the subject is spared as far as the necessity of restraint and intimidation permits; yet no one will adventure upon the commission of any enormous crime, from a knowledge that the laws have not provided for its punishment. The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries. The charge of cruelty is answered by observing, that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it establishes its last and highest sanctions, trusts to the benignity of the crown to relax their severity, as often as circumstances appear to palliate the offence, or even as often as these circumstances of aggravation are wanting, which rendered this vigorous interposition necessary. Upon this plan, it is enough to vindicate the lenity of the laws, that *some* instances are to be found in each class of capital crimes, which require the restraint of capital punishment, and that this restraint could not be applied without subjecting the whole class to the same condemnation.'

Dicey states that despite Paley's keen and enlightened interest in legal problems, he either did not grasp the need for, or did not care to pursue the idea of, a systematic revision of English laws. His philosophy 'is, in so far as he applied it to law, an ingenious defence of things as they stood in 1786. He is neither an innovator nor a reformer, but like Blackstone an apologist'.[79] Leslie Stephen similarly refers to Paley's

[78] *Ibid.*, pp. 411–412.

[79] *Law and Public Opinion in England* (2nd ed., repr. of 1930), p. 143. As an illustration, Dicey quotes (p. 73) an extract from Paley's chapter on the

'placid conservatism',[80] while Professor Elie Halévy points out that an apology of the established system of criminal justice is an integral part of Paley's doctrine.[81]

The basic principle of Paley's doctrine

Paley's attitude does not fundamentally differ from either that of the author of *Hanging, Not Punishment Enough*, or of Ollyffe or Madan. In common with these earlier authors he held that the basic consideration in selecting a punishment should be its effectiveness in preventing crime rather than the degree of guilt of the offender, and that for this purpose death is the best penalty; he even agreed that for exceptionally serious crimes it might be advisable to inflict certain aggravated forms of it. Similarly, he doubted the effectiveness of secondary punishments in reforming offenders, and considered the English criminal law peculiarly well adapted to the political and social conditions of the country. Indeed, in his apology

English constitution. This chapter of his book Paley later published separately in the form of a tract. Another example is provided by Paley's sermon on *Discontent*, in which he endeavours to show that the lower classes of society ought to regard their poverty as a source of happiness, greater in many respects than that which the upper strata might derive from their wealth and social influence; *The Works* (ed. by the Rev. E. Paley, 1825), Vol. 6, p. 410. Both the tract on *Constitution* and the sermon on *Discontent* gave rise to a spirited controversy. See the anonymous pamphlets: *Letters to William Paley, . . . on His Objections to a Reform in the Representation of the Commons, and on his Apology for the Influence of the Crown in Parliament* (1796); and *A letter to William Paley . . . from a poor labourer in answer to his 'Reason for Contentment', addressed to the labouring part of the British Public* (1793).

[80] *History of English Thought in the Eighteenth Century* (repr. of 1927), Vol. 2, p. 125.

[81] *The Growth of Philosophic Radicalism* (1928), p. 25. Paley had much in common with the Utilitarians, whose leaders, however, were the most consistent opponents of his doctrine; see J. S. Mill's 'Professor Sedgwick's Discourse', in *Dissertations and Discussions* (1875), Vol. 1, p. 114 and pp. 127–128; see also Austin, *Lectures on Jurisprudence* (5th ed., repr. of 1929), Vol. 1, p. 136. Mill regarded him as reactionary and even accused him of intellectual dishonesty.

This attack is exaggerated and unfair. Both Mill and Austin entirely disregard the period in which Paley lived. His views on many problems were much in advance of his time; he was thus a fervent partisan of the abolition of slavery, of religious toleration and of the movement for raising the educational standards of the lower strata of society. Lord Stanhope relates that 'Pitt had wished to make Paley a Bishop. But the King, it is understood, resisted the proposal on account of the liberal tendency of some of the views on government which the *Moral Philosophy* contains'; *Life of Pitt* (1867), Vol. 4, pp. 408–409.

of the established system Paley went further than Blackstone,[82] having remained uninfluenced by any of the well-known contemporary writings which propagated a new approach to crime and punishment.[83]

Though the *Principles* passed through many editions during his lifetime, he introduced no changes in the relevant section of this work. However, he differed from Madan on some important points. First, he singled out one offence for which capital punishment should, in his view, be abolished,[84] and he further suggested that forgery of bonds, leases and mortgages should be punished less severely than that of bills of exchange and of securities.[85] These mitigatory proposals deserve to be noted inasmuch as they are the first to be brought forward by any writer of eminence who was otherwise in full agreement with the predominantly capital criminal laws. The second point of difference between Madan and Paley is of even greater significance. Madan contended that to prevent crime all capital laws should be strictly enforced, as indeed they had been intended to be by the Legislature,[86] whereas according to Paley they were not intended to be put fully into effect. Paley believed that even if only occasionally inflicted, capital punishment is still capable of exercising a restraining influence upon potential offenders.[87] The doctrine of maximum severity had thus undergone a notable change, for

[82] On Blackstone's views see below, pp. 345–348.

[83] Beccaria's book appeared in a widely-known English translation eighteen years before the publication of the *Principles*; Eden's *Principles of Penal Laws* were published in 1771 (see on this below, p. 301). That the new penal views evoked widespread interest may also be judged from the fact that in 1784 the Rev. William Turner read a paper in the Manchester Literary and Philosophical Society entitled ' An Essay on Crimes and Punishments ' in which he advocated a drastic revision of criminal law; *Memoirs of the Literary and Philosophical Society of Manchester* (1785), Vol. 2, p. 293 et seq.; on this essay and other contemporary writings on penal matters see below, note 17 at pp. 348–349.

[84] Privately stealing from the person, made a non-clergyable felony in 1565 by 8 Eliz. c. 4, s. 2. Paley's reason for making this suggestion was that this offence cannot be committed with any degree of force or without gross and culpable negligence on the part of the victim; *Principles*, pp. 412–413. This statute was the first that Romilly singled out for repeal; see below, p. 497.

[85] *Ibid.*, pp. 417–418. Whereas, as he explains, bills of exchange or securities are in wide circulation and are indispensable for the purposes of commerce, great precautions can be taken against the forgery of the other documents, which are never in circulation.

[86] Above, p. 242.

[87] In contrast to Madan, Paley favoured the wide exercise of the royal prerogative of mercy and did not object to frequent reprieves; on this see above, note 78 at pp. 131–132.

whereas previous writers had contended that to prevent crime all offenders found guilty of capital offences should be executed, Paley's view was that this object would be achieved if 'few actually suffer death, whilst the dread and danger of it hang over the crimes of many'.[88]

Its influence on criminal legislation

Paley's doctrine became the *credo* of all opponents of the movement for the reform of criminal law.[89] When in 1808 Sir Samuel Romilly brought in his first Bill purporting to repeal the death penalty for privately stealing from the person, a Member of the House of Commons questioned the soundness of his views and contrasted them with Paley's doctrine.[90] Well aware of Paley's authority and influence, Romilly devoted a large portion of his speech of 1810 to a critical analysis and refutation of Paley's views.[91] When the speech appeared in print, Romilly received a letter of congratulation

[88] Paley singles out three aggravating circumstances which 'ought to guide the magistrate in the selection of objects of condign punishment'; they are repetition, cruelty and combination; *ibid.*, p. 414. He objects, however, to stipulating these circumstances in the statutes on the ground that it would thus be known beforehand which crimes 'might be committed without danger to the offender's life'; p. 411.

[89] Paley's work, writes Professor T. R. Birks, has 'leavened for many years the habits of thought of a very large number both of the clergy and educated laity of England, till rival influences asserted their superior strength'; *Modern Utilitarianism* (1874), p. 5. The same author states (p. 48) that Paley's book 'reigned widely in England for near half a century, as the best modern work on ethical science'. In 1852, Alexander Bain wrote that Paley's treatise 'maintains its ground as a text-book of moral science', though the chapters on politics 'have nearly become obsolete'. He omitted Chap. 8 from his edition of this work and gave in an Appendix a fundamentally different doctrine on the nature and object of punishment; A. Bain, *The Moral Philosophy of Paley*; with additional dissertations and notes (1852).

Principles of Moral and Political Philosophy was adapted as a textbook by Cambridge University, and ran through fifteen editions in Paley's lifetime. A contemporary of Paley wrote: '. . . it may truly be said of Dr. Paley, that he has brought Philosophy from the retreats of the learned into the walks of common life, and almost into the cradles of the young'; E. Pearson, *Annotations on the Practical Part of Dr. Paley's 'Principles of Moral and Political Philosophy'* (1801), p. ix. As an illustration of how the substance of Chapter 9 'Of Crimes and Punishments' was digested in the form of questions and answers see: *An Analysis of Paley's Moral and Political Philosophy* (1824), and W. Andrew, *A Series of Examination Questions on Paley's Elements of Moral and Political Philosophy* (1841).

[90] Mr. Herbert; *Parl. Deb.* (1808), Vol. 11, col. 880.

[91] *Speeches* (1820), Vol. 1, p. 106 *et seq.* This speech was afterwards published as a pamphlet, thirty-three pages of which relate directly to Paley; in an Appendix large extracts from the eighth chapter of Paley's *Principles* are reproduced *in extenso*. On this pamphlet see below, pp. 322–331.

from Dugald Stewart who wrote: 'I was more particularly interested in that part of your argument where you combat Paley, whose apology for the existing system I never could read without feelings of indignation. Indeed, I have more than once lost my temper in discussing the merits of that part of his book, with some of your countrymen, who were disposed to look up to him as an oracle both in politics and in morals. Your reply to him is, in my opinion, quite unanswerable'.[92] But this was an isolated view.[93] During the same debate Windham said in reply to Romilly's exposition: 'The system of morality contained in Dr. Paley's works was founded on the nature and moral fitness of mankind, and until man should become a different being from what he is at present, that system would continue to be the wisest and the justest for the guidance and government of mankind', adding that Paley's works 'had done more for the moral improvement of mankind than perhaps the writings of any other man that had ever existed'.[94] Similarly in the House of Lords, Lord Ellenborough thus replied to a Member who had referred to Blackstone's moderate but significant strictures on the excessive severity of some of the capital statutes[95]: 'Sir William Blackstone has been quoted as an authority in favour of the principle of the bill: but that writer, of whose genius and talents no one thinks more highly than I do, was young and inexperienced when he published his opinions; and much as I respect him, I cannot help regarding his judgment as of less value than that of Dr. Paley on the same point'.[96]

So great was the influence of Paley's doctrine that even as

[92] Romilly, *Memoirs* (1840), Vol. 2, p. 305.

[93] Another author of note who disagreed with Paley's doctrine was Dr. Samuel Parr. In 1810 Basil Montagu published a tract entitled *An Examination of some Observations made in the House of Commons upon a Passage in Dr. Paley's Moral Philosophy on the Punishment of Death*; in reply R. G. Arrowsmith published under the pseudonym of Juvenis, *A Letter to Basil Montagu upon his 'Examination of some Observations . . . in Paley's Moral Philosophy'*. Arrowsmith also published *Doubts upon the Reasoning of Dr. Paley relative to, and Observations on, the Criminal Law* (1811).

[94] *Parl. Deb.* (1810), Vol. 15, col. 371. See also Colonel W. Frankland's speech, *ibid.* (1811), Vol. 19, cols. 615–648. It is interesting to note that Paley's doctrine was accepted by Joseph Priestley; see 'Lectures on History and General Policy', *Theological and Miscellaneous Works* (ed. by J. T. Rutt, 1817–1831), Vol. 24, pp. 287–292 and 295.

[95] See on this below, p. 347.

[96] Reproduced by Basil Montagu in *The Opinions of Different Authors upon the Punishment of Death* (1813), Vol. 3, p. 272. For a slightly different version

late as 1836, when the reform of criminal law had already been largely accomplished, the Commissioners who drafted the *Second Report on Criminal Law* judged it necessary to precede their recommendations for a further revision by a lengthy critical examination of his views. For, as they put it, 'they are all that could be said for the practice by an eminently acute and skilful reasoner; and because they are the arguments chiefly relied upon by those who have defended it when subjected to Parliamentary discussion'.[97]

§ 4. SOME FORERUNNERS OF THE MOVEMENT FOR THE REFORM OF CRIMINAL LAW

Notwithstanding the forcibly expounded opinions of Madan, Paley and other writers, it would be wrong to assume that until the last decades of the eighteenth century the excessively severe criminal law evoked no opposition. On the contrary, its revision was intermittently urged throughout the sixteenth and seventeenth centuries by a number of statesmen, lawyers, divines and leaders of religious sects. In the writings and pronouncements of these men were laid down many of the principles on which the late eighteenth century reform movement was based.

The first statesman to recommend a revision of criminal law is generally admitted to have been Sir Thomas More. But the views of Coke, Bacon, George Fox, Bishop Jeremy Taylor and several others also deserve to be noted. Their main points are as follows.

Insistence on the need for a right balance between crime and punishment

Severity, though certainly necessary, cannot by itself be relied upon to prevent crime. When in More's *Utopia*,[98] the lawyer 'began dilligently and earnestly to praise that strait and

of this passage of Ellenborough's speech see *Parl. Deb.* (1811), Vol. 20, col. 299. Again in 1813, the Solicitor-General (Sir William Garrow), the Attorney-General (Sir Thomas Plumer), Serjeant Best, Wetherall and Frankland all based their views on Paley's doctrine; *Parl. Deb.* (1813), Vol. 25, cols. 369–389.

[97] 'The Second Report from His Majesty's Commissioners on Criminal Law' (1836), 343, 29; in *Parl. Papers* (1836), Vol. 36, p. 183 at p. 215.

[98] (Ed. by Ph. E. Hallett, 1937), p. 43.

rigorous justice which at that time was there executed upon felons, who, as he said, were for the most part twenty hanged together upon one gallows', and wondered why in spite of this exemplary severity so many robberies were still being committed, the divine replied: 'Marvel nothing hereat; for this punishment of thieves passeth the limits of justice, and is also very hurtful to the weal public. For it is too extreme and cruel a punishment for theft, and yet not sufficient to refrain and withhold men from theft. For simple theft is not so great an offence that it ought to be punished with death'. If in the *Utopia* it was a divine who pleaded for reform, some hundred years later the same issue was raised by a famous lawyer. It is a fallacy, states Coke, to believe that frequent punishment prevents crime. Those offences that are most often punished, are also most often committed, for the frequency of the punishment makes it too familiar to be feared. 'What a lamentable case it is', he writes,[99] 'to see so many Christian men and women strangled on that cursed tree of the gallows, insomuch as if in a large field a man might see together all the Christians, that but in one year, throughout England, come to that untimely and ignominious death, if there were any spark of grace, or charity in him, it would make his heart to bleed for pity and compassion. . . . the consideration of this preventing justice were worthy of the wisdom of a parliament, and in the mean time expert and wise men to make preparation for the same, as the text saith, *ut benedicat eis dominus*. Blessed shall he be that layeth the first stone of this building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our king and nation'.[1]

[99] 3 Inst. 243. But Coke makes no specific proposals for the mitigation of the severity of criminal law, and in the same passage insists that pardons should not be frequently granted.

[1] The frequency of capital punishment in England is also noted by Sir John Fortescue, who states that more men were being hanged in this country in the course of one year, than in France in seven years: *The Governance of England* (ed. by Ch. Plummer, reprint of 1926), p. 141. It would seem, however, that Fortescue did not object to the severity of English law; see on this *De Laudibus Legum Anglie* (ed. by S. B. Chrimes, 1942), p. 113, where the prince says: 'There is no need, chancellor, to argue much in these cases. For though in England clandestine and open thieves are everywhere punished with death, they do not cease to plunder there, and if they do not in the least fear so great a penalty, how much less would they abstain from crime, if they anticipated a lesser punishment?'.

The excessive severity of a great number of statutes tends to undermine the authority of the law. 'The acerbity of a law ever deadens the execution', writes Bacon[2]; while Lord Clarendon alleges that undue severity of punishment causes faults to be carefully concealed rather than not to be committed.[3] In an enlightened tract published in 1657 William Tomlinson[4] draws attention to the need for maintaining a right proportion between crime and punishment. Disregard of this principle leads inevitably to a falling off of prosecutions, a fact which in his view had become notorious in England. Samuel Chidley similarly pleads for steps to be taken 'so that in the execution of justice, the remedy may not be worse than the disease'; steps to make punishments correspond to offences so that prosecutors or executors of the law may have no cause to repent; and so that 'one witness may not rise against any man, for any iniquity, but that, at the mouth of two or three witnesses, the matter may be established'.[5]

[2] He also advocates the repeal of 'the multitude of unnecessary penal laws which now lie upon . . . people as the rain whereof the Psalm speaks, *Pluet super eos laqueos*, to their infinite (interest) and peril, and besides doth breed another inconvenience as ill as the former, in that the cessation and abstinence to execute these unnecessary laws doth mortify the execution of such laws as are wholesome and most meet to be put in execution both for your Majesty's profit and the universal benefit of the realm'; *The Works* (ed. by J. Spedding, E. L. Ellis and D. D. Heath, 1879), Vol. 7, note 2 at p. 315.

[3] 'Of Drunkenness', *Miscellaneous Works* (2nd ed., 1751), p. 107.

[4] *Of hanging for theft, so filling the land with blood*; published in a collection of the 'Westminster Meeting of Friends' and partially reproduced by Basil Montagu in *Rise and Progress of the Mitigation of the Punishment of Death* (1822), pp. 28–35.

[5] 'A Cry against a Crying Sin: Or, a just Complaint to the Magistrates, against them who have broken the Statute Laws of God, by Killing of Men merely for Theft' (1652); *Harleian Miscellany* (1811), Vol. 8, p. 477, at p. 479. Chidley made great efforts to stir up an agitation in favour of a reform of the law, and though he embarked upon this ambitious project in rather an awkward way, his efforts deserve to be noted. He first sent a petition to the 'Lord Mayor, Aldermen and Commons, in Common-Council assembled'. When the petition was disregarded, he wrote a letter to the Lord Mayor, a memorandum 'in behalf of Transgressors', a letter to the judges at the Old Bailey delivered when they were engaged in a capital trial, and two additional petitions, one addressed 'To the Right-Honorable the Council of State', and another 'To the Right-Honorable the General Council for the Army'. These were followed by a letter addressed 'to the Regulators of the Law, appointed by the Parliament, and sent, and presented to that Committee'. When all his exertions failed, Chidley, with the aid of his supporters, attempted to nail his tract to the gallows at Tyburn just before an execution was to take place; *ibid.*, pp. 477–489.

The third principle laid down in these early writings is that whereas society is justified in inflicting capital punishment, it ought to be recognised as an extreme measure, to be confined to serious offences. Bishop Jeremy Taylor states[6]: 'Fear is the beginning of wisdom, and fear is the extinction and remedy of folly; and therefore the laws take care by the greatest fear, the fear of death, to prevent or suppress the greatest wickedness'. But although the infliction of capital punishment is warranted, this power 'must not be reduced to act in trifling instances; for the loss of a few shillings or for every disobedience to command it must not be done, but in great and unavoidable necessities of the commonwealth'.[7] George Fox, the founder of the Society of Friends, was moved by the same considerations when he condemned the practice of 'putting men to death for cattle, and money, and small matters'. This, he writes in his *Journal*, is contrary 'to the law of God in old time'.[8] One of the main arguments these early writers advanced in favour of a more restricted use of the death penalty was the Mosaic law, which appointed death for murder, but only restitution of goods for theft.[9]

Berkeley's views may also be mentioned here. In the

[6] 'Ductor Dubitantium, or, The Rule of Conscience in all their General Measures', *Works* (ed. by A. Taylor. 1852), Vol. 10, p. 71. Taylor was born in 1613 and died in 1667.

[7] *Ibid.*, p. 70.

[8] *Journal of George Fox* (ed. by W. Armistead, 1852), Vol. 1, p. 95.

[9] Sir Walter Raleigh is an exception in this respect. In one passage of his *History of the World* he states that 'they (the laws of Moses) do not hold affirmatively that we are tied to the same severity of punishment now, which was inflicted then; but negatively they do hold, that now the punishment of death should not be adjudged, where sentence of death is not given by Moses: Christian magistrates ruling under Christ the *Prince of peace*, that is, of clemency and mercy, may abate of the severity of Moses' law, and mitigate the punishment of death, but they cannot add unto it, to make the burden more heavy; for to shew more rigour than Moses becometh not the gospel'. Yet in an earlier passage he says that he is not competent to judge whether the laws of Moses 'ought to be a precedent, from which no civil institutions of other people should presume to digress'. That he was himself inclined to support such a departure, at least as regards the punishment for theft, may be inferred from the following passage: 'And such is the mischief of robbery as where Moses for lesser crimes appointed restitution fourfold, policy of state and necessity hath made it death'; 'The History of the World', *Works* (1829), Vol. 3, pp. 146, 145 and 135.

Bishop Martin Bucer (1491–1551) wanted capital punishment to be retained only for those offences which had been punished by death by the law of Moses but in addition to impose it for the breaking of Sabbath; H. T. Buckle, *Miscellaneous and Posthumous Works* (ed. by G. Allen, 1885), Vol. 2, p. 74.

Querist, a series of 595 maxims in the form of queries embodying suggestions on economic and social matters,[10] Berkeley questions the expediency of transporting offenders instead of employing them on public works; suggests that the death penalty should be replaced by hard labour—a proposal similar to that which Beccaria brought forward some forty years later; and further suggests the setting up of corrective institutions for reforming young offenders.[11]

Proposals to restrict the scope of the death penalty for offences against property.

As regards specific proposals for the revision of English criminal law, two tendencies may be discerned. The first was to repeal the death penalty for at least minor thefts, and was favoured by Thomas More, Jeremy Taylor, Samuel Chidley, William Tomlinson and George Fox.[12] The law reformers of the Commonwealth held similar views.[13]

[10] Published between 1735–1737. On the importance of the *Querist* see A. C. Fraser, ' Life and Letters of George Berkeley, D.D.', in Berkeley's *Works* (ed. by A. C. Fraser, 1871), Vol. 4, pp. 242–243.

[11] Queries 53, 54 and 55. They run as follows: ' 53. Whether some way might not be found for making criminals useful in public works, instead of sending them either to America, or to the other world? 54. Whether we may not, as well as other nations, contrive employment for them? And whether servitude, and hard labour, for a term of years, would not be a more discouraging, as well as a more adequate, punishment for felons than even death itself? 55. Whether there are not such things in Holland as bettering houses for bringing young gentlemen to order? And whether such an institution would be useless among us? '; *ibid.*, Vol. 3, pp. 359–360. Querie No. 55 refers to the famous Amsterdam Houses of Correction. On this early experiment see Professor Thorsten Sellin, *Pioneering in Penology* (1944).

[12] George Fox also referred to horse-stealing. Thomas Middleton (the dramatist, 1570–1627), was against capital punishment for sheep-stealing; ' Any Thing for a Quiet Life ', *Works* (ed. by A. Dyce, 1840), Vol. 4, p. 460.

[13] In a tract entitled ' The Corruption and Deficiency of the Law of England, soberly discovered ' (1649), John Warr criticises the system of laws in a series of questions, two of which are: ' Why are men's lives forfeited by the law upon light and trivial grounds? Why do some laws exceed the offence? And, on the contrary, other offences are of greater demerit than the penalty of the law? ' *Harleian Miscellany* (1809), Vol. 3, p. 257. William Sheppard holds that ' there are some Laws that are or seem to be hard, cruel, burdensome and oppressive to the people . . . where the punishment doth exceed the offence in the manner, or matter; as the manner of death for Treason, and where one refuseth to plead in case of Felony: And for the matter, where a man is to dye for a theft, perhaps for stealing a small matter. . . '. He objects to taking a man's life ' for a small or trivial Theft, For razing a Record, For taking away an Heir to marry her, For forging a Deed, For acknowledging a Deed or Fine in anothers name, For calling a man's self an

The second line of approach to the problem was advocated by Sir Henry Spelman. Concerning laws which made the infliction of capital punishment dependent on the value of stolen property, he remarks that the purchasing power of money had changed considerably since these laws were

Egyptian, For transporting of sheep beyond Sea, For counterfeiting Testimonial, and some other such like things . . . '.

As an example of what he calls ' hard laws ' he quotes: 8 Hen. 6, c. 11 (1429; Apprentices); 5 Eliz. c. 14 (1562; Forgers of false deeds and writings); 21 Jac. 1, c. 29 (1623; Leases of lands, etc.); 8 Eliz. c. 13 (1565; Sea-marks and mariners); 1 Jac. 1, c. 31 (1604; Persons infected with plague); 1 & 2 Ph. & M. c. 5 (1554; Carrying of corn, etc. over the seas); 39 Eliz. c. 17 (1597; Wandering persons pretending to be soldiers or mariners); 33 Hen. 6, c. 1 (1452; Servants imbezzling their masters' goods after his death); 3 Jac. 1, c. 4 (1605; Discovering and repressing Popish recusants); 3 Hen. 7, c. 2 (1482; Carrying away a woman that has lands or goods, against her will); 34 Edw. 3, c. 22 (1360; Concerning the use of another man's hawk); 37 Edw. 3, c. 19 (1363; *ditto*); 18 Hen. 6, c. 19 (1439; Soldier departing from his captain without licence); 3 Hen. 6, c. 1 (1423; Masons not to confederate themselves in chapiters and assemblies); 5 Hen. 4, c. 4 (1403; Felony to use the craft of multiplication of gold or silver); 1 Hen. 7, c. 7 (1485; Hunting at night or in disguise); 21 Hen. 8, c. 7 (1529; Servants embezzling their masters' goods to the value of 40 shillings); 3 Edw. 1, c. 20 (1275; Robbing tame animals in a park); 39 Eliz. c. 4 (1597; Punishment of rogues, vagabonds and beggars); 1 Jac. 1, c. 7 (1604; *ditto*); 43 Eliz. c. 13 (1601; Concerning outrages committed in Cumberland Northumberland, and some other counties); *England's Balme: Or, Proposals By way of Grievance and Remedy* (1657), pp. 15 and 195. It would appear that Sheppard was the most radical among the law reformers of the Commonwealth.

Inequality of punishment was further criticised by Whitelock. Cromwell's attitude towards reform was sympathetic. In a speech delivered in 1656 he said: ' The Truth of it is, There are wicked and abominable Laws, which it will be in your power to alter. To hang a man for Six-and-eightpence, and I know not what; to hang for a trifle, and acquit murder—is in the ministration of the Law, through the ill-framing of it. I have known in my experience abominable murders acquitted. And to see men lose their lives for petty matters: this is a thing God will reckon for. And I wish it may not lie upon this Nation a day longer than you have an opportunity to give a remedy: and I hope I shall cheerfully join with you in it. This hath been a great grief to many honest hearts and conscientious people; and I hope it is in all your hearts to rectify it '; Thomas Carlyle, *Oliver Cromwell's Letters and Speeches* (1897), Vol. 3, pp. 298–299.

However, the laws, as well as some of the draft-proposals made under the Commonwealth, fall short of these critical observations. They constitute a curious mixture of enlightened and regressive tendencies. The burning of women for murder, *peine forte et dure* and the benefit of clergy were to be abolished: these were all bold and anticipatory proposals. Moreover, it was proposed to repeal the death penalty for first offences of both horse-stealing and pocket-picking, though the alternative penalties were very severe. On the other hand, not only was capital punishment to be retained for all other previously capital offences, but it was to be extended to a number of others, such as adultery, bigamy, manslaughter, duelling and taking away children under fifteen. Finally, a murderer was to have his right hand cut off before being put to death. For these and other highly interesting provisions see

framed [14]; hence while the value of everything had risen, the life of man had grown cheaper.[15] Spelman does not lay down to what extent these laws should be revised, but any amendment on the lines he suggests would have considerably restricted the scope of the death penalty for all offences against property.

Emlyn on the reform of criminal law and procedure

These early observations leave little doubt that even without the stimulus of foreign influences a new penal doctrine would have been evolved in this country. That this was inevitable is clear from the attitude of so learned and cautious a writer as Sollom Emlyn,[16] who in 1730, that is thirty-four years before

Somer's *Tracts* (2nd ed., 1811), Vol. 6, pp. 188–189; 190–191; 234–239; see also: S. R. Gardiner, *History of the Commonwealth and Protectorate* (1903), Vol. 2, pp. 2 and 82–83; F. A. Inderwick, *The Interregnum* (1891), particularly Chaps. 1 and 4; R. Robinson, 'Anticipations under the Commonwealth of Changes in the Law', *Select Essays in Anglo-American Legal History* (Boston, 1907), Vol. 1, pp. 467–491; Stephen, *H.C.L.*, Vol. 2, pp. 208–211; Holdsworth, *H.E.L.*, Vol. 6, p. 412 *et seq.*

The programme of penal revision sponsored by the Levellers was much more extreme. They favoured the abolition of capital punishment for all offences except murder and violent attempts to overthrow the constitution; see on this Don. M. Wolfe, *Leveller Manifestoes of the Puritan Revolution* (1944), pp. 137, 302, 398 and 407.

[14] *Archaeologus in modum Glossarii* (1626), Vol. 1, p. 350. Spelman was born about 1564 and died in 1641; *D.N.B.* XVIII, 736.

[15] *Ibid.*, pp. 425–426, Spelman writes: 'Prisca Anglorum lex *larrcinium* seu furtum divisit in maius, et minus: maiusq; dictum est, cum res furata 12. valeret denarios: minus, cum non tanti aestimaretur: et hoc flagro, illud patibulo (prout hodie) luibatur. Anidmadverte autem in quantam asperitatem, ex rerum temporumq; vicissitudine, lex antiqua abripitur. Quod enim olim aliquando 12. vaenit denarijs, hodie saepe 20. solid. imo 40. vel pluris est: nec vita hominis interca charior, sed abiectior. Qui tunc igitur 7. surripuerat frumenti modios, morti nen tradendus fuit: cum eiusdem hodie reus sit, qui quartam modij partem clepserit. Justum certe est, vt. collapsa legis aequitas restauretur, et vt diuinea imaginis vehiculum, quod superiores pridem aetates ob grauissima crimina nequaquam tollerent, . . . leuicribus hodie ex delictis nen perderetur.

'Inter minuta autem furta quae forenses vocant *petie Larcenes*, olim habebantur equi et bovis subtractio; vt perspicuum est ex Assisis Hen. II. *Clarendomae* editis: vbisic legitur: *Hac Assisa attenebit—in murdro et proditione, et iniqua combustione, et in omnibus praedictis, nisi in minutis furtis, et roberijs quae factae fuerunt tempore guerrae, sicut de equis et bobus, et minoribus rebus*'.

[16] Born in 1697 and died in 1754. Studied law at Leyden, became a member of Lincoln's Inn and gained a great reputation as a counsel. Edited with remarkable skill Hale's *History of the Pleas of the Crown* (1736) and prepared the second edition of the *State Trials* in six volumes (1730). Author of the tract *Queries relating to Elizabeth Canning's Case, with Answers* (1754).

the publication of Beccaria's treatise *On Crimes and Punishments*, pleaded for a far-reaching reform of the whole system of criminal justice.[17] Expressing his great appreciation of English criminal procedure in the words 'it may with great truth and justice be said, That we have by far the better of our neighbours, and have deservedly their admiration and envy,' he none the less puts forward certain proposals for reform even in this field, all of which were adopted in the course of the next hundred and fifty years. But his main criticism is directed against the capital laws and the grave deficiencies of secondary punishments. He complains that 'the letter of the law makes no difference between picking a man's pocket and cutting his throat; between stealing his horse and firing his house about his ears'. In another passage he thus sums up his critical remarks:—

> 'Death is *ultimum supplicium*, and is therefore intended only for crimes of the highest rank; but when it is indiscriminately inflicted, it leaves no room to difference the punishments of crimes widely different in their own nature. The lower part of mankind are apt in dubious cases to judge of the heinousness of the Offence by the severity of the Punishments; but yet, when they see the same punishment annext, where the difference of Guilt is manifest and apparent, they soon lose the sense of that extraordinary guilt, and instead of conceiving worse of the crime, they only blame the cruelty of the law. Further, when such numbers are continually ordered for Execution, . . . the frequency of the example destroys the terror of it, and makes it less dreaded than going to the Galleys or any place of hard labour. Besides, when the punishments are so very disproportionate to the offence, it defeats the end of them, forasmuch as those, who have any tenderness or humanity in their temper, will much rather forbear wholly to prosecute, than be made the Instruments of putting such severe laws in execution; instead therefore of being a means of bringing the Offenders to punishment, it is oftentimes the very reason why they escape with impunity.'[18]

This statement embodies the basic principles on which in later years English penal reformers built their programme.

[17] See his preface to the second edition of *State Trials* reproduced in T. B. Howell's edition of 1816, Vol. 1, pp. XXII–XLI.

[18] *Ibid.*, p. 33.

However, before this programme had had time to mature, a strong parallel movement had developed on the Continent. It led to the reform of the criminal codes of a number of European States, influencing also English contemporary thought on penal matters.

Chapter 9

SOME MAJOR DEVELOPMENTS IN THE MOVEMENT FOR THE REFORM OF CRIMINAL LAW ON THE CONTINENT

Eighteenth century English criminal law was undoubtedly in need of extensive revision. Yet taken as a whole, the English system of criminal justice was incomparably superior to that of any other leading European country. Mirabeau—with his customary grasp of essentials—thus tersely defined the position in this field: 'En Angleterre il n'y a, selon moi, du moins à cet égard, qu'à corriger, au lieu que chez nous tout est à refaire . . .'.[1]

The one signal feature, common to the English and the Continental systems of criminal law alike, was the utter lack of balance between the gravity of offences and the severity of their corresponding punishments, with the consequent wide scope assigned to the death penalty.[2] Therefore when a new and much more humane penal doctrine was evolved in many European countries in the middle of the eighteenth century, and far-reaching reforms brought about, these developments were watched with great interest in England. They had a

[1] See Comte de Mirabeau's Preface to *Observations d'un Voyageur Anglais sur Bicêtre* (1788), p. VI. The English traveller was Sir Samuel Romilly who, during his stay in Paris in 1788, visited Bicêtre and was shocked by the state both of the prison and of the hospital; see on this below, p. 321 and note 97, *ibid.*

[2] De Pastoret quotes one hundred and fifteen offences for which French law appointed capital punishment; *Des Lois Pénales* (Paris, 1790), Vol. 2, Part IV, pp. 120–133. Aggravated forms of the death penalty were both more numerous and more frequently inflicted than in England. In one of his *Discours sur l'Administration de la Justice Criminelle* (1767), Servan said: 'En effet, nos loix n'ont distingué ni les délits, ni les peines; elles n'ont fait aucune division des crimes par leur genre, par leur espèce, par leur objet, par leurs degrés. . . . Mais avons-nous mieux déterminé les peines que les délits? Non, sans doute; et le premier vice entraine le second. . . . Quelle différence avons-nous mise dans nos supplices? La mort, toujours la mort, . . . cependant quelle distance dans les crimes'; reprinted in the *Bibliotheque Philosophique du Législateur* (ed. by J. P. Brissot de Warville, 1782), Vol. 2, p. 125 *et seq.*; quotation at pp. 192, 194–195, 195.

profound influence on the trend of English thought and gave a strong impetus to the movement for the reform of English criminal law.

§ 1. PENAL CONCEPTS OF MONTESQUIEU

The first notable author of the period to point to a number of defects in contemporary systems of criminal law and to lay down certain guiding principles for future legislation was Montesquieu.[3] Some of the ideas and suggestions which he later developed more fully in *L'Esprit des Lois*,[4] are already traceable in the *Lettres Persanes*, first published in 1721.[5] On the basis of these earlier observations and subsequent, much more comprehensive, statements it is possible to reconstruct what may be called Montesquieu's penal doctrine.

The object and measure of punishment

On the object of punishment his remarks are somewhat disconnected. The principal object of all punishment—he

[3] G. W. Böhmer—not without reason—calls Montesquieu the ' Vater der Kriminalpolitik '; *Handbuch der Litteratur des Kriminalrechts* (Göttingen, 1816), p. 859 (Register). This is also the view of a modern writer, E. Hertz, *Voltaire und die französische Strafrechtspflege im 18 Jahrhundert* (Stuttgart, 1887), p. 136.

On Montesquieu's personality and his contribution to political and legal science see Sir Courtenay Ilbert's brilliant Romanes Lecture delivered at Oxford in 1904 and reproduced in *Great Jurists of the World* (ed. by Sir John Macdonell and E. Manson, 1913), pp. 417–446. Charles Louis de Secondat, Baron de la Brède et de Montesquieu, was born in 1689 and died in 1755.

[4] The first edition was published in Geneva in 1748. Montesquieu described this book as ' the work of twenty years ', including three years of travel. ' My business ', he writes, ' is not to make people read, but to make them think '; Book XI, Chap. 20. He achieved both. On its publication, *Esprit des Lois* was reprinted in Amsterdam, London and Paris. Within less than two years twenty-one editions were published and the book was translated into most European languages.

[5] See in particular *Lettre* LXXX (cruel punishments are not necessarily the most effective means of repressing crime); *Lettre* CII (the danger of making punishment disproportionate to crime); *Lettre* LXXVI (objecting to a severe punishment for suicide); and *Lettre* LXVIII (criticising the ignorance of French judges); *Lettres Persanes* (preceded by ' Éloge de Montesquieu ' by d'Alembert, Paris, 1828), pp. 200–201, 248–249, 189–191, and 174–175.

On the importance of *Lettres Persanes* see F. Vorländer, *Gesechichte der philosophischen Moral, Rechts- und Staats-Lehre der Engländer und Franzosen* (Marburg, 1855), p. 628 *et seq.*, and P. Janet, *Histoire de la Science Politique* (3rd ed., 1887), Vol. 2, p. 322 *et seq.*

states in one place—'ought always to be the establishment of order'.[6] Elsewhere he mentions repayment of the damage caused by crime, while in yet another important passage he refers to the law of retaliation.[7] He seems to consider that retaliation ought in some part to determine the nature and measure of punishments, but emphasises the need for moderation, pointing out that only despotic countries accept retaliation 'in full rigour'.[8] It is important to note that although Montesquieu recognises that crimes offend religion, he rejects the theological approach to punishment which left its mark on many European legal systems.[9] He was a rationalist and was—on this subject—in full agreement with the ideology of the period of illumination.[10] He also notes that the purport of punishments varies according to the state of civilisation and of manners; hence the need for a periodical readjustment of penalties which should never be considered immutable, to be accepted in the same form from generation to generation, regardless of constantly changing social and political conditions.[11]

On the principles governing the assessment of punishments Montesquieu's remarks are much more precise. (a) Penalties

[6] *The Spirit of Laws* (Transl. by Th. Nugent, 1823), Vol. 1, Book XII, Chap. 14, p. 195. All ensuing references are to this edition of Montesquieu's work.

[7] *Ibid.*, Book VI, Chap. 19, p. 90.

[8] He approves of certain ancient laws based on retaliation, provided that this were the only way to give the plaintiff full satisfaction, and provided further that the payment of damages would be allowed even after conviction and that if effected, would obviate the need for enforcing corporal punishment.

[9] According to this concept, 'la peine était une sorte de satisfaction donnée par avance au Tribunal Suprême'; A. Guillot, quoted by R. Höhn, *Die Stellung des Strafrichters in den Gesetzen der französischen Revolutionszeit 1751–1810* (Berlin, 1929), p. 30, who thus defines the basic postulate of this approach: 'Indem man straft, sühnt man in gewissem Sinn das Verbrechen in den Augen Gottes. Die Strafe kann deshalb gar nicht hart genug sein'; *ibid.* See also below, note 89 at p. 289. Montesquieu states his attitude to this problem in the following words: 'But we must honour the Deity and leave him to avenge his own cause. And, indeed, were we to be directed by such a notion, where would be the end of punishments'; *The Spirit of Laws*, Book XII, Chap. 4, p. 185.

[10] The descriptive term used by the Germans is *Aufklärungszeit*; Italians speak of *movimento illuminista*; John Morley uses the word *Illumination*; see for instance his *Diderot and the Encyclopædists* (1878), Vol. 1, p. 9.

[11] Professor Donnedieu de Vabres rightly points out that Montesquieu '. . . a ainsi montré la relativité du droit pénal . . .'; *Traité Élémentaire de Droit Criminel et de Législation Pénale Comparée* (2nd ed., Paris, 1943), p. 20.

should be moderate. Again and again he insists on this principle, urging the avoidance of extreme measures and praising the wisdom of legislators who endeavour to reclaim people ' by a just temperature of punishments and rewards '.[12] One of the main advantages of moderate penalties, he states, is that ' there would be always judges and accusers ', whereas cruel measures deter would-be prosecutors and also corrupt the manners of the people.[13] (b) It is essential that a great crime should be avoided rather than a smaller, and one more dangerous to society rather than one less so. Hence the need for maintaining a certain balance between the gravity of the offence and the severity of the corresponding punishment. A great abuse in French law was, he writes, ' to condemn to the same punishment a person that only robs on the highway, and another who robs and murders. Surely, for the public security, some difference should be made in the punishment '.[14] (c) He has little or nothing to say on such matters as the probable effect of particular penalties, their characteristics and the methods to be employed in carrying them out. Since

[12] *The Spirit of Laws*, Vol. 1, Book VI, Chap. 13, p. 84.

[13] *Ibid.*, Chap. 14, p. 85 and Chap. 12, p. 82. At the same time he thus condemns emergency laws:

' If an inconveniency or abuse arises in the state, a violent government endeavours suddenly to redress it; and instead of putting the old laws in execution, it establishes some cruel punishment, which instantly puts a stop to the evil. But the spring of government hereby loses its elasticity; the imagination grows accustomed to the severe as well as to the milder punishment; and as the fear of the latter diminishes, they are soon obliged in every case to have recourse to the former. . . . When the abuse is redressed, you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this severity; the minds of the people are corrupted, and become habituated to despotism '; *ibid.*, pp. 81 and 82.

[14] *Ibid.*, Book VI, Chap. 16, p. 88. It is interesting to note that Montesquieu defends his postulate not on the grounds of justice but on those of public utility. This emerges still more clearly from the example he gives to illustrate his point of view: ' In *China* those who add murder to robbery, are cut in pieces; but not so the others; to this difference it is owing, that though they rob in that country, they never murder. In Russia, where the punishment of robbery and murder is the same, they always murder. The dead, say they, tell no tales '; *ibid.*

In England the punishment for these two offences was substantially the same and yet the incidence of murder was very low; see above, p. 30 and below, p. 530; see also Appendix 3, pp. 708–709. According to Montesquieu this apparent contradiction is to be explained by the fact that in England robbers ' have some hopes of transportation which is not the case in respect to those that commit murder '; *ibid.* On Bentham's comment on this remark see below, pp. 376–377.

he believed in the efficacy of moderate punishments, it may be inferred that he would probably have opposed cruel penalties, such as mutilation; he explicitly objects to measures that would punish children for their fathers' crimes.[15] He also suggests that a fine should be the punishment for a greater range of offences, adding that 'a good legislator takes a just medium; he ordains neither always pecuniary, nor always corporal punishments'.[16] But he is emphatic on the limitations of punishments.[17] Crime can best be prevented by improving manners, which alone can occasion that feeling of shame which 'on every side invades the delinquent' and makes penalties effective. The cause of human corruption proceeds 'from the impunity of criminals, and not from the moderation of punishments'.[18] (d) Penalties must derive from 'the particular nature of the crime' to which they refer.[19] He insists on this point primarily because its observance would enhance the legality of the system of criminal justice. But he also gives a classification of offences according to their gravity and suggests the punishment which each should carry, thus incidentally raising one of the most complex problems with which penal reformers had to contend.[20]

Classification of offences

Montesquieu divides crimes into four groups: those prejudicial to religion; to morals; to public order; and to the security of the subject.[21] As regards the first group his views were much in advance of his time. He suggests that only direct attacks on religion, expressed in public acts, ought to be punished; '. . . where there is no public act, there can be no criminal matter, the whole passes betwixt man and God, who knows the measure and time of his vengeance'. These direct

[15] Like for instance confiscation of property in cases of high treason; *ibid.*, Book XII, Chap. 18, p. 198.
[16] *Ibid.*, Book VI, Chap. 18, p. 90.
[17] 'Punishments . . . will not remove the evil itself'; *ibid.*, Book XIX, Chap. 17, p. 309.
[18] *Ibid.*, Book VI, Chap. 21, p. 91, and Chap. 12, p. 82.
[19] *Ibid.*, Book XII, Chap. 4, p. 184.
[20] For similar suggestions made by some English reformers see below, pp. 304–309, 446–447, and 536.
[21] *Ibid.*, Book XII, Chap. 4, p. 184 *et seq.*

sacrileges[22] should be punished by expulsion from places of worship and by temporary or permanent exclusion from the society of the faithful, which could be brought about by such means as avoidance or execration. In the second group he puts offences which violate '. . . the manner in which the pleasure annexed to the conjunction of the sexes is to be enjoyed '.[23] At the root of such offences are carelessness and self-neglect rather than malice. Their punishment should always be derived 'from the nature of the thing'; fines, public infamy, expulsion from home and society and other corrective measures should be sufficient. Offences against public order, which form the third group, should be punished either by imprisonment, by exile, or by any other measure likely to curb turbulent spirits and force them to conform to the established order. Offences belonging to the fourth group should carry punishments based on the principle of retaliation. Those directed against life should be punished by death; those against property should, as a rule, be punished by a fine, but Montesquieu does not exclude the possibility of inflicting the death penalty for at least some of them.[24] It is important to note that where the penalty for a certain offence is very severe, he does not recommend its extension to other similar offences. Thus, although he approves of the Greek and Roman practice of providing the same penalty for both the thief and the receiver of stolen property, he objects to the adoption of this principle in France on the ground that since in France larceny is a capital offence, 'the receiver cannot be punished like the thief, without carrying things to excess'.[25] However, he does recommend an equal punishment whenever the punishment for theft was a fine.

Montesquieu's classification, although somewhat rudimentary, is important inasmuch as it was one of the first attempts

[22] He transfers to the third and fourth group offences that prevent the exercise of religion.

[23] Excluding rape, which he includes in the fourth group.

[24] For Montesquieu's views on capital punishment see below, pp. 283–284.

[25] 'A receiver', he writes, 'may act innocently on a thousand occasions; the thief is always culpable: one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the thief must surmount more obstacles, and his soul must be more hardened against the laws'; *ibid.*, Vol. 2, Book XXIX, Chap. 12, p. 246.

to divide criminal acts into groups in accordance with their gravity and to revise the scale of punishments. It constituted a valuable point of departure for future legislators.[26]

Connection between the form of government and the penal system. Remarks on the form of law

Montesquieu believed that a penal system based on moderate punishments could only fully develop in a liberal and free country. 'It would be an easy matter to prove', he writes, 'that in all, or almost all the governments of Europe, penalties have increased or diminished in proportion as those governments favoured or discouraged liberty'.[27] Only in a country where authority is upheld not by terror but by consent, will the laws be framed in accordance with the spirit of the nation. Such conditions favour the emergence of an enlightened and humane penal system under which the scope of criminal law is reduced to a minimum and the individual rights and freedom of the subject safeguarded.[28]

[26] He finds it 'very odd' that according to French law, witchcraft, heresy, and crimes against nature were punishing with burning, for as he puts it, 'the first might easily be proved not to exist; the second to be susceptible of an infinite number of distinctions, interpretations, and limitations; the third to be often obscure and uncertain . . .'; *ibid.*, Vol. 1, Book XII, Chap. 6, p. 188. He objects to the inclusion of coining in the class of high treasons. This, he contends, is nothing else but '. . . confounding the idea of things'; the very horror of high treason is diminished by giving the name to another crime; *ibid.*, Book XII, Chap. 8, p. 190. He also insists that only very few offences should be included in the class of high treasons, and that certain less serious offences within this class should carry correspondingly lighter penalties; see on this *ibid.*, Chaps. 7–19, p. 189 *et seq.*

[27] *Ibid.*, Book VI, Chap. 9, p. 79. This maxim was quoted by those who favoured the revision of English criminal law; see for instance above, note 32 at p. 38.

[28] *Ibid.*, Book XIX, Chap. 4, p. 300; Book VI, Chap. 2, p. 72; and Book XIX, Chap. V, p. 301.

Elsewhere Montesquieu writes that the laws 'which render that necessary which is only indifferent, have this inconveniency, that they make those things indifferent which are absolutely necessary'; *ibid.*, Vol. 2, Book XXIV, Chap. 14, p. 113.

In a brief but brilliant chapter he shows that 'there is no word that admits of more various significations, and has made more different impressions on the human mind, than that of *Liberty*'; *ibid.*, Vol. 1, Book XI, Chap. 2, p. 149; but elsewhere he states that 'political liberty consists in security, or, at least, in the opinion that we enjoy security'; *ibid.*, Book XII, Chap. 2, p. 183, and that it is 'on the goodness of criminal laws, that the liberty of the subject principally depends'; *ibid.* Montesquieu makes a number of suggestions relating to this subject, all of which have the same object in view: to improve criminal law and procedure in order to safeguard the liberty

When examining the technique of legislation Montesquieu does not refer to any specific segment of the law; but the principles he lays down are yet directly relevant to criminal law, and are moreover often illustrated by examples borrowed from various penal codes. There is a certain affinity between Montesquieu's remarks on this subject [29] and Bacon's aphorisms.[30] They implement each other and together form a guide for legislators, laying down a number of principles almost all of which were grossly neglected in the eighteenth century. The range of these remarks is very wide. Referring mainly to the form in which laws should be expressed, they also have a bearing upon their substance [31] and indicate the extent to which the comparative method may be of use to legislators framing laws for their own particular countries.[32]

Montesquieu evolved no uniform penal doctrine. The importance of his contribution lies first and foremost in that he denounced the concept of punishment based on extreme intimidation and by so doing paved the way for more enlightened and humane doctrines to come.[33] The detachment with which he discussed penal matters is particularly

and security of the subject; and to limit the power of the State so as to prevent it from becoming despotic and arbitrary.

Guido de Ruggiero rightly emphasises that Montesquieu was the exponent of the doctrine called by the French ' guarantisme '—a system designed to protect the rights of the individual against encroachment by the State—that is ' the conception of substituting guarantees of freedom for formal and often ineffectual declarations of its ideal essence '; *The History of European Liberalism* (transl. by R. G. Collingwood, 1927), p. 54. This subject is outside the scope of the present inquiry, the purpose of which is only to examine Montesquieu's penal doctrine.

[29] *Ibid.*, Vol. 2, Book XXIX, p. 239 *et seq.*

[30] ' Advancement of Learning ', *Works* (ed. by J. Spedding, R. L. Ellis and D. D. Heath, 1877), Vol. 5, p. 88 *et seq.*

[31] Laws, Montesquieu holds, should be concise, plain and simple; not too subtle; exceptions and limitations should, if possible, be avoided. Among many remarks applicable to English penal laws the following may be quoted: ' When the law would fix a set rate upon things, it should avoid as much as possible the estimating it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent fellow at Rome, who used to give those he met a box on the ear, and afterwards tendered them the five and twenty pence of the law of the Twelve Tables '; *Ibid.*, Vol. 2, Book XXIX, Chap. 16, p. 250. See on this Sir Henry Spelman's remark above, pp. 264–265.

[32] *Ibid.*, Book XXIX, Chaps. 11 and 12, pp. 245–246.

[33] ' Les idées de Montesquieu ', writes Brissot de Warville, ' ont le mérite d'en avoir fait naître bien d'autres. Il faudra donc lui rendre l'hommage qu'il

striking when it is remembered how great were then the deficiencies of the system of criminal justice in his own country.[34] Believing in a peaceful readjustment of institutions to new needs, he offered his suggestions in a spirit of moderation and self-restraint. To further the revision of the entire system of criminal justice a much more vigorous attack was needed.[35] To a large extent this was initiated by Voltaire, who succeeded in mobilising public opinion which, largely under the influence of his flamboyant writings, became a powerful force behind the movement for reform. But mostly concerned as Voltaire was with certain specific abuses, he too evolved no constructive plan for the revision of criminal law.[36]

mérite, comme à celui qui a ouvert la carrière '; *Bibliotheque Philosophique du Législateur* (Paris, 1782), Vol. 1, p. XX.

[34] Only once, when referring to a provision of French penal law, he speaks of ' a great abuse '; see on this above, p. 271. The punishment for heresy and witchcraft he calls ' very odd '; above, note 26 at p. 274. He devotes twenty lines to the question of torture and refers to England to show that torture is not necessary ' in its own nature '. He agrees with the provision of the French law according to which the deposition of two witnesses was sufficient to justify the infliction of the death penalty. His attitude towards inquisitorial procedure lacks clarity and shows a certain hesitancy; compare Book VI, Chap 8, pp. 78–79 and Book XII, Chap. 20, p. 200. Though he points out that in France the accused was not allowed to produce his own witnesses and that circumstantial evidence in favour of the accused was very seldom admitted, he refrains from expressing any views about it; Book XXIX, Chap. 11, p. 245. Montesquieu, writes Professor Paul Janet, ' se garde bien d'attaquer les lois de sa patrie, car il n'a point, comme il le dit, l'esprit désapprobateur . . . '; *Histoire de la Science Politique* (3rd ed., Paris, 1887), Vol. 2, p. 380.

[35] Comparing Montesquieu with Rousseau, Leslie Stephen admirably brings out certain intellectual and temperamental characteristics of the former: ' On turning from Montesquieu to Rousseau, we may fancy that we have been present at some Parisian salon where an elegant philosopher has been presenting to fashionable hearers, conclusions daintily arrayed in sparkling epigram and suited for embodiment in a thousand brilliant essays. Suddenly, there has entered a man stained with the filth of the streets, his utterance choked with passion, a savage menace lurking in every phrase, and announcing himself as the herald of a furious multitude, ready to tear to pieces all the beautiful theories and formulas which may stand between them and their wants '; *History of English Thought in the Eighteenth Century* (3rd ed., reprint of 1927), Vol. 2, p. 193. Mme du Deffand said Montesquieu's book should be called not ' L'Esprit des Lois ', but ' De l'Esprit sur les Lois '.

[36] ' Voltaire's attitude towards criminal law had been rather vague and uncertain: he had taken an interest in many details, rather than in the criminal problem as a whole, and his reactions towards different cases had been rather impulsive and contradictory. He had not shown . . . a desire to see the existing criminal law thoroughly discussed and reformed '; M. T. Maestro, *Voltaire and Beccaria as Reformers of Criminal Law* (1942), p. 40. For a good survey of Voltaire's attitude to the problems of criminal justice prior to the appearance of Beccaria's book see *ibid.*, pp. 34–50.

A vigorous, but yet fragmentary, plea for criminal law reform was made by

§ 2. CESARE BECCARIA

The influence of 'Dei Delitti e delle Pene'

When Cesare Beccaria wrote *Dei Delitti e delle Pene* he was only twenty-six years old and hardly known[37]; a year later his fame was world-wide.[38] It would be beyond the scope of this inquiry to attempt a detailed analysis of the circumstances

the Chevalier Louis de Jaucourt in his article on 'Crime' which appeared in 1754 in the *Encyclopédie ou Dictionnaire raisonné des Sciences, des Arts et des Métiers* (Paris, 1751–65), Vol. 4; see especially pp. 467–468. The influence of Montesquieu on de Jaucourt is apparent. In *Contrat Social* Rousseau made no constructive suggestions on the subject of penal law and procedure, except for a few remarks concerning the origins of punishment and of the death penalty; see on this below, note 62 at p. 284. There is hardly anything in Helvétius' works relating to penal matters, though his general influence on Beccaria was very pronounced; D'Alembert, Holbach and Diderot all made only a few fragmentary remarks on criminal law and punishment; some of these are quoted by Coleman Phillipson, *Three Criminal Law Reformers* (1923), pp. 44 and 49.

[37] Cesare Bonesana, Marchese di Beccaria, was born in Milan in 1738 to an old patrician family; he died in that city in 1794. He began his studies at the Jesuits' College in Parma, where he was particularly interested in mathematics; later he went to Padua where he graduated in law in 1758. For English literature concerning Beccaria see: Professor Coleman Phillipson, *Three Criminal Law Reformers* (1923), Chap. 1, p. 3 *et seq.*; T. R. Bridgwater's essay 'Cæsar Bonesana, Marquis di Beccaria', *Great Jurists of the World* (1913), pp. 505–516; and J. A. Farrer's 'Introduction' to his English translation of Beccaria's *Crimes and Punishments* (1880), especially Chaps. 1 and 2.

[38] He wrote his book between March, 1763 and January, 1764. The subject had been suggested to him by his friends Pietro and Alessandro Verri, who also gave him much valuable advice and moral support in the accomplishment of this task. Pietro was a noted economist as well as the author of several philosophical studies; Alessandro wrote literary and historical essays and held the office of a 'Protector of Prisoners', a kind of prison visitor. The two brothers were the main founders of the periodical *Il Caffé*, inspired by Addison's *Spectator*.

The first edition of *Dei Delitti e delle Pene* was published anonymously in Leghorn in 1764, both Beccaria and his friends the Verris being afraid—and not without reason—that it might expose Beccaria to persecution. The book evoked profound interest and a second edition followed almost immediately; a third edition was published in 1765.

The *Societé Economique* of Bern described the unknown author as a 'citizen who had dared to raise his voice on behalf of humanity against inveterate prejudice', and awarded him a gold medal; C. Cantù, *Beccaria e il Diritto Penale* (Firenze, 1862), p. 173. At the same time the book met with violent opposition. In Italy, Angelo Fachinei, a Dominican monk, published in 1765 *Note ed Osservazioni sul Libro 'Dei Delitti e delle Pene'*, in which he accuses Beccaria of sedition and irreligion. In 1766, the Verri brothers published anonymously at Lugano a reply—*Risposta ad uno Scritto*, which was written in the first person and conveyed the impression of having been the work of Beccaria. It was mainly owing to the generous intervention of Count Firmian, the liberal minister of Maria Theresa, that Beccaria did not become a victim of persecution. In France he was attacked by Jousse and by P. F.

leading to this instantaneous and remarkable success, but some indication of its major causes seems desirable.

Towards the middle of the eighteenth century enlightened public opinion in France and in many other European countries began to realise that an oppressive system of criminal justice was one of the most grievous of the many political and social abuses which the people of almost all European States had to endure.[39] It followed naturally therefore that at a time when free inquiry into all matters affecting man and society was universal,[40] the vital question of penal laws and their administration should be subjected to searching scrutiny. Writing in 1771, Jousse reproached Beccaria for attempting to establish

Muyart de Vouglans, in *Réfutation des Principes hazardés dans le Traité des Délits et des Peines* (Paris, 1767).

The success of Beccaria's book was outstanding. It was translated into French in 1766 by Abbé Morellet; within six months seven editions were issued, some annotated by Morellet and some by Diderot. In 1765 Voltaire wrote of Beccaria ' l'auteur est un frère '; and in 1766 he published his well-known ' Commentaire sur le livre des délits et des peines ', *Oeuvres* (ed. by Moland, 1877–85), Vol. 25, p. 539 *et seq.* In the course of the years that followed, Beccaria's work was translated into almost all European languages. In the autumn of 1766 Beccaria, responding to an invitation extended to him by French philosophers, went to Paris where he was greeted as a benefactor of mankind. No less effusive was the admiration of the rulers of many continental States; see on this below, p. 287. In his own native town he was appointed to the chair of political economy in the Palatine School of Milan and made a Councillor of State.

Beccaria's penal doctrine was already adopted in his lifetime. But even before it became the basis of many penal codes, it had been followed in practice. Thus in a letter written to Beccaria's daughter, Röderer states: ' . . . C'est que le *Traité des délits* avait tellement changé l'esprit des anciens tribunaux criminels en France, que, dix ans avant la révolution, ils ne se rassemblaient plus. Tous les jeunes magistrats des cours, et je puis l'attester puisque j'en étais un moi-même, jugeaient plus selon les principes de cet ouvrage, que selon les lois '; quoted by C. Cantù, *Beccaria e il Diritto Penale* (1862), note at p. 176. On the interest which Beccaria's book evoked in England see below, note 60 at p. 284.

[39] ' Liberty and Equality ', observes J. M. Thompson, ' are dreams: Justice is something which even the slave, even the prisoner at the bar, expects. To Frenchmen in '89 justice seemed the most important part of good government. There is nothing about which the *cahiers* are so unanimous as the need for judicial reform '; *The French Revolution* (1944), p. 131. On the criminal law reforms urged by the *Etats Généraux* see Professor A. Desjardins, *Les Cahiers des Etats Généraux en 1789 et la Législation Criminelle* (Paris, 1883).

[40] ' In the eighteenth century, . . . the character of free enquiry is universality; religion, politics, pure philosophy, man and society, moral and material nature, all at the same time became the object of study, doubt, and system; ancient sciences were overturned, new sciences were called into existence. The movement extended itself in all directions, although it had emanated from one and the same impulse '; F. Guizot, *The History of Civilisation* (transl. by W. Hazlitt, 1856), Vol. 1, p. 264.

what he called a most dangerous system and for propagating new ideas which, if adopted, would reverse the traditional belief of the nations, sparing neither religion, customs, nor yet the sacred principles of government.[41] But such was the spirit of the age that the same ideas which Jousse and other defenders of the *Ancien Régime* denounced as destructive and nugatory were hailed by a multitude of others, who looked to the sweeping away of established legal concepts and systems as an essential condition of progress.

Such problems as the origins and functions of the State, religion, or the status of man in society, were all the subject of many philosophical and political writings. *Dei Delitti e delle Pene* was the only major work devoted exclusively to the question of criminal justice. A product of the period of enlightenment, it is a perfect expression of its ideals and aspirations in the penal sphere.[42] With a boldness and ruthlessness which Faustin Hélie so aptly described as ' la force qui détruit ',[43] Beccaria surveyed one after another the various aspects of the established systems of justice. His judgment was stern and unsparing, but having destroyed, he at once proceeded to rebuild. His critical remarks are followed by constructive proposals which, taken together, form a practically complete system of criminal law and procedure[44] such as

[41] Jousse, *Traité de la Justice Criminelle de France* (Paris, 1771), Vol. 1, p. LXIV.

[42] On the influences which moulded his outlook, Beccaria states in a letter to Morellet (written in 1766): '. . . D'Alembert, Diderot, Helvétius, Buffon, Hume, illustrious names, which no one can hear without emotion! Your immortal works are my continual study, the subject of my occupation by day, of my meditation in the silence of night. Full of the truth which you teach, how could I ever have burned incense, or worshipped error, or debased myself to lie to posterity? . . . My conversion to philosophy only dates back five years, and I owe it to my reading of the *Lettres Persanes* . . .'; Maestro, *Voltaire and Beccaria* (1942), p. 52. C. A. Vianello writes: ' Il Beccaria non fu un precursore . . . Egli non fece che adattare logicamente i presupposti teorici degli Enciclopedisti alla questione dei delitti e delle pene '; *La Vita e l'Opera di Cesare Beccaria* (Milano, 1933), p. 33.

He was obviously also acquainted with *L'Esprit des Lois*; in his introduction to *Dei Delitti e delle Pene* he acknowledges his debt to Montesquieu, stating that he is following ' the luminous footsteps of this great man ', though he adds that ' . . . thinking man, for whom I write, will be able to distinguish my steps from his '.

[43] See his Introduction to a French edition of Beccaria's *Des Délits et des Peines* (2nd ed., Paris, 1870), p. XVIII.

[44] Already during Beccaria's lifetime his proposals were largely embodied in the laws of Prussia, Sweden, Austria, Tuscany and France; see on this below, pp. 286–295). Although during the nineteenth and early twentieth centuries

had never before been evolved with an equal precision and thoroughness.[45]

Beccaria's language is non-technical and forceful; he combined eloquence of expression with strictly logical reasoning.[46] But far and above these accomplishments of form stands his profound humanity, his ardent belief in human reason and the perfectibility of social institutions which he instilled into everything he wrote, and which make his book such inspiring reading. Whether speaking of social oppression, of prejudice, or of short-sightedness, he never failed to indicate the other and better path to follow. His faith in progress was intense. From every page of his book flows that serene and confident hope of which Europe was then so much in need.

Punishments to be moderate but certain

Of the forty-one chapters into which Beccaria divides his book, six are devoted to the system of punishment in general,[47] another three to particular forms of it,[48] while many additional remarks on these subjects are scattered throughout the

the classical school of criminal law, which was largely based on Beccaria's doctrine, lost some of its influence, and a part of the programme outlined in *Dei Delitti e delle Pene* was rejected, many of its guiding principles still remain unchallenged.

[45] 'Beccaria was the first systematic modern criminal law reformer in point of time; and if we take as a criterion the far-reaching results brought about by this work, we must also account him the greatest. . . . In certain respects it (his book) might be regarded as standing, in reference to the sphere of criminal jurisprudence, as, say, Bacon's *Novum Organum* does in science, or Descartes' *Principa* in philosophy. It represents a definite rejection of reiterated dogma and mere precedent, and marks a return to first principles'; Coleman Phillipson, *Three Criminal Law Reformers* (1923), p. 100. See also Professor Ugo Spirito, *Storia del Diritto Penale Italiano* (2nd ed., Torino, 1932), p. 28 *et seq.*, and Professor S. Glaser, 'Beccaria et son Influence sur la Réforme du Droit Pénal'; *Revue Internationale de Droit Pénal* (4me Trim., 1928), No. 4, p. 425 *et seq.*

[46] The uncompromising logic of his reasoning and his disregard of history account for some of Beccaria's erroneous or abstract judgments, such as for instance that concerning the royal prerogative of mercy, above, pp. 127–128, and the discretionary powers of the judges, below, p. 295.

[47] The titles of these chapters are as follows: 'The Mildness of Punishments' (Chap. 15); 'The Promptness of Punishments' (Chap. 19); 'Certainty of Punishments—Pardons' (Chap. 20); 'Proportion between Crimes and Punishments' (Chap. 23); 'Measure of Punishments' (Chap. 24); 'Division of Punishments' (Chap. 25); see also 'Conclusion' (Chap. 43). These titles, as well as all quotations which follow, are taken from J. A. Farrer's translation of Beccaria's *Crimes and Punishments* (1880).

[48] 'Capital Punishment' (Chap. 16); 'Banishment and Confiscations' (Chap. 17); 'Infamy' (Chap. 18).

remainder of the book. This preoccupation with punishment, hitherto so grossly neglected, is in itself striking proof of the importance Beccaria attached to it. Equally significant is his method of approach. Such matters as the object of punishment and more particularly the methods to be adopted in order to increase its effectiveness and rightly to assess its appropriate severity in respect to particular offences, claimed most of his attention. He devotes but little space to speculations on the origins of the right to inflict punishment, but accepts it as an unavoidable social institution designed to serve a specific purpose.[49] His primary concern is the policy rather than the philosophy of punishment; thus whereas the works of Grotius or Puffendorf are provocative of thought, Beccaria devised a practical system for combating crime.

According to Beccaria, the object of punishment is neither to torment, nor to undo a crime already committed. Punishment ought not to be allowed to degenerate into an act of violence; and not the gravity of the offence but the degree of injury thereby done to society should determine its measure. It is no more than a 'political obstacle' the object of which is 'to prevent the criminal from injuring anew his fellow-citizens, and to deter others from committing similar injuries'.[50]

This object cannot be attained through mere severity. As punishments become more and more cruel, 'human minds harden, adjusting themselves, like fluids, to the level of objects round them'.[51] Hence, after a hundred years of cruel punishments, men are only just as much frightened of the wheel as at first they were of prison. It is a historical fact that the most severe punishments and the bloodiest crimes are usually concomitant, 'the same spirit of ferocity that guides the hand of the legislator having guided also that of the parricide and assassin'. There is a limit to severity, and when

[49] Beccaria derives the right to punish from the social contract which, following Rousseau, he unreservedly adopts as the basis of society. His remarks on this subject are superficial and lacking in his usual forcefulness; *op. cit.*, pp. 121–124. He is on much safer ground when, following Montesquieu, he indicates why penal laws should be distinguished from religion and natural law, and why they should be continually readjusted to the changing conditions of society, *ibid.*, pp. 113–115.

[50] *Ibid.*, p. 165; also pp. 198, 199, 200 and 251.

[51] *Ibid.*, p. 167.

that limit has been reached it inevitably becomes impossible to invent such a corresponding increase of punishment as would be necessary to prevent even more injurious and atrocious crimes. Moreover, severity breeds impunity; 'men are restrained within limits both in good and evil; and a sight too atrocious for humanity can only be a passing rage, not a constant system, such as the laws ought to be'.[52] The final object and the supreme test of all State activity is 'the greatest happiness divided among the greatest number', and the State should be 'a wise administrator of the public happiness'.[53] Consequently, however much good a punishment may effect, that alone will not justify it, because to be just it must be necessary. The object of a punishment will already have been attained if the evil it inflicts on the offender exceeds the advantage he derived from his crime; 'all beyond this is superfluous and consequently tyrannical'.[54]

Beccaria thus pleads for a system of moderate penalties. He contends that such a system would prove more effective in preventing crime, provided that due regard were paid to the following three factors. First, the certainty of punishment. The effect of a punishment depends much more on its inevitability than on its violence, and the hope of impunity will blunt the edge of even the most terrible penalties. The crucial weakness of excessive penalties is that they tend to become uncertain.[55] Secondly, the promptness of punishment. The shorter the interval between the punishment and the crime, 'the stronger and the more lasting in the human mind is the association of these ideas, crime and punishment, so that insensibly they come to be considered, the one as the cause and the other as its necessary and inevitable consequence. It is a proved fact', he adds, 'that the association of ideas is the cement of the whole fabric of the human intellect, and

[52] *Ibid.*, p. 168.

[53] *Ibid.*, pp. 118 and 224. On the influence of this principle upon Bentham, see below, pp. 378–379.

[54] *Ibid.*, p. 166; also pp. 173 and 182. He also defends this principle on the ground that when forming themselves into a society, men naturally did not intend to subject themselves to more evils than absolutely necessary; *ibid.*, pp. 123 and 186.

[55] *Ibid.*, p. 168. It is because the royal prerogative of mercy contributes to making punishment uncertain that Beccaria was in favour of abolishing it altogether; above, p. 128.

that without it pleasure and pain would be isolated and ineffective feelings'.[56] And thirdly, a certain conformity between crime and punishment. A theft without violence should be punished with a fine which would deprive the offender of his gain; when it is impossible to impose a fine, he should be sentenced to labour by which he would repay his debt to society. A theft with violence should be met by the combination of a corporal punishment and labour.[57] But if punishments are to be prompt and are to conform to the nature of different crimes, a comprehensive scale of penalties must be evolved ranging from the most severe to the very slight, which must then be affixed to offences of corresponding gravity.[58]

It is seen that both Montesquieu and Beccaria rejected the doctrine of maximum severity and urged the establishment of a well-balanced system of moderate penalties. They contended that the mildness of penalties, provided they are inflicted with certainty and promptness, will not detract from their deterrent effect.[59] They further insisted that the efficacy of punishment depends much more on these factors than on its severity, and that crime is therefore better prevented by moderate than by excessively severe penal laws.[60]

Montesquieu and Beccaria on capital punishment

On the subject of capital punishment, however, their views are at variance. Montesquieu regards it as 'a remedy, as it were

[56] *Ibid.*, p. 186.

[57] *Ibid.*, pp. 213–214. Beccaria distinguishes between offences against the person and those against property; he holds that personal security is a 'natural', whereas the security of property is a 'social' right; *ibid.*, p. 159.

[58] Like Montesquieu, Beccaria holds that crime cannot be reduced by punitive measures alone but that its prevention depends largely on the manners of society, a wise economic and fiscal policy and good standards of education. He is also in favour of an efficient police system, the repression of idleness and a reform of laws relating to debtors and smugglers; see in particular *ibid.*, Chaps. 31, 32 and 33. Finally he insists that the scope of criminal law should be reduced to a minimum, for, as he puts it, 'to prohibit a number of indifferent acts is not to prevent the crimes that may arise from them, but it is to create new ones from them'; p. 243.

[59] They hardly ever mention the reformatory purpose of punishment.

[60] 'M. Beccaria fut applaudi de l'Europe pour avoir démontré que les peines doivent être proportionnées aux délits'; Voltaire, *Oeuvres* (ed. by Moland, 1877–85), Vol. 20, p. 459.

Beccaria's book evoked great interest in England. The first English translation was published in 1767; it was translated from a French edition and

of a sick society' and holds that it should be retained for murder, attempted murder and possibly for certain kinds of manslaughter. He would also seem to be inclined to favour the death penalty for a number of offences against property.[61] Beccaria, on the other hand, argues that capital punishment should be abolished, first, because the State has no right to inflict it[62] and secondly, because it is not effective.

The sovereignty of the State and the laws, he submits in support of his contention, are nothing else '. . . but the sum-total of the smallest portions of individual liberty, and represent the general will, that is, the aggregate of individual

included Voltaire's commentary. Between 1769 and 1807 altogether seven editions were published. In his preface to the second edition of 1769 the translator writes: 'Penal Laws, so considerable a part of every system of legislation, and of so great importance to the happiness, peace and security of every member of society, are still so imperfect, and are attended with so many unnecessary circumstances of cruelty in all nations, that an attempt to reduce them to the standard of reason must be interesting to all mankind. . . . It is not surprising, then, that this little book hath engaged the attentions of all ranks of people in every part of Europe . . . and perhaps no book, on any subject, was ever received with more avidity, more generally read, or more universally applauded. . . . It may be objected, that a treatise of this kind is useless in England, where, from the excellence of our laws and government, no examples of cruelty or oppression are to be found. But it must be allowed, that much is still wanting to perfect our system of legislation. . . . The confinement of debtors, the filth and horror of our prisons, the cruelty of jailors, and the extortion of the petty officers of justice, to all which may be added the melancholy reflection, that the number of criminals put to death in England is much greater than in any other part of Europe . . .'. The book was most favourably reviewed in the *Annual Register* (1767), Vol. 10, (Characters), pp. 316–320, most probably by Burke. It exercised a profound influence on Blackstone; see on this below, p. 346.

[61] 'When there is a breach of security with regard to property, there may be some reasons for inflicting a capital punishment: but it would be much better, and perhaps more natural, that crimes committed against the security of property should be punished with the loss of property; and this ought, indeed, to be the case if men's fortunes were common or equal. But as those who have no property of their own are generally the readiest to attack that of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment'; *The Spirit of Laws* (transl. by Nugent, 1823), Vol. 1, Book XII, Chap. 4, p. 186.

[62] Even Rousseau, whose doctrine of the origin of society Beccaria adopted, does not deny that the State has the right to inflict this punishment: 'La peine de mort infligée aux criminels', he writes, 'peut être envisagée à peu près sous le même point de vue: c'est pour n'être pas la victime d'un assassin que l'on consent à mourir si on le devient . . . tout malfaiteur, attaquant le droit social, devient par ses forfaits rebelle et traître à la patrie; il cesse d'en être membre en violant ses lois, et même il lui fait la guerre. Alors, la conservation de l'Etat est incompatible avec la sienne; il faut qu'un des deux périsse; et quand on fait mourir le coupable, c'est moins comme citoyen que comme ennemi'; *Du Contrat Social* (ed. by C. E. Vaughan, 1926), Book II, Chap. 5, p. 29.

wills. But who ever wished to leave to other men the option of killing him? '.[63] Obviously this argument is not well founded, for on its strength it might be maintained that the State has no right to inflict any punishment whatsoever. Beccaria's second argument, according to which the State is not justified in killing an individual whom it has forbidden to take his own life, is equally unconvincing. As regards the ineffectiveness of capital punishment alleged by Beccaria, he supports this contention by stating that 'the mind of man offers more resistance to violence and to extreme but brief pains than it does to time and to incessant weariness; for whilst it can, so to speak, gather itself together for a moment to repel the former, its vigorous elasticity is insufficient to resist the long and repeated action of the latter'.[64] In accordance with this principle he proposes to replace the death penalty by penal servitude for life which, being of long duration and consequently more painful, would constitute a greater deterrent than death.[65] This is a controversial issue on which there has always been a wide difference of views. It should be noted that Beccaria's attitude to capital punishment is somewhat inconsistent with the view, which he emphasises most strongly in other parts of his book, that penalties should as far as possible conform to the nature of crimes.[66] If accepted, this principle would seem to justify the infliction of the death penalty at least for murder.

Leading continental philosophers and penologists did not share Beccaria's views on capital punishment.[67] Only two of the several new criminal codes then introduced abolished the death penalty. Both of them—the code of Leopold, Grand Duke of Tuscany,[68] and that of Joseph II of Austria[69]—were primarily inspired in their decisions not by the first of Beccaria's contentions, namely that the State has no right to

[63] *Crimes and Punishments*, p. 169.

[64] *Op. cit.*, p. 173.

[65] On the most atrocious manner in which this suggestion was implemented by certain eighteenth-century continental States see below, pp. 297–300.

[66] Above, p. 283.

[67] De Pastoret, *Des Loix Pénales* (Paris, 1790), Vol. 1, Part 2, pp. 7 *et seq.*, quotes a great number of opinions on this subject. Even so enthusiastic a supporter of Beccaria's doctrine as Voltaire did not indicate his assent to these views; E. Kohlrausch, 'Todesstrafe', *Handwörterbuch der Kriminologie* (Berlin, 1936), Vol. 2, p. 798.

[68] Below, pp. 291–293.

[69] Below, pp. 290–291.

inflict this penalty, but by the second, which professed the superiority of penal servitude for life.[70] In the writings of early English reformers there is little that would indicate their concurrence with Beccaria on this point, while Sir Samuel Romilly explicitly declared his disagreement.[71]

§ 3. THE TREND OF CONTINENTAL REFORMS

Montesquieu, and more particularly Beccaria, imparted a powerful stimulus to contemporary European thought on penal matters[72] and inspired far-reaching reforms in criminal law. The intimate contact between leading philosophers and the rulers of many Continental States helped to spread new ideas and accelerated the pace of the movement. Notwithstanding the revolutionary tone of his book, Beccaria calls European rulers 'the great monarchs, the benefactors of humanity . . . , men who encourage the virtues of peace, the sciences and the arts, who are fathers to their people, who are crowned citizens, and the increase of whose authority forms the happiness of their subjects . . .'.[73] The extent to which Voltaire flattered Catherine the Great is well known[74]; even Kant, when describing the eighteenth century, states:

[70] For the criticism this change evoked in England see below, pp. 299–300.

[71] See his letter to Roget, below, p. 315 and note 75, *ibid.* On Eden's and Bentham's views on capital punishment see below, pp. 304–305 and pp. 389–391, respectively.

[72] On the post-Beccarian penological literature of Italy, France and Germany see C. Cantù, *Beccaria e il Diritto Penale* (1862), p. 194 *et seq.*, and L. Günther, *Die Idee der Wiedervergeltung* (Erlangen, 1891), Abt. II, pp. 162 *et seq.* A number of the most representative writings of Beccaria's followers are reproduced in the already quoted *Bibliotheque Philosophique du Législateur* (ed. by J. P. Brissot de Warville, 1782), 10 Vols.

[73] *Crimes and Punishments*, pp. 112 and 180. He describes Gustavus III of Sweden as '. . . uno dei più saggi monarchi dell 'Europa, che avendo portata la filosofia sul trono, legislatore amico de 'suoi sudditi, . . . ' and Elizabeth of Russia as having given '. . . quest' illustre exempio, che equivale almeno a molte conquiste comprate col sangue dei figli della patria '; *Dei Delitti e delle Pene* (Livorno, 1828), pp. 75 and 104.

[74] He thus wrote to Catherine: 'Vous êtes devenue ma passion dominante . . . Je me mets à vos pieds, je les baise beaucoup plus respectueusement que ceux du pape . . . Je me mets à vos pieds avec adoration de latrie'; quoted by W. F. Reddaway, *Documents of Catherine the Great* (1931), p. IX. When sending her his *Prix de la Justice et de l'Humanité*, a work on the reform of criminal law, he describes it as 'un petit coup de cloche qui annonce vos bienfaits au genre humain', and ends his letter by saying: 'Je me prosterne à ses (Catherine's) pieds, et je crie dans mon agonie, *allah, allah, Catherine rezoul, allah*'; Letter of Dec. 5, 1777; Reddaway, *op. cit.*, p. 213.

'In diesem Betracht ist dieses Zeitalter das Zeitalter der Aufklärung, oder das Jahrhundert Friedrichs'.[75]

These touching homages were fully reciprocated. Frederick the Great composed verses in Voltaire's honour [76] and remained in close correspondence both with him and with other French philosophers. Catherine wrote to Voltaire: 'Je baiserai de bon cœur cette main qui a écrit tant de belles choses',[77] and informed him about all her most important projects of social and legal reform. When Beccaria published his book, Frederick stated in a letter to Voltaire that he (Beccaria) 'n'a guère laissé à glaner après lui. Il n'y a qu'à s'en tenir à ce qu'il a si judicieusement proposé'.[78] The King of Naples payed him a visit,[79] Catherine urged him to settle down in Russia,[80] while Louis Eugene, Duke of Württemberg, wrote to him that should he (the Duke) ever be called upon to rule over his fellow-citizens, he would do his utmost to abolish the system which Beccaria had so successfully assailed. Both Gustavus III of Sweden and Leopold, Grand Duke of Tuscany, studied Beccaria's book and were strongly influenced by it.[81] At one time it certainly looked as if that mutual admiration might help to transform Beccaria's ideas into reality.[82]

Prussia

During the eighteenth century new codes of criminal law were promulgated in several European countries, the tendency in

[75] Quoted by Professor R. von Hippel, *Deutsches Strafrecht* (Berlin, 1925), Vol. 1, note 5 at p. 271. The period of illumination Kant defined as 'Aufklärung ist der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit, (aus dem) Unvermögen, sich seines Verstandes ohne Leitung eines andern zu bedienen . . . Sapere aude! Habe Mut, dich deines eigenen Verstandes zu bedienen! ist also der Wahlspruch der Aufklärung'; *ibid.*, note 1 at p. 258.

[76] See *Oeuvres de Frédéric le Grand* (Berlin, 1849), Vol. 11, p. 119 *et seq.*

[77] W. F. Reddaway, *op. cit.*, p. IX.

[78] Voltaire, *Oeuvres Complètes* (ed. by L. Moland, 1877–85), Vol. 50, p. 265. (Letter dated Sept. 5, 1777.)

[79] Cantù, *Beccaria e il Diritto Penale* (1862), p. 154; 'Ma', adds Cantù, 'il Beccaria era tanto indifferente alle onorificenze, che non lasciossi trovare in casa'.

[80] The invitation was extended to him in 1767; M. T. Mæstro, *Voltaire and Beccaria as Reformers of Criminal Law* (1942), p. 72. Her project of reform of criminal law contains several almost verbatim extracts from *L'Esprit des Lois* and from *Dei Delitti e delle Pene*; below, p. 296.

[81] K. D'Olivecrona, *De la Peine de Mort* (transl. from Swedish by L. Beauchet, 2nd ed., 1893), p. 59; C. Cantù, *op. cit.*, p. 251.

[82] It is interesting to note that James Ramsay, the painter, was one of the

each case being towards a considerable reduction of the scope of the death penalty. Owing mainly to the reformatory zeal of Frederick the Great,[83] Prussian criminal law was extensively revised; the death penalty was appointed for a lesser number of offences,[84] its execution being further restricted by an extensive use of the prerogative of mercy and by the sending of instructions to the courts to award it only when absolutely necessary.[85] According to statistics for the period 1775–1778, the yearly average of executions was only about fifteen. It is significant that, except for two executions for robbery in the streets, none other out of the total of 46 was for an offence against property.[86] In 1779 Frederick instructed his chancellor to draft a new code to be based on the principle 'dass die Strafen dem Verschulden mehr angemessen sind'. This code, which constitutes an important landmark in the movement for the reform of criminal law in Germany,[87] did not come into force until after the accession of Friedrich Wilhelm II, but a great part of it had been examined by Frederick the Great before his death.[88]

very few who were somewhat sceptical about such prospects. After Diderot had shown him Beccaria's book he wrote to him a letter expressing sympathy with Beccaria's doctrine and also passing some wise criticisms; he concluded his letter by saying: 'Les cris des sages et des philosophes sont les cris de l'innocent sur la roue, où ils ne l'ont jamais empêché et jamais ne l'empêcheront d'expirer, les yeux tournés vers le ciel; . . . Ce n'est jamais la harangue du sage qui désarme le fort, c'est une autre chose, que la combinaison des événements fortuits amène'; for this very interesting letter see Diderot, *Oeuvres Complètes* (ed. by J. Assézat, 1875), Vol. 4, p. 52, quotation at p. 60.

[83] In 1749, Frederick wrote a remarkable paper (read by Darget in the Academy of Sciences of Berlin on January 22, 1750) in which he outlined a programme of reform of criminal law strikingly resembling that of Montesquieu and Beccaria; 'Dissertation sur les Raisons d'établir ou d'abroger les Lois', *Oeuvres de Frédéric le Grand* (Berlin, 1848), Vol. 9, pp. 12–33.

[84] In 1740 the punishment was mitigated for infanticide; in 1743–44—the death penalty was abolished for thefts unaccompanied by violence; in 1756 many aggravated forms of capital punishment such as *Schleifen*, *Zangenreissen* and *Handabhauen* were discarded; breaking on the wheel was still maintained for certain crimes, but the offender was first to be strangled.

[85] In 1774 Frederick issued an instruction to the courts urging them to sentence 'in criminalibus eher zu gelinde als zu scharf'.

[86] R. von Hippel, *Deutsches Strafrecht* (Berlin, 1925), Vol. 1, note 4, at p. 274.

[87] *Ibid.*, p. 282.

[88] *Allgemeines Landrecht für die Preussischen Staaten* (1794). On one of the sections he made the following remark: 'Gut; aber es ist ja so dicke, Gesetze müssen kurz sein'; Von Hippel, *op. cit.*, p. 276. The code was most formidable: it contained 1577 paragraphs and comprised many matters which one would not expect to find in such a codification. 100 articles were devoted to the crime of infanticide alone.

Reforms introduced by Gustavus III of Sweden

In Sweden, until Gustavus III introduced his extensive reforms, criminal matters had been regulated by the code of 1734. The clarity, simplicity and precision of this code were remarkable but, in common with the systems of other European countries, it was marked by an excessive and indiscriminate severity. Sixty-eight offences carried the death penalty, which sometimes was to take the form of breaking on the wheel or be accompanied by public exposure on the wheel or by the cutting off of the offender's right hand.[89]

Soon after his accession to the throne Gustavus III abolished the use of torture by an ordinance of August 22, 1772. This he intended as the beginning of a comprehensive revision of criminal law, which was to include the abolition of the death penalty for all offences except treason and parricide.[90] In a proposal brought before *Riksdag* he stated that ' it is the human and royal duty to save human blood ', and ' that all wise and prudent governments make use of punishment to the advantage of the State and refuse to be guided by a false zeal of useless cruelties '. However, his proposal was strongly opposed with the result that the law of

[89] Punishments were not only most severe but also almost impersonal. When, for instance, a number of assailants inflicted grievous bodily harm as the result of which their victim died, and it was not possible to ascertain which of the assailants gave the blow that caused the death, the decision as to which of them was to be executed was arrived at by means of a ballot. D'Olivecrona quotes the following notice which appeared in Swedish newspapers on Nov. 23, 1775: ' Sa Majesté, ayant confirmé le jugement prononcé par le Svea Hofrätt contre les malfaiteurs qui, à la fin de l'année précédente, s'étaient rendus coupables de violences à Wärmdön, près de Stockholm, sur le contrôleur Wilberg, qui succomba à ses blessures, on a procédé avant-hier, à la chancellerie, en présence du chancellier de justice et du préfet du roi, à un coup de dés sur la question de vie ou de mort entre Erik Jacobsson d'Aspedal et Carl Henricsson de Norkarret; la première fois chacun d'eux eut 9 points; mais, au deuxième coup, le premier eut 7 points et le second 9; aussi Erik Jacobsson subira-t-il la peine de mort par la décapitation, avec amputation de la main droite et exposition sur la roue; mais Carl Henricsson sera noté d'infamie, recevra quarante paires de coups de baguette et travaillera huit ans dans la fortresse de Sveaborg '; *De la Peine de Mort* (transl. from Swedish by L. Beauchet, 1893), note 1 at pp. 55–56. Some other crimes such as sorcery, sodomy, bigamy, adultery and incest were punished in accordance with the theological concept that if they are not expiated by blood, the anger of God will fall on the whole country; *ibid.*, p. 54.

[90] For arson, theft committed with violence and robbery he proposed to replace the death penalty by flogging, life imprisonment, and an additional penalty to be inflicted on such offenders every year on the anniversary of their crime.

January 20, 1779, was much less bold.[91] Its practical effect was nevertheless considerable. Whereas during the period 1769–1778, there were 268 executions—a yearly average of 26.8—during the period 1779–1788, that is immediately after the new law had been passed, the number fell to 108—a yearly average of 10.8.[92]

'Constitutio Criminalis Theresiana' and the code of Joseph II of Austria

Maria Theresa of Austria was among those European rulers who failed to adjust their views to the increasingly humanitarian spirit of the age.[93] Yet Joseph von Sonnenfels, a distinguished professor of the University of Vienna, was then pleading for a reform which would reduce the scope of the death penalty and abolish torture[94]; moreover, Maria Theresa's two sons, the future Emperor Joseph II and Leopold, Grand Duke of Tuscany, were both strongly influenced by liberal ideas.[95] The doctrine of terror still lingers in her code of 1769,[96] although it includes some more

[91] Extracts of various memoranda which throw a vivid light on the trend of penal thought in Sweden in the eighteenth century are given by D'Olivecrona, *op. cit.*, p. 70 *et seq.*

[92] *Ibid.*, p. 78. The leniency of Swedish laws favourably impressed William Coxe; see *Account of the Prisons and Hospitals in Russia, Sweden and Denmark* (1781), pp. 31–32.

[93] When in 1775 Joseph II said that he regarded the total abolition of torture as 'ein notwendiges Mittel', she expressed her doubts as to the advisability of such a reform: 'Ich ersuche den Kayser, der die jura studiert hat . . . er möge dieses Werck decidiren ohne meine consilia . . .', and urged him to take some expert advice; W. Müller, *Josef von Sonnenfels* (Wien, 1882), p. 140.

[94] He was on more than one occasion requested by the Empress to abstain from propagating these views; W. Müller, *ibid.*, pp. 131–134.

[95] 'Desirous of possessing a thorough knowledge of his dominions and of the principal countries of Europe, he (Joseph II) undertook many journeys, primarily in quest of information. No pride of State attended him; he would put up at inns, and rarely showed himself at entertainments or spectacles, devoting the whole of his time to matters of real importance. In every town through which he passed, it was his care to enquire minutely into all that concerned the army, trade, industry, and charity, and in his thirst for comprehensive knowledge he plied with eager questions anyone who could furnish him with useful information'; Professor Eugène Hubert, 'Joseph II', *Cambridge Modern History* (1909), Vol. 6, p. 626. Like his brother, Leopold too was an admirer of the new 'philosophy'; reform was the main interest of his life but, in common with Joseph, he believed that only an autocratic government couuld bring it about; H. M. Vernon, 'Italy and the Papacy', *ibid.*, pp. 601 and 602.

[96] *Constitutio Criminalis Theresiana* of Dec. 31, 1768 (published in Vienna in 1769).

progressive provisions.[97] Von Bar rightly remarks that some of the punishments it enforced were marked 'with a really barbarous intensity of suffering'.[98] Capital punishment, often in an extremely aggravated form, was appointed for thirty-two offences.[99] It should be noted, however, that it was usual in practice to send confidential instructions to the courts requesting them not to put these provisions fully into effect.[1]

The code of Joseph II,[2] who succeeded his mother as Emperor of Austria, was the first of any major European State to abolish capital punishment for all crimes including high treason and murder.[3] Even some years before the new code was promulgated, Joseph II had issued confidential instructions to the courts not to order the excution of death sentences, unless confirmed by a higher authority. As a result of this order only one offender was executed during the seven years from 1781–1787.[4] But remarkably bold as was this approach to the question of the death penalty, the code of Joseph II was in many respects deficient, and even retrogressive.[5]

Edict of the Grand Duke of Tuscany

The criminal code of Tuscany, promulgated in 1786[6] by Maria Theresa's second son Leopold, Grand Duke of Tuscany,

[97] Thus sorcery for instance was regarded as a deception and fraud, the use of the pillory was limited, exile of subjects was made less arbitrary and in a number of cases it had been endeavoured to readjust penalties to crimes.

[98] *A History of Continental Criminal Law* (1916), p. 250.

[99] I, Art. 6, § 5, enacts: '. . . Verstümmelungen am Leibe . . . können . . . zur Verschärfung einer Todesstrafe verhängt werden'. The Appendix to the Code, which contains detailed explanatory notes on the method of executing various penalties, gives the following instructions regarding the execution of an aggravated form of the death sentence (not for treason): '. . . Sein (the offender's) lebendiges Herz herausgenommen, um das Maul geschlagen, sodann der Leib in 4 Theile geschnitten and die an 4 Strassen, absonderlich aber das Haupt, Herz und rechte Hand zusammen, männiglich zum Abscheu aufgehenkt und aufgestecket werden'.

[1] See W. E. Wahlberg, 'Neuere Praxis und Geschichte der Todesstrafe in Oesterreich', *Gesammelte kleinere Schriften über Strafrecht* (Wien, 1877), Vol. 2, p. 138.

[2] *Allgemeines Gesetz über Verbrechen und deren Bestrafung*, Jan. 13, 1787.

[3] Except under martial law.

[4] C. J. Mittermaier, *Die Todesstrafe* (Heidelberg, 1862), pp. 19–20.

[5] See on this below, pp. 297–298.

[6] *Riforma della Legislazione Criminale Toscana*, of Nov. 30, 1786. A good English translation of this law was published in 1789 under the title *Edict of the Grand Duke of Tuscany, for the Reform of Criminal Law in His Dominions*. All quotations which follow are taken from this edition of the code.

is mainly based on the doctrine of Beccaria but is also marked with the influence of Filangieri and of Leopold himself.[7] In the course of the years immediately preceding the passing of this new law, the Grand Duke had introduced a number of material reforms by means of ordinances or instructions. During the twelve years from 1754 to 1766 there had been hardly any executions, recourse had only very seldom been had to torture, the right to confiscate property as a punishment for certain offences had been considerably curtailed, and branding with a red-hot iron and penalties leading to maiming had been abolished, as had several offences known as *lèse majesté*. The result of these and other reforms was most beneficial, for as Leopold states in his introduction to the new code: 'With the utmost satisfaction to our paternal feelings, we have at length perceived, that the mitigation of punishments, joined to a most scrupulous attention to prevent crimes, and also a great dispatch in the trials, together with a certainty and suddenness of punishment to real delinquents, has, instead of increasing the number of crimes, considerably diminished that of the smaller ones, and rendered those of an atrocious nature very rare: we have therefore come to a determination, not to defer any longer the reform of the said criminal laws . . .'.[8]

The code is divided into two sections, one of which deals with the system of prosecution and the laws of evidence and trial. It is based on the principle of presumption of innocence and strives to safeguard the individual rights of the subject. The other section, devoted to criminal law, is most remarkable not only in that it abolishes the death penalty, but also because it regards the re-adaptation of offenders to normal life as the main object of all punishment. It further makes a bold attempt at classifying offences in accordance with their gravity and at evolving a correspondingly comprehensive scale

[7] On these influences see C. Cantù, *Beccaria e il Diritto Penale* (1862), p. 251; and C. Calisse, *A History of Italian Law* (1928), pp. 471–472.

[8] *Edict of the Grand Duke of Tuscany* (1789), p. 2. The opening words of his preface are: 'Since our accession to the throne of Tuscany, we have considered the examination and reform of the criminal laws as one of our principal duties'. On the beneficial results of these reforms see H. W. Woolrych, *Capital Punishments in England* (1832), pp. 42–44.

of penalties, devised so as to allow for readjustments which circumstances might make desirable.

The code of Tuscany is in every respect superior to any other promulgated in the eighteenth century and, on certain essential points, even to the proposals outlined by Montesquieu and Beccaria.[9] It constitutes the crowning achievement of the Continental movement for the reform of criminal law.[10]

The French penal code of 1791

Before the eighteenth century drew to its close, vast reforms of criminal law were also effected in France, where the abuses of the *Ancien Régime* system of justice were possibly even more pronounced than in any other country. The urgency of the problem had been recognised even before the Revolution,[11] but it was the tide of Revolution that bore with it the much needed reforms. They are embodied in a number of enactments which together form a complete system of law known as *Le Droit Pénal de la Révolution Française.*[12]

The guiding principles of this system were proclaimed in the *Déclaration des Droits de l'Homme et du Citoyen* of August 26, 1789, and in a number of ordinances such as those of January 21, 1790, and of August 16–24, 1790. The *Déclaration* states that the purpose of every political association shall

[9] The English translator of the code states in his short preface that '. . . he is fully persuaded that there are many things in it [the code] which are well deserving of *notice* and *imitation*; and that whenever a revisal of our penal laws shall take place, many useful hints may be derived from this code for their *improvement*; which has appeared to him a sufficient inducement to disperse a number of copies in the present form '.

[10] The following two opinions, expressed some fifty and eighty years later by a French and a German professor of criminal science, are also worthy of notice. M. Ortolan calls it ' . . . le code si fameux de la Toscane, . . . oeuvre législative la plus remarquable et la plus avancée de l'époque '; *Cours de Législation Pénale Comparée. Introduction Historique* (Paris, 1841), p. 157. F. von Holtzendorff describes it as ' ein unvergängliches Denkmal gesetzgeberischer Weisheit ', *Handbuch des deutschen Strafrechts* (ed. by F. von Holtzendorff, Berlin, 1871–74), Vol. 1, p. 207.

[11] See on this E. Seligman, *La Justice en France pendant la Révolution 1789–1792* (Paris, 1901), Vol. 1, p. 88 *et seq.* The *Cahiers des États Généraux* of 1789 contain many suggestions regarding not only a drastic improvement of criminal procedure but also the reform of criminal law; see on this A. Desjardins' excellent monograph *Les Cahiers des États Généraux en 1789 et la Législation Criminelle* (Paris, 1883), particularly Chapter 4 (Des Peines), p. 27 *et seq.*

[12] R. Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3rd ed., Paris, 1913), Vol. 1, p. 150.

be the preservation of the natural rights of man, that only acts damaging to the community shall be forbidden by law, only strictly and obviously essential punishments shall be enforced, and that no one shall be punished except for an act which has been previously declared an offence.[13] The very important code of October 6, 1791, was framed in accordance with these principles.

Although it remained in force for less than twenty years—it was abrogated in 1810—this code marks the first stage in the evolution of modern French criminal law.[14] The arbitrariness so characteristic of the laws of the *Ancien Régime* gave way to a rigid legality. All punishments were revised. It had been the intention of the framers of the code to abolish the death penalty, but this proposal having been strongly opposed by the Assembly,[15] a compromise solution was adopted by virtue of which the number of capital offences was reduced from 115[16] to 32, and all aggravated forms of the death penalty were abolished. Capital sentences were henceforth to be carried out in the simplest possible manner, irrespective both of the social status of the offender and of the nature of his crime; the only exception from this uniformity of treatment was that murderers and offenders found guilty of arson were to proceed to the place of execution dressed in a red shirt, and those found guilty of parricide were to have their faces covered.[17] When putting the new code before the Assembly for its consideration, Le Pelletier de Saint-Fargeau, who had taken a prominent part in drafting it, said that he

[13] ' Nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée '. The evolution of this principle, on which the legality of any system of criminal justice so largely depends, is the subject of a thesis by Professor L. J. de la Morandière, *De la Règle Nulla Poena sine Lege* (Paris, 1910).

[14] H. Donnedieu de Vabres, *Traité Élémentaire de Droit Criminel et de Législation Pénale Comparée* (2nd ed., Paris, 1943), p. 25; and H. Remy, *Les Principes Généraux du Code Pénal de 1791* (Paris, 1910), p. 226.

[15] For some interesting extracts from this remarkable debate see H. Remy, *op. cit.*, p. 58 *et seq.*

[16] Above, note 2 at p. 268.

[17] *Code Pénal* (1791), Titre I, Arts. 2 & 4. Henceforth offenders were executed by beheading on the *guillotine*. This machine was invented in 1789 by J. I. Guillotin, a doctor and a member of the *Constituante*. ' Je vous fais sauter la tête en un clin d'oeuil et vous ne souffrez pas ', he said when describing his invention to the Assembly.

had striven to give effect to the following considerations: penal laws should be humane; punishments should be moderate and well graduated; they should be public, should be inflicted as close as possible to the place of the crime, and have as one of their aims the reform of the offender by means of work.

Perhaps the greatest defect of the code of 1791 was its extreme rigidity. The effort which had been made to readjust punishments to the varying gravity of offences was largely nullified by the fact that no discretionary power at all was vested with the courts. Montesquieu and Beccaria, who looked forward but remembered the past, were strongly in favour of such a system.[18] Aware of the evils of arbitrariness and convinced that the law should be both determinate and equal, they were against allowing any latitude to the judge to choose a penalty, even within the limits laid down by the code. They thus partly defeated their own purpose which was to make the punishment proportionate to the offence, for even a most carefully drafted law cannot foresee all circumstances that may arise in practice.[19] Yet Le Pelletier de Saint-Fargeau considered it one of the most important achievements of the new code that it reduced the functions of a judge to a bare minimum: 'Il faut qu'il ouvre la loi et qu'il y trouve une peine précise applicable au fait déterminé; son devoir est de prononcer cette peine'.[20]

The 'Instruction' of Catherine the Great of Russia

An attempt to revise Russian criminal law was made in 1767 when the Empress Catherine drafted her famous *Nakás*, or

[18] See for instance Baccaria, *Crimes and Punishments* (transl. by J. A. Farrer, 1880), p. 127.

[19] In this respect the code of Tuscany constitutes a notable exception.

[20] H. Remy, *op. cit.*, p. 33. The chief defect of this system was thus described by Adolph Prins, a distinguished Belgian Professor of criminal science: '. . . le delinquant n'est pas un être vivant et agissant, mais un type abstrait, conçu par la raison pure en dehors de la vie réelle, le délit n'est pas une portion de la vie réelle, mais une formule juridique inscrite dans un Code: la peine n'est pas une défense appropriée à l'attaque, mais un système théorique conçu par des savants, qui ne tiennent pas compte de la nature du délinquant . . .'; quoted by R. Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3rd ed., Paris, 1913), Vol. 1, pp. 160–161.

Instruction, intended to serve as a basis for a new civil and criminal code.[21] The formidable task of evolving these codes was entrusted to a commission of 1,500 members representing various sections of the Russian community. The convocation of this body heralded the beginning of the parliamentary system in Russia and created a sensation throughout Europe.[22] Although the plan to frame new codes was ultimately abandoned, this fact does not detract from the importance of the *Instruction*.

In the section dealing with criminal law, the influence of Montesquieu and Beccaria is striking. Many paragraphs are an almost *verbatim* transcription of corresponding chapters of *L'Esprit des Lois* and of *Dei Delitti e delle Pene*,[23] and Catherine herself acknowledged her debt to the two authors.[24] The *Instruction* proclaims that punishments should be moderate, for ' it is Moderation which rules a People and not Excess of Severity '; they should be proportionate to the corresponding offences,[25] and although they are nothing but ' Pain and Suffering ', they should also serve a social purpose. Only essentially necessary punishments are just; they should correspond to the ' Nature of the thing ' that is punished.[26] The death penalty should only be inflicted for offences resulting

[21] For a French translation of *Nakàs* see J. P. Brissot de Warville, *Bibliotheque Philosophique du Législateur* (Paris, 1782), Vol. 3, p. 34 *et seq.* W. F. Reddaway, *Documents of Catherine the Great* (1931), p. 215 *et seq.* reproduces an English translation, from which all ensuing quotations have been taken. This English version, as Reddaway points out, is very imperfect.

[22] O. Höltzsch, ' Catherine II ', *Cambridge Modern History* (1909), Vol. 6, p. 686.

[23] Compare for instance §§ 175–178 of the *Instruction* concerning the theory of legal proofs, with Chap. 7—' Proofs and Forms of Judgments '—of Beccaria's *Crimes and Punishments* (1880), or §§ 151–158—on the subject of the interpretation of penal laws by the courts, with Chap. 4—' Interpretation of the Laws ', *Ibid.*

[24] W. F. Reddaway, *op. cit.*, p. xxiv.

[25] Distinction should be made between political and moral offences; *Instruction*, § 56. Catherine divided all offences into four classes: offences against religion, against manners, against peace and against security; §§ 68–79. She was well aware of the difficulties attending the readjustment of penalties to offences. In a letter to Voltaire she writes: ' . . . mais de proportionner les peines au crime, cela demande, je crois, un travail à part et beaucoup de réflexions '; Letter of Oct. 1, 1777; W. F. Reddaway, *op. cit.*, p. 212.

[26] *Instruction*, §§ 66, 205, 147 and 77. Punishment will be effective ' when the *Evil* it occasions exceeds the *Good* expected from the Crime, including in the Calculation the *Excess* of the Evil *over* the Good, the undoubted *Certainty* of the Punishment, and the *Privation* of all the *Advantages* hoped for from the Crime. All Severity *exceeding* these Bounds is *useless*, and consequently tyrannical '; § 207.

in the death of the victim or for attempts at murder, or in cases where a subject '*has such Power* by his *Connections*, as may *enable* him to raise *Disturbances* dangerous to the public Peace'.[27] All maiming punishments should be abolished; offences against property should be punished with deprivation of property or alternatively with flogging.[28] The *Instruction* lays down that prevention of crime—attainable largely by means of education—is more desirable than its repression.[29] Catherine sent the manuscript of the *Instruction* to Voltaire, adding in the accompanying letter: '. . . J'espère qu'il n'y a pas une ligne qu'un honnête homme ne puisse avouer'[30]; Voltaire expressed his profound admiration.[31]

§ 4. THE LIMITATIONS OF THESE REFORMS

The significance of the reforms surveyed in the foregoing paragraph is twofold. Introduced under the influence of the liberal and humanitarian doctrines of Montesquieu and Beccaria, they certainly greatly improved the existing systems of justice in all the countries concerned.[32] At the same time, however, they brought to light the cardinal fact that to effect a reform of criminal law it is necessary to do much more than to restrict, or even to abolish, capital punishment. For instance, though Joseph II of Austria had abolished capital punishment,[33] the code he sponsored was by no means uniformly humane. Many crimes were still punished with ferocious severity. Flogging, either with canes, leather whips or birch rods, was very often enforced either as an independent penalty or as an addition to imprisonment.[34] Equally frequent was branding with hot irons, which was usually carried out in public and consisted in branding the outlines of a

[27] *Ibid.*, §§ 79 and 210. On the atrocious penalties which replaced the death penalty see below, pp. 299–300.
[28] *Ibid.*, §§ 96 and 79.
[29] *Ibid.*, §§ 240 and 248.
[30] Voltaire, *Oeuvres Complètes* (ed. by L. Moland, 1877–85), Vol. 46, p. 192.
[31] *Ibid.*, p. 263.
[32] Particularly if due account is taken of various improvements adopted in the field of criminal procedure.
[33] Above, p. 291.
[34] *Allgemeines Gesetz über Verbrechen und deren Bestrafung* (1787), Buch I, §§ 25, 32 and Buch II, §§ 10 and 11.

gallows on both the victim's cheeks.[35] Imprisonment was appointed for very long terms, sometimes up to a hundred years.[36] There were several kinds of penal detention, such as 'imprisonment in chains', which consisted in confining a chained offender in a cell so small as to allow for hardly any movement,[37] or in chaining him to a wall or floor in a cell by means of a heavy ring suspended round the middle of his body.[38] Von Bar quotes a contemporary traveller for the following impression of prisoners manning galleys: 'A Danube vessel towed by human beings is so repulsive a spectacle that even an executioner who has become familiar with breaking upon the wheel will turn his eyes away'.[39] The reason for this lingering cruelty was that, as has been pointed out, Joseph II abrogated capital punishment only because he considered it ineffective.[40] Although strongly impressed by Beccaria, he still believed in extreme intimidation as the best means of preventing crime.

Another similar example is provided by the French code of 1791. When Le Pelletier de Saint-Fargeau suggested that capital punishment should be replaced by penal detention to be called *la peine du cachot*, he outlined the details of his proposal, and then added: 'It is contended that capital punishment is the only one capable of deterring from crime; the penalty which we are now proposing would be worse than the most cruel death'.[41] If adopted, his proposed penal

[35] *Ibid.*, Buch I, §§ 24 and 39.

[36] *Ibid.*, Buch I, Kap. 2, § 23.

[37] To this penalty annual flogging was added.

[38] *Ibid.*, § 27. Sometimes a board was suspended over his chest on which was indicated the crime he had committed. Often too during the convict's detention his income was confiscated, even if he had a family.

[39] *A History of Continental Criminal Law* (1916), note 7 at p. 252. Professor L. Günther describes these aggravated forms of detention as 'barbarisch'; *Die Idee der Wiedervergeltung* (Erlangen, 1895), Abt. III, Erste Hälfte, note 195 at p. 89.

[40] His Chancellor, Count Kaunitz, issued the following statement on Sept. 2, 1784: 'In abolishing the death penalty His Majesty did not follow the principles of modern philosophers who feel horror at the effusion of blood and maintain that punitive justice has no right to take away the life of a man which nature alone can give. Our sovereign has only followed his own conviction that the punishment by which he proposes to replace the penalty of death is more effective owing to its duration and therefore more appropriate to inspire terror to malefactors'; C. Cantù, *Beccaria e il Diritto Penale* (1862), p. 234. See also W. E. Wahlberg, *Gesammelte kleinere Schriften über Strafrecht* (Wien, 1882), Vol. 3, p. 9.

[41] H. Remy, *Les Principes Généraux du Code Pénal de 1791* (1910), p. 59. Saint-Fargeau further said: '. . . Pour ne point affaiblir le sentiment salutaire

detention would indeed have amounted to a slow death. This suggestion was rejected by the Assembly, but some of the provisions embodied in the new code were equally cruel. *La peine des fers*, for instance, consisted in chaining a heavy iron ball to one of the legs of the condemned; this punishment could be pronounced for a term of several years.[42] Offenders sentenced to *la peine de la gêne* were to be detained in solitary confinement, receive bread and water only, and pay for any additional food out of the income arising from their work; a large part of that income was, however, allocated towards general prison expenses.[43] Certain classes of recidivists, in addition to suffering the punishment carried by their last offence, were to be transported for life.[44]

In Russia, Catherine the Great paid homage to the Empress Elizabeth for having virtually suspended the infliction of the death penalty, but neither she, nor yet Beccaria, indicated what punishment took its place. William Coxe writes that such offenders were first subjected to 333 lashes of the *knoot*.[45]

d'effroi que les peines doivent inspirer, il faut frapper l'esprit des hommes en renouvelant le système des peines. Il est donc convenable d'établir une maison de peines dans chaque ville où siège un tribunal criminel, afin que l'exemple soit toujours rapproché du lieu du délit. Avant d'y être conduit le condamné sera exposé pendant trois jours sur un échafaud dressé dans la place publique, il y sera attaché à un poteau; il paraîtra chargé des mêmes fers qu'il doit porter pendant la durée de sa peine. Son nom, son crime, son jugement seront tracés sur un écriteau placé au-dessus de sa tête. Cet écriteau présentera également les détails de la punition qu'il doit subir. Elle consiste dans les privations multipliées des jouissances dont la nature a placé le désir dans le coeur de l'homme. Un des plus ardents, c'est d'être libre: la perte de liberté sera le premier caractère de sa peine. La vue du ciel et de la lumière est une des plus douces jouissances: le condamné sera détenu dans un cachot obscur. La société et le commerce de ses semblables sont nécessaires à son bonheur: le condamné sera voué à une entière solitude. Son corps et ses membres porteront des fers. Du pain, de l'eau, de la paille fourniront pour sa nourriture et pour son pénible repos l'absolu nécessaire. . . . Cependant une seule fois par mois les peines due condamné ne seront pas solidaires. Les portes du cachot seront ouvertes, mais ce sera pour offrir au peuple une imposante leçon. Le peuple pourra voir le condamné chargé de ses fers au fond de son douloureux réduit; et il lira tracés en gros caractères au-dessus de la porte du cachot le nom du coupable, le crime et le jugement . . . '; *ibid.* He proposed that this punishment should be pronounced for not less than twelve, and not more than twenty-four years. It should be noted that this punishment was intended only for those found guilty of murder (including poisoning), arson, or high treason.

[42] *Code Pénal* (1791), Titre I, Arts. 6–8.

[43] *Ibid.*, Arts. 14–17.

[44] *Ibid.*, Titre II, Art. 1. Pillory was added to many of these penalties.

[45] *Travels into Poland, Russia, Sweden and Denmark* (1784), Vol. 2, p. 78. For a review of the chapters dealing with the Penal Laws of Russia see the

He was present during the infliction of this penalty and adds that 'the reader will judge of the great force which the skilful executioner can give to this instrument, when informed, that if he receives a private order, he can dispatch the criminal by striking him two or three blows upon the ribs'.[46] After the flogging, the offender's nostrils were torn with pincers and his face marked with a hot iron. Finally he was transported to Siberia and there kept to hard labour in mines or other public works for life. He could be set free only following a general or some special amnesty.[47] Even the code of Tuscany, the most liberal of all introduced in the eighteenth century, replaced death by an extremely severe penalty.

The reforms introduced on the Continent were thus obviously incomplete. The scope of capital punishment was considerably restricted, punishments were in many instances better adjusted to the gravity of offences, and torture was abolished. Yet the cruelty—sometimes amounting to torture—inherent in other penalties remained.[48] This grave defect of the new Continental codes was already incipient in the writings of Montesquieu and Beccaria, who neglected the problem of secondary punishments without the solution of which any reform of criminal law was destined to remain abortive.

Annual Register (1784–85), Vol. 27 (Characters), p. 118: 'Short Account of the Penal Laws of Russia—Description of the Punishment called the Knoot—The Empress's Answers to Mr. Coxe's Queries on the State of the Russian Prisons—The Outlines of the New Code of Laws, established by her at her Accession'.

[46] Coxe, *op. cit.*, note at p. 77. For an account of the infliction of the punishment of *knoot* on a man and a woman see J. Howard, *The State of the Prisons* (3rd ed., 1784), p. 86.

[47] On the terrible state of prisons, see Coxe, *op. cit.*, p. 84 *et seq.*

[48] This point was raised by some opponents of criminal law reform in England. Thus when reviewing Romilly's speech of 1810 in which he mentioned the continental reforms, *The Quarterly Review* writes: '. . . In listening to their illusive panegyrics, upon legal and judicial lenity, we have found the Utopia dream cruelly disturbed by the cries of its own victims'; (1812), Vol. 7, p. 177.

CHAPTER 10

THE REFORMERS: (1) EDEN AND ROMILLY

§ 1. WILLIAM EDEN

Some biographical facts

THE first attempt critically to examine the structure and principles of English criminal law[1] and to evolve a comprehensive plan for its reform was made by William Eden[2] in his book *Principles of Penal Law*, so aptly described by Sir William Holdsworth as '. . . a pioneer treatise . . . remarkable precursor of that new era of agitation for the reform of the law, which, under Bentham's leadership, was soon to begin . . .'[3]

Eden was born in 1745 and died in 1814. A descendant of an old and distinguished family,[4] he was educated at Eton and Christ Church, Oxford, and later read law in London. In 1769 he was called to the Bar at the Middle Temple.[5] His university career was already full of brilliant promise and he published *Principles of Penal Law* in 1771[6] when only twenty-six years old. This book, strongly inspired by Montesquieu and Beccaria, gained quick recognition both in this country and abroad as an important contribution to the reform of criminal law.[7] Eden combined a wide knowledge of law

[1] Including the penal system and certain aspects of criminal procedure.

[2] Afterwards first Lord Auckland.

[3] *H. E. L.*, Vol. 12, pp. 364–365.

[4] See *Journal and Correspondence of William, Lord Auckland* (ed. by Robert John, third Baron Auckland, Bishop of Bath and Wells, 1861–62), Vol. 1, p. xi. He married Eleanor Elliot, the only sister of Sir Gilbert Elliot (afterwards first Earl of Minto); one of his sisters was the wife of Dr. Moore, Archbishop of Canterbury.

[5] *D. N. B.*, VI, 362.

[6] A second edition appeared in the course of the same year and a third in 1772. The *Dictionary of National Biography* incorrectly states that *Principles of Penal Law* was first published in 1772.

[7] Even Bentham, highly critical though he was, calls Eden an 'elegant and admired writer'; 'Principles of Penal Law', *Works* (Bowring, 1843), Vol. 1, p. 466. He was extensively quoted by Dagge, Dr. S. Parr and Basil Montagu. On recognition abroad see, for instance, J. P. Brissot de Warville, *Bibliotheque Philosophique de Législateur* (1782), Vol. 1, p. xv.

with a firm grasp of its basic principles and a mature judgment of the political and social issues involved in a system of criminal justice. The general arrangement of the matter is exceptionally clear, the language attractive and the whole work inspired by a genuine desire to promote progress.

Although very successful at the bar, Eden abandoned the legal profession for politics by accepting the office of Under-Secretary of State which was offered to him in 1772.[8] In 1774 he entered the House of Commons and soon established himself as an authority on economic questions. He held a number of important posts and proved himself an able statesman and negotiator. As an envoy-extraordinary he successfully concluded a commercial treaty with France; later, he became ambassador to Spain.[9] He was chairman of a Committee to inquire into illicit practices to defraud the revenue, and also of a Select Committee to examine reports of directors of the East India Company. Until 1804 he remained on very intimate terms with Pitt,[10] whom he helped to carry through the Union with Ireland. It may well be that it was owing to his influence that Pitt became interested in the reform of

[8] In a letter to Sir A. Wedderburn (afterwards Earl of Rosslyn), who suggested that he should take up this office, Eden writes: '. . . I certainly have had no reason to be disgusted with my profession. My success in it hitherto hath infinitely exceeded both my pretensions and expectations. I now see my way in this path (and, to a limited degree), with some certainty; in the political path I have no experience, I know nothing of it with certainty, except that many have lost their way in it. It is also evident, that if I turn from my profession, it will be in vain to look back upon it, " vestigia nulla retrorsum ". I am aware, too, of the daily confinement and regular attendance at the office, of the affected reserve which a man must adopt on all subjects, whether ignorant or otherwise; and, lastly, of the hourly necessity of giving disagreeable answers both to reasonable and unreasonable requests. So much contra. On the other hand, I love politics better than law (and this not from caprice, for I feel it to be the natural bent of my inclination). I also love business, and am conscious that I possess the spirit of perseverance. I have no wish to make a fortune, and those who know me will believe that I am capable of being happy with a very moderate competence. I am armed, therefore, against events . . .'; *Journal and Correspondence of William, Lord Auckland* (1861–62), Vol. 1, pp. xii–xiii.

[9] He changed sides and joined Pitt and for a time became the object of bitter attacks on the part of his old political friends as well as of many satires in contemporary periodicals and on the stage. His success as a negotiator in France was, however, so outstanding that his achievement has been recognised even by his opponents. See on this Sir N. W. Wraxall, *Posthumous Memoirs of his Own Time* (1836), Vol. 1, pp. 437–441, and Vol. 2, pp. 17–20, and p. 180.

[10] Pitt is believed to have entertained sentiments of affection for Eden's eldest daughter Eleanor who later married the Earl of Buckinghamshire. On their projected marriage see *Journal and Correspondence of William, Lord Auckland* (1861–62), Vol. 3, pp. 367, 369, 373, 374 and 378.

criminal law.[11] A number of tracts on economic and political matters which he published aroused much interest.[12] In 1789 he was made an Irish baron and in 1793 was created a peer of Great Britain, as Lord Auckland of West Auckland, Durham. He also obtained the degree of Doctor of Law and was elected Fellow of the Royal Society. He was keenly interested in various aspects of penal law and administration and in 1778, helped by Blackstone and John Howard, framed and carried through Parliament an important law relating to the prison system.[13] He also strongly urged the House of Lords to adopt a Bill to make adultery a criminal offence.[14]

His views on the object of punishment and the death penalty

Eden agrees in principle with writers such as Madan and Paley, who defended the system of criminal law based on capital punishment, that deterrence is the main object of punishment.[15] But, and here lies the important difference, Eden's doctrine may perhaps be called one of mitigated deterrence. The severity of penal laws should be controlled first by 'natural justice' and secondly by 'public utility'.[16] He rejects the thesis advanced by Madan and Paley[17] that penalties of any degree of severity may be justified if they are effective in preventing a particular crime,[18] and also disagrees with Paley[19] and Blackstone[20] that the severity of punishments should be increased in proportion to the ease with which the corresponding offences may be committed,

[11] See on this below, pp. 342–343.

[12] But Mackintosh relates that Adam Smith did not think highly of him as an economist and described him as 'but a man of detail'; *Miscellaneous Works* (1846), Vol. 3, p. 17, note *.

[13] 19 Geo. 3, c. 74 (1779). On this subject see the interesting correspondence between Bentham and Eden referred to below, note 93 at p. 380. More will be said about this statute in a subsequent volume of this *History* (section dealing with secondary punishments).

[14] *Parl. Hist.* (1800–1801), Vol. 35, April 2, 1800, cols. 225–301.

[15] *Principles of Penal Law* (2nd ed. 1771), p. 7. All ensuing references are made to this edition of Eden's book.

[16] *Ibid.*, p. 6. Elsewhere he writes: 'When the rights of human nature are not respected, those of the citizen are gradually disregarded'; p. 13.

[17] Above, pp. 240–241 and 250.

[18] '. . . a position, which, when offered without limitation, I conceive to be both morally and politically false'; *ibid.*, p. 13.

[19] On this aspect of Paley's doctrine see above, p. 251.

[20] On this aspect of Blackstone's doctrine see below, p. 346.

or to the degree of temptation to commit them. Such a 'perversion of distributive justice' [21] must inevitably lead to the appointment of excessively and indiscriminately severe punishments, on the effectiveness of which Eden fully agrees with Montesquieu and Beccaria [22]; like these two authors, he also insists that punishments should bear some proportion to the gravity of offences.[23]

How did these general considerations regarding the object and degree of punishment affect his attitude towards the death penalty? He refuses to accept the view that death is but one among several legal punishments. 'The infliction of Death', he writes,[24] 'is not therefore to be considered, in any instance, as a mode of punishment, but *merely* as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with public safety.' It thus appears that like Montesquieu, Eden was in favour of retaining the death penalty; but the tenor of this passage seems to indicate that he would confine it within a very narrow compass indeed. This is further corroborated by another passage where he states that nothing 'but the evident result of absolute necessity can authorise the

[21] *Ibid.*, p. 8. As an illustration of this concept Eden quotes 7 Geo. 2, c. 21, by which 'to assault another with an offensive weapon, or by menaces, demanding money, goods or chattels, with a felonious intent to rob', was to be punished with transportation, and contrasts it with 9 Geo. 1, c. 22, which makes it a capital offence without benefit of clergy merely 'to write an anonymous letter, signed with a fictitious name, demanding money, venison, or other valuable thing'. He further quotes statutes based on a similar principle which were adduced by Blackstone in support of this doctrine with which Eden disagrees, though—as he puts it—it was expounded by '. . . the most ingenious and eloquent writer on the law of England'.

[22] '. . . the acerbity of justice deadens its execution' (p. 14); 'severe penalties, the instruments of despotism, have a tendency to extend themselves to every class of crimes' (p. 13); 'may give a sudden check to temporary evils; but . . . their frequency hardens the sentiments of the people' (*ibid.*); they increase the chances of impunity (p. 14); make the administration of justice indeterminate (p. 21). 'It is a property inseparable from harsh laws, that they are neither regular, nor expeditious in their execution, consequently, that they flatter the hope of impunity, and, equally injurious to the society and to the criminal, tend to the fatal multiplication both of crimes and of punishments' (pp. 291–292). Eden agrees with Barrington, see above, pp. 29–30, that the severity of English criminal law was the result of the 'increasing opulence of the kingdom; and indeed there seems sufficient reason to believe, that sanguinary laws are the probable consequence of national prosperity'; pp. 290–291; whereas Barrington regards this tendency as inevitable and almost irremediable, Eden maintains that its progress should be checked.

[23] *Ibid.*, p. 8, and note K, *ibid.*, pp. 83 and 88.

[24] *Ibid.*, p. 25

destruction of mankind by the hand of man '.[25] He further objects to all aggravated forms of the death penalty[26] and suggests that new capital laws should always be only temporary.[27]

Proposed revision of capital statutes:

(a) High treason and offences against the person

Eden's main interest lay not in a theoretical discussion of problems of punishment but in the measures to be taken in order to improve English criminal law and its administration. '. . . The ideas, which in the course of this inquiry I have endeavoured to establish as principles of penal law ', he writes, ' have not been stated as abstract propositions; but rather as argumentative inferences, interwoven with, and to be collected from, observations on the penal systems of different governments.'[28] Scattered through his book are a number of concrete proposals which form the first uniform plan for the reform of English criminal law.

What were the capital statutes Eden proposed to revise, and to what extent did he intend to revise them? He suggests that the following offences should cease to be regarded as high treason: the killing of certain magistrates in the execution of their office, which should be made murder[29];

[25] *Ibid.* For offences which in his opinion should carry capital punishment see below, note 50 at p. 311.

[26] Eden was against the burning of women found guilty of petty treason, against exposing the bodies of executed criminals on gibbets, as well as against the system of execution appointed for high treason; *ibid.*, pp. 208, 80 and 151. It would appear, however, that he was in favour of public executions; it is, he adds, ' a certain proof of some defect in the mode of infliction, when it ceases to be considered as the most solemn and affecting scene that can be exhibited '; *ibid.*, p. 327.

[27] *Ibid.*, p. 259.

[28] *Ibid.*, p. 328. Like Beccaria, Eden looks upon society as having been formed by agreement of its individual members (p. 2). Again, in common with Montesquieu and Beccaria, he considers the main function of the State to be to ensure a maximum measure of liberty to individuals. The scope of criminal law should be reduced to the minimum and the definition of criminal acts should be very precise. The rights of the accused should be fully respected in all the stages of prosecution and trial. He suggests a number of reforms all of which were adopted in the course of the ensuing sixty years.

[29] ' Reverence and security are certainly due to the dispensers of public justice; but it may be doubted, whether they are so immediately the representatives of sovereignty, as to make the crime of killing them, however aggravated its nature, lose its proper name of murder '; *ibid.*, p. 143.

counterfeiting the King's or the Privy Seal, but more especially various coinage offences[30]; all offences directed against established religion.[31] He thinks it doubtful whether the extension by judicial construction of the scope of the provision of 25 Edw. 3, St. 5, c. 2, relating to levying war was fully warranted, and questions the construction by which it was made high treason for a son, husband or father to protect a wife, parent or child guilty of that offence.[32] As regards offences against the security of the State not amounting to high treason, Eden objects to the second part of a section of 20 Geo. 2, c. 46, which made it a capital offence both for rebels under sentence of transportation to escape to Spain or France and for the friends of such persons to keep or entertain any correspondence with them by letters, messages or otherwise.[33]

In the class of offences against the person, Eden was in favour of revising the following statutes: 21 Jac. 1, c. 27, relating to the murder of bastard children by their mothers[34]; 1 Jac. 1, c. 8, known as the Stabbing Act; a clause of 9 Geo. 1, c. 22 (Waltham Black Act) making it a capital offence wilfully and maliciously to shoot at a person though neither death nor maiming should ensue; 9 Anne, c. 16, making it a non-clergyable felony not only to strike, wound, or attempt to kill, but also to *assault* any privy councillor in the execution of his office.[35] He also criticises the rule established by

[30] *Ibid.*, p. 141. He singles out for revision 8 & 9 Will. 3, c. 26, and 15 Geo. 2, c. 28 (which he mistakenly quotes as 16 Geo. 2), and regrets that several statutes relating to this subject are not reduced into one Act; pp. 140 and 141. For his views on the scope of such a consolidation see below, p. 310.

[31] Such as 3 Jac. 1, c. 4, and 23 Eliz. c. 1, which made it high treason 'not only to pervert but *even to be perverted* to the see of Rome'; 5 Eliz. c. 1, s. 11—a second refusal to take the oath of supremacy, and s. 10—the second offence of establishing the Pope's power, '. . . upon which it is obvious to observe, that the idea of treason, arising from a repetition of the offence, is in itself an absurdity'; 13 Eliz. c. 2—to obtain, or publish, or put in execution, within the British dominions, as Popish Bull of absolution, or reconciliation. 'Such Laws', he says, 'are rarely exerted; but their existence is a national reproach'; *ibid.*, pp. 144 and 99.

[32] *Ibid.*, pp. 16–17.

[33] *Ibid.*, p. 36. He also considered that 9 Geo. 2, c. 30, and 29 Geo. 2, c. 17, which made it a non-clergyable felony for a subject to enlist, or to procure the enlistment of another, in a foreign service without the licence under the King's sign manual, were too severe; *ibid.*, p. 202.

[34] On this statute see below, pp. 430–434.

[35] *Ibid.*, pp. 15 (note t), 232, 255 and 258.

judicial decisions that a person shooting at a bird belonging to another with intent to steal, and happening to kill a man, shall be guilty of murder, by reason of the felonious intent.[36]

Eden does not suggest the revision of any statute relating to sexual offences. He remarks that although rape is '. . . peculiarly liable to vary in the degree of its atrociousness, according to the circumstances of the case . . .,' it is for that very reason 'peculiarly open to the divine prerogative of pardon'. He also questions the wisdom of public prosecutions in cases of sodomy which 'some have thought unsafe, and likely rather to sollicit the attention, than to deter from the

(*b*) *Offences against property*

Eden's proposals concerning a great many offences against property are particularly drastic. The offence of wilfully burning the house of another he considers to be one 'of the blackest malignity; being fatal to the security of the innocent occupier, dangerous to the lives and professions of persons even unknown, unlimited in its consequences, and mainly malicious in its nature'. Yet he deplores the uniformly extreme severity of the relevant statutes, more particularly of that section of 9 Geo. 1, c. 22, rendered permanent by 31 Geo. 2, c. 42, which punished with death the setting on fire of any house, barn, out-house, or any hovel, cock, mow, or stack of corn, straw, hay, or wood.[38] This provision, he claims, is 'a strong instance of the vague, unfeeling, undistinguishing carelessness with which penal laws are composed', with every idea of proportion obliterated. He is against appointing the death penalty for any malicious injuries to property, the great bulk of which are no more than 'mischiefs of very inferior criminality', and objects to almost all the provisions of the Waltham Black Act,[39] as well as to

[36] 'That external, unconnected circumstances should regulate the nature and enormity of crimes', Eden writes, 'that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and unnatural'; *ibid.*, pp. 227–228.

[37] *Ibid.*, pp. 261 and 269.

[38] *Ibid.*, p. 271. On this section see above, pp. 68–69.

[39] 9 Geo. I, c. 22; on this Act see above, p. 49 *et seq.*

12 Geo. 1, c. 34, which made it a capital offence wilfully to break any tools used in the manufacture of wool, and to 4 Geo. 3, c. 37, s. 16, another capital statute relating to maliciously cutting or destroying any linen cloth when exposed in order to bleach or dry.[40]

As regards larceny and allied offences, Eden expresses himself against the practice of making capital punishment dependent on the value of stolen property. He suggests the repeal of the extreme penalty for stealing privately from the person (8 Eliz. c. 4) and its replacement by imprisonment with labour, '. . . a mode of punishment, which by inducing a habit of industry, and by the effects of that habit, would be equally beneficial to the criminal and the public'. He further suggests the repeal of all capital statutes relating to stealing cattle, and of 22 Car. 2, c. 5, s. 3, 4 Geo. 2, c. 16, and 18 Geo. 2, c. 27, relating to the theft of cloth and fustian from tenters and bleaching grounds. Though Eden agrees that burglary should continue to be punished with death, he insists on the need for extreme strictness in interpreting the relevant statutes and regrets that so many larcenies in dwelling-houses, which do not amount to burglary, have nevertheless been made capital offences by a multiplicity of statutes so complicated in their limitations and so intricate in their distinction that '. . . there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which on this point they are made liable'. On the subject of 3 W. & M. c. 9, relating to robbery, Eden makes the interesting suggestion that punishments should be differentiated according to whether a simple robbery, or a robbery with murder, has been perpetrated.[41] He also proposes to revise all statutes dealing with coinage offences and to abolish capital punishment for sending threatening letters in order to extort money.[42]

His other suggestions are: to repeal capital punishment for putting out false lights with intent to bring any ship into

[40] *Ibid.*, pp. 269–270, 271–272, 296, 297, 301 and 304.

[41] On these points see *ibid.*, pp. 14, 274, 274–275, 276–277, 287, 288–289, 292.

[42] He further disagrees with making the destruction or damage of certain bridges a non-clergyable felony, while the destruction or damage of others was within benefit of clergy; *ibid.*, p. 18.

danger (26 Geo. 2, c. 19)[43]; to revise another section of the same Act, relating to plundering wrecks; to revise 11 & 12 Will. 3, c. 7, and 8 Geo. 1, c. 24, relating to piracy, so as to exclude from their scope certain offences not amounting to piracy and having no direct connection with that offence[44]; to revise 19 Geo. 2, c. 34, making violent acts connected with smuggling felonies without benefit of clergy; in this branch of penal laws, he writes, '. . . lawgivers should be extremely cautious, not to confound atrocious breaches of the civil contract with simple violations of the police'[45]; to repeal statutes which make it a capital offence unlawfully to return from transportation, especially when the original offence was not a capital one; to revise 1 Edw. 2, St. 2, which enacted that no person shall be punished with loss of life or limb for breaking prison unless the original offence for which he was imprisoned carried that punishment; this provision Eden thought to be too severe.[46]

The repeal of obsolete statutes. Consolidation. The scope of proposed reforms

In addition to the revision of these important capital statutes, Eden suggests the outright repeal of all obsolete statutes, and of such as were enacted to deal with exceptional circumstances no longer in existence.[47] Describing these statutes as

[43] This he thought particularly important since by another Act, 8 Eliz. c. 13, s. 4. the destruction of sea-marks was punished only with a fine of £100 or outlawry; *ibid.*, pp. 112–113.

[44] '*The misapplication of terms in the framing of penal laws is dangerous to liberty*' (Eden's italics); p. 115.

[45] *Ibid.*, pp. 204–205. He also takes objection to 9 Geo. 2, c. 35, s. 13, which punished with death persons who shall *assemble* armed for the purpose of smuggling.

[46] *Ibid.*, p. 203.

[47] The statutes mentioned by Eden may be grouped under the following three headings:

(1) Capital non-clergyable offences: 5 Eliz. c. 20—to associate one month with Egyptians; 39 Eliz. c. 17—for a soldier or mariner to wander without a testimonial; 43 Eliz. c. 13—to entice subjects over the frontier of the northern counties or blackmail them; 14 Edw. 3, c. 10—jailers forcing prisoners to become approvers; 3 Hen. 6, c. 1—masons confederating to prevent the statutes of labourers; 28 Edw. 1, St. 3, c. 2—purveyors in certain cases, though purveyance is abolished; 27 Edw. 1, *Ex Rot. in Turr.*—forfeiture of life and goods for those who shall bring Pollardz and Crokardz (foreign coins of base metal) into the realm.

(2) Offences carrying mutilating penalties: 33 Hen. 8, c. 12—for giving a blow in a court of justice the hand to be cut off in the presence of the master-cook and serjeant of the larder who are to attend with dressing knives, the

a 'dismal catalogue' he states: 'Positive laws are those, which do not flow from the general obligation of morality, and the general condition of human nature; but have their reason and utility, in reference to the *temporary* advantage of that particular community for which they are enacted. Every law therefore, which comes under this description, ought to have a limited duration; and should not be suffered to remain a burthen upon the people, when the grievance, for which it was framed, hath ceased, and is forgotten'.[48]

The consolidation and digestion of criminal statutes Eden considered to be a matter of great urgency and importance. He would entrust this work to a commission of experts who were not Members of Parliament, and would like them first, to frame separate declaratory statutes 'relative to each class of crime, comprehending all the descriptions and degrees of each crime, with their proportionate punishments'; and secondly, to follow every such declaratory statute by a 'supplemental Bill, repealing all prior provisions relative to the class of crimes in that statute contained'. To repeal particular statutes, without any such work of preparation was, in his view, 'a mere palliative remedy; which may tend indeed to abate the symptoms of the disease, but from which a radical cure cannot be expected'.[49]

serjeant of the wood-yard who is to furnish a chopping-block, the yeoman of the scullery—to attend with a pan of coals, and the serjeant or the chief ferror to bring hot irons to sear the stump; 5 & 6 Edw. 6, c. 4—punishing a blow given in a church-yard with the loss of an ear, or, if the offender has no ears, with branding the letter F on his cheek; 8 Eliz. c. 3—imprisonment and the loss of the left hand for sending live sheep out of the kingdom or for embarking them on board any ship.

(3) Offences carrying other severe penalties: 13 Eliz. c. 8, made permanent by 39 Eliz. c. 18—forfeiture of goods, chattels, lands and tenements to the King and life imprisonment for acting as broker or agent in any usurious contract, where more than 10 per cent. was taken; 16 Car. 1, c. 21, and 1 Jac. 2, c. 8—providing the same punishment for obtaining a patent for the monopoly of gunpowder; 7 & 8 Will. 3, c. 24—a similar penalty for any person practising law not taking the new oaths of allegiance and supremacy and not subscribing the declaration against popery; 3 Hen. 5, St. 1, c. 1—concerning the offence of bringing into the realm Gally-halfpence; 10 Geo. 2, c. 31, s. 8—punishing with transportation any waterman who shall take a greater number of passengers than allowed if any be drowned, in which case, as Eden points out, the crime is founded on the hypothesis of a causal event; see *ibid.*, pp. 19–20, 311, 64–65, 303, 303–304.

[48] *Ibid.*, p. 305.

[49] *Ibid.*, note h, at p. 329. A similar suggestion was made by D. Barrington, *Observations on the More Ancient Statutes* (3rd ed. 1769), p. iii, and Appendix, pp. 497–503. Eden acknowledges that he was influenced by Barrington's views on this subject.

Although Eden favours the retention of the death penalty for a substantial number of offences,[50] his suggested reforms are none the less strikingly bold. It should be remembered that Eden was writing at a time when new capital offences were being continually created, and when Madan was urging the strict enforcement of all capital statutes.[51] When some twenty-five years later Sir Samuel Romilly began his campaign in Parliament against capital punishment for certain offences, all that he was able to accomplish was the repeal of two capital statutes relating to offences against property.[52] Not until 1823 was the Waltham Black Act abrogated, even then only partially,[53] whereas no consolidation and digestion of criminal law was undertaken until the second quarter of the nineteenth century, by Sir Robert Peel.[54]

Remarks on secondary punishments

Eden gave much thought to the question of secondary punishments, one of the most complex and difficult that faced eighteenth century legislators.[55] He raised this issue in Parliament,[56] and his book opens with an examination of various punishments,[57] followed later by an analysis of crimes.

In the eighteenth and early in the nineteenth centuries, one

[50] He is in favour of capital punishment for high treason; murder, urging for this crime a ' rigid infliction ' (p. 244) and suggesting that parricide should be included in the class of petty treason (p. 243); certain offences against the person not amounting to murder, such as maiming (p. 255); rape and sodomy; certain smuggling offences, particularly those accompanied with violence; certain kinds of piracy; most serious cases of wilful burning; riot; robbery attended with loss of life; burglary; and it would seem also forgery.

As regards forgery Eden explicitly singles out for repeal only one statute —5 Eliz. c. 14—and though he regrets that there are so many capital statutes relating to forgery, he stresses that ' the increase of modern riches, the invention of paper, the many complex securities, and representations of property, the institution of national funds, and rules of written evidence, have all contributed to render forgery a consideration of great extent and importance '; *ibid.*, pp. 294–295.

[51] Above, pp. 241–243.

[52] Below, note 10 at p. 525.

[53] Above, pp. 78–79.

[54] Below, pp. 574–577.

[55] On the grave deficiencies in this respect of the eighteenth century Continental codes see above, pp. 297–300.

[56] See above, p. 303.

[57] See Chapters 4–9, entitled: ' Of Banishment '; ' Of Forfeiture, and Corruption of Blood '; ' Of Imprisonment '; ' Of Corporal Punishment, and of Infamy '; ' Of Fines '; ' Of the Disposal of the Dead Body of the Criminal '.

of the most common punishments was transportation[58]; also most capitally convicted offenders had their sentences commuted to transportation.[59] It is important to note that while anxious to revise many capital statutes, Eden doubts the efficacy of transportation: ' . . . Every effect of banishment, as practised in England ', he writes, ' is often beneficial to the criminal, and always injurious to the community. The kingdom is deprived of a subject, and renounces all the emoluments of his future existence. He is merely transferred to a new country; distant indeed, but as fertile, as happy, as civilised, and in general as healthy, as that which he hath offended. It would not be incredible then, if this punishment should be asserted in some instances to have operated even as a temptation to the offence; in many instances hath its insufficiency been a fatal argument for the multiplication of capital penalties '.[60] He then examines how far and by what means this could be remedied, suggesting that some offenders sentenced to transportation be employed in dockyards, mines and other public works, the most dangerous offenders be sent to Tunis, Algiers or elsewhere to be exchanged for Christian slaves and others still be compelled to take part in dangerous expeditions or to establish new colonies. These proposals—except perhaps the first[61]—were unlikely to appeal to the Legislature or indeed to public opinion. Eden is equally critical of imprisonment, which he thought contrary to all the principles of wise legislation. ' It sinks useful subjects into burthens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people '.[62] He favours flogging, provided that it is inflicted in public and

[58] See above, pp. 109–110, 119–120 and 160.

[59] See above, pp. 119–120. On Eden's views concerning the royal prerogative of mercy see above, pp. 131–133.

[60] *Principles of Penal Law*, p. 33.

[61] On the strong objections raised in Parliament against the public employment of offenders see below, pp. 422–423.

[62] *Op. cit.*, p. 50. Eden stresses the necessity of legal guarantees and strict supervision (what he calls ' preventives of secret tyranny ') to ensure the humane treatment of prisoners for, as he puts it, ' jailers are in general a merciless race of men '. He also urges that debtors, and those detained before caution, be kept apart from offenders sentenced to imprisonment for criminal offences.

is never ordered by one Justice of the Peace only; flogging could, he thought, be ordered with good effect for some offences instead of death.[63] He similarly favours pillory and loss of civic rights: 'The idea of shame', he writes, 'should follow the finger of the law'. The imposition of fines he thought to be a very important punishment, the judicious use of which could help materially to reduce capital and corporal penalties[64]; he stresses that the *quantum* of each fine should always be determined by the court. For certain offences he recommends a combination of flogging and fining. Much greater use should, in his view, be made of 'recognisances of peace', to be taken from persons expected to commit further offences, and of 'sureties for the future good behaviour', both these measures being particularly appropriate to ensure '. . . the proper objects of that preventive justice, which is calculated for the amendment of offenders, the example of others, and the security of the state'.[65] He was against any form of mutilation and also urged a revision of the law of forfeiture and corruption of blood.[66]

It is evident that Eden realised the need for devising some system of humane and effective secondary punishments. Yet he does not seem to have grasped the implications of the repeal of the death penalty for a great number of offences simultaneously, and he hardly ever indicates possible alternative penalties.[67] In view of his dislike for general and vague proposals, this may be taken as another indication of how difficult it was then to solve this problem.

§ 2. SIR SAMUEL ROMILLY

Early influences

When on May 18, 1808, Romilly initiated his pioneer campaign in Parliament for the reform of criminal law by bringing in his first Bill purporting to repeal the death penalty for one

[63] *Ibid.*, pp. 58 and 63.
[64] *Ibid.*, p. 68.
[65] *Ibid.*, p. 78.
[66] *Ibid.* pp. 46–49.
[67] Privately stealing from the person is one of the very few exceptions; see above, p. 308.

of the capital offences so numerous at the time,[68] he said: 'My apology . . . must be that I have not taken up the matter suddenly or lightly; that the subject which I now presume to bring before the House, is one that has occupied my thoughts for many years'.[69] And again in 1811 he said: 'The subject of Criminal Law has always been most interesting to me. It has, more or less, through life, been my particular study. For fifteen years I constantly attended our Courts of Criminal Law; and, although my researches may not have been very successful, I am in possession of notes, by which my Hon. Friend[70] may be convinced I was not wanting in diligence; and that my endeavours to obtain information were not confined to the collection of a few scattered remarks in our Superior Courts upon the Circuit, but extended to the Courts of Quarter Sessions, where I had the honour for many years to practise'.[71]

Romilly's interest in penal matters was stimulated by the writings of Howard and Beccaria and, to a certain extent, of Bentham.[72] John Howard's book on the state of prisons from which he gained a vivid picture of the ineffectiveness and corruption of English houses of correction, and even more so, the author's devotion to the cause of prison reform, left a lasting impression on him. In a letter dated May 22, 1781, he wrote to John Roget[73]:

> 'It (Howard's *State of Prisons*) is not a book of great literary merit; but it has a merit infinitely superior; it is one of those works which have been rare in all ages of the world,—being written with a view only to the good of mankind. The author . . . made a visit to every prison and house of correction in England with invincible perseverance and courage; for

[68] On this Bill see below, p. 497.

[69] *Speeches of Sir Samuel Romilly* (1820), Vol. 1, p. 38. At that time Romilly was fifty-one; he was born on March 1, 1757, and died on November 2, 1818.

[70] He referred to Colonel Frankland who opposed his Bill.

[71] *Op. cit.*, p. 341.

[72] Romilly's three intimate friends, the Rev. John Roget (later his brother-in-law), Dr. Samuel Parr and Dugald Stewart, with whom he often discussed penal matters, should be mentioned here, as well as James Scarlett (first Lord Abinger). On his friendship with Scarlett, see P. C. Scarlett, *A Memoir of the Rt. Hon. James, first Lord Abinger* (1877), pp. 50–55.

There is no reference in Romilly's *Memoirs* or *Speeches* to Eden's *Principles of Penal Law*, but he does mention it in a letter of March 1, 1782, addressed to Roget, and quotes Eden in his *Observations on Executive Justice*.

[73] *Memoirs of the Life of Sir Samuel Romilly* (ed. by his sons, 1840), Vol. 1, pp. 169–170.

> some of the prisons were so infected with diseases and putrid air that he was obliged to hold a cloth steeped in vinegar to his nostrils during the whole time he remained in them, and to change his clothes the moment he returned. After having devoted so much time to this painful employment here, he set out on a tour through a great part of Holland, Germany and Switzerland, to visit their prisons. What a singular journey! —not to admire the wonders of art and nature,—not to visit courts and ape their manners,—but to compare the misery of men in different countries, and to study the arts of mitigating the torments of mankind! What a contrast might be drawn between the painful labour of this man, and the ostentatious sensibility which turns aside from scenes of misery, and with the mockery of a few barren tears, leaves it to seek comfort in its own distresses!'

In another letter written to Roget a year later, he says[74]: 'I have lately read a second time, Beccaria on Crimes and Punishments, a favourite book, I know, of yours, and I think deservedly'. But although strongly influenced by Beccaria, Romilly disagreed with him on the subject of capital punishment which, he was convinced, it is essential to inflict for some offences.[75] He closely studied the systems of criminal justice both in England and on the Continent. In his autobiography he describes how in 1786 he devoted much time to 'writing observations on different parts of our criminal law. Upon the circuit, too, I made the criminal law very much my study, and attended as much as I could in the Crown

[74] Extract from a letter dated March 1, 1782: 'Memoirs of Sir Samuel Romilly' being an introduction to his *Speeches* (1820), Vol. 1, p. XXIX.

[75] On May 9, 1783, he wrote to Roget:

> 'I am much obliged to you for giving me your sentiments on the question whether any crime ought to be punished with death. The objection you make to the punishment of death, founded on the errors of human tribunals and the impossibility of having absolute demonstration of the guilt of a criminal, strikes me more forcibly than any argument I have ever before heard on the same side of the question. I confess, however, that to myself it seems absolutely impossible, even if it were to be wished (of which I am not quite sure), to omit death in the catalogue of human punishments; for, if the criminal will not submit to the punishment inflicted on him, if he escapes from his prison, refuses to perform the labour prescribed to him, or commits new crimes, he must, at last, be punished with death. So it is, at least, in the *Utopia* of Sir Thomas More; . . . One reason why I cannot think that death ought so carefully to be avoided among human punishments is, that I do not think death the greatest of evils. Beccaria and his disciples confess that it is not, and recommend other punishments as being more severe and effectual, forgetting, undoubtedly, that if human tribunals have a right to inflict a severer punishment than death, they must have a right to inflict death itself'; *Memoirs*, Vol. 1, pp. 277–278.

Court and noted down all the most remarkable things that passed there; not merely the points of law that arose, but the effects which the different provisions of the law, the rules of evidence, and our forms of proceeding appeared to me to produce on the manners of the people and on the administration of justice'.[76] He was equally anxious to acquire a first-hand knowledge of the Continental systems, and his *Memoirs* contain most interesting observations on the working of criminal justice both in Switzerland[77] and in France[78]; he also closely followed foreign literature on these subjects.[79]

'*Observations on Executive Justice*'

Thus when Madan published his *Thoughts on Executive Justice* in 1785 Romilly, though only twenty-eight years old, was already well acquainted with the subject and had had time to form strong views on the need for a far-reaching reform both of criminal law and of the penal system. He therefore gladly responded to a suggestion made to him by Lord Lansdowne to write a pamphlet refuting Madan's thesis.[80]

[76] *Ibid.*, Vol. 1, pp. 90–91. Romilly relates that his servant, Bickers, whom he sometimes employed to copy his notes on various defects of the administration of justice, noticing the little progress Romilly was making on the circuit, told him one day that the business of a barrister depends 'on the good opinion of the attorneys; and attorneys could never think well of any man who was troubling his head about reforming abuses when he ought to be profiting by them'; *ibid.*, p. 78.

[77] *Ibid.*, pp. 57–58. In Geneva he was even admitted by a Court as an assistant to an advocate defending in a criminal trial held in secret; on the interesting details of this trial see C. G. Oakes, *Sir Samuel Romilly* (1935), pp. 27–29.

[78] *Memoirs*, Vol. 1, pp. 82–84.

[79] See for instance his detailed critical remarks upon a book written by an Italian criminal lawyer in a letter of February 10, 1783, to Roget; 'Memoir of Sir Samuel Romilly', *Speeches*, Vol. 1, pp. xxxi–xxxv. This letter contains interesting observations on how an attempted crime ought to be punished and on the foundations of the right to punish in general.

[80] Lord Shelburne (later Marquis of Lansdowne) thought highly of Romilly. He particularly valued Romilly's pamphlet *A Fragment on the Constitutional Power and Duties of Juries upon Trials for Libels*, published anonymously and circulated by the Society for Constitutional Information in 1784, but even before the publication of this pamphlet he had heard a great deal about Romilly from Mirabeau. After having read the pamphlet, he expressed the desire to make Romilly's acquaintance. It was at Lord Lansdowne's house at Bowood that Romilly met many distinguished men, among others Jeremy Bentham. On the delightful and stimulating atmosphere at Bowood see Lord Fitzmaurice, *Life of William Earl of Shelburne* (2nd ed., 1912), Vol. 2, p. 300 *et seq.* Four years after the publication of Bentham's 'Fragment on Government', Shelburne happened to read the work and determined to make his acquaintance. In July, 1780, he called on him in his chambers at Lincoln's Inn and thus began

He published this essay anonymously in 1786 under the title *Observations on a late Publication intituled, Thoughts on Executive Justice.*[81] It would be misleading to look upon this youthful tract as a mature expression of his views on the subject of criminal law reform. Not until much later—in 1808 or even 1810—was his penal doctrine fully formed. Nevertheless this pamphlet occupies an important place in the history of English penal thought.

Romilly, like Eden, urged ' a total revision and reformation of our penal laws ',[82] but his proposals were in certain respects even bolder. Though he disagrees with Beccaria that the punishment of death ought not, and cannot, legally be inflicted for any crime, nevertheless he holds that it cannot be appointed ' for a mere invasion of property, consistently with reason and justice, nor without a gross violation of the laws of nature '.[83] He further contends that penal detention constitutes an appropriate and adequate substitute for capital punishment and although he acknowledges that the system of hulks proved unsuccessful, he refuses to draw from this partial failure the

the long friendship between the two, all through which Shelburne showed a most generous understanding of Bentham's many eccentricities. For a penetrating appreciation of Shelburne's many outstanding qualities see B. Disraeli, *Sybil; or, the Two Nations* (1845), Vol. 1, p. 36.

[81] To this pamphlet he added an anonymous letter—*A Letter from a Gentleman Abroad*—also containing views on Madan's tract. The letter was written by Benjamin Franklin to Benjamin Vaughan.

His authorship of the pamphlet was known to some of his friends, such as Baynes, Vaughan, Dr. Jebb, Wilberforce and Sir Gilbert Elliot (afterwards Earl of Minto). He sent a copy to each of the judges; he notes in his *Memoirs* that one of them, Justice Willes, praised it highly and wondered who could be the author.

He also sent a copy to Lord Sydney, who was then Secretary of State for the Home Department, but it was not received; Lord Sydney's servant told Romilly's messenger that in accordance with Sydney's orders he was not to receive any letter or parcel without knowing who was the sender; *Memoirs*, Vol. 1, p. 90.

[82] *Observations on a late Publication intituled Thoughts on Executive Justice* (1786), p. 105.

[83] ' Between a sum of money and the life of an individual ', he writes, ' there is no proportion, or, to speak more accurately, they are incommensurable ': *ibid.*, p. 25. These two quotations would seem to indicate that Romilly went further than Eden who, as has been pointed out, was in favour of retaining the death penalty for certain offences against property, such as burglary for instance.

In addition, Romilly, like Eden, urges the repeal of the Waltham Black Act and of all obsolete capital statutes, such as 27 Eliz. c. 2; 35 Eliz. c. 2, s. 10; 39 Eliz. c. 17; 43 Eliz. c. 13; as well as as 9 Anne, c. 16; *ibid.*, note 10 at p. 17 and note 11 at p. 18.

conclusion that another, more effective plan, could not be devised: 'A plan, which unites the advantages of a charitable with those of a penal institution, and has in view that important end of punishment, which has been overlooked in almost all our other laws—the reformation of the criminal . . .'[84] The regimen should be based on solitary confinement and corrective training; 19 Geo. 3, c. 74, a statute drawn up by Blackstone, Eden and Howard, was—he thought—a foundation stone upon which an adequate system could be built.

Limitations of his early penal doctrine

The significance of Romilly's pamphlet lies not only in that it was his first public pronouncement on penal matters, but even more so in that it brings to light certain important limitations of the doctrine of law reformers, as expounded in the early stages of the movement.

Romilly thus contends that the excessive severity of criminal law was the main cause of the disquieting increase of crime, a trend which could not be reversed unless and until the great majority of statutes imposing capital punishment were revised.[85] Their interdependence is not to be denied. But, economic and social factors apart, it was a fallacy to think that without the help of an adequate police force and an effective system of secondary punishments a revision of criminal law would by itself produce the required effect. Particularly significant is the underrating of the steadying influence of a well-organised police. While Eden did not examine this problem at all, Romilly looked upon a police force as an instrument of political oppression. 'However great and inordinate the powers with which the officers of such a police might be armed,' he writes, 'they would in the end be found insufficient. Those very powers, rendering the persons who possessed them the objects of suspicion, and perhaps of public detestation, would make other and still more extraordinary powers necessary, till all the precautions, all the restraints, and all the severities of the most jealous tyranny were one by one established. In a word, if the police of

[84] *Ibid.*, p. 59.

[85] *Ibid.*, pp. 107–108, and p. 105, where he states that the revision of capital statutes is more important to the prevention of crime '. . . than all the rest'.

France is to be adopted, it must be adopted throughout: to leave out of such a system the employment of spies and of soldiers, is to omit that part of it on which the success of the whole depends. A system, which betrays the greatest distrust of the people, must never look for popular support; all that it can expect from the public is a constrained and reluctant obedience'.[86] Though at a later stage Romilly largely revised his views,[87] this prejudice against police was strongly embedded in many quarters and constituted a major obstacle to the reform of criminal law.

Another feature common to Romilly and other penal reformers was their uncritical attitude towards the new codes recently promulgated in several Continental countries.[88] Romilly was undoubtedly right in stating that in the eighteenth century criminal jurisprudence became 'a very popular study throughout Europe', and that 'the cultivation of it has been generally attended with very sensible and very beneficial effects'. It was, however, a gross exaggeration to affirm that 'the absurd and barbarous notions of justice, which prevailed for ages, have been exploded, and humane and rational principles have been adopted in their stead'.[89] English criminal procedure was incomparably more liberal than that of any other European country.[90] In the field of substantive criminal law, although all new Continental codes substantially restricted the scope of, and some even abolished the death penalty, the punishments they adopted in its place were so severe as would have proved utterly unacceptable to public opinion in England.[91]

Finally, Romilly's pamphlet also indicates that at this

[86] *Ibid.*, pp. 103–104.

[87] Below, pp. 330–331.

[88] For these codes see above, pp. 286–297.

[89] *Op. cit.*, pp. 1 and 2.

[90] Even the most progressive of all new codes—that of Tuscany—was not an exception from this rule. Its translator rightly states in his editorial note 'that there are passages in this Edict which do not consist with that extensive liberty which is the just pride and boast of Englishmen'. Thus if the accused would not confess or could not be convicted '. . . whence the full and perfect proofs of his guilt are wanted, if however there be sufficient indications, . . . and only when there shall be a concurrence of very strong conjectures . . .', the courts were empowered to inflict 'some extraordinary punishment, provided it did not exceed banishment or confinement'; *Edict of the Grand Duke of Tuscany for the Reform of Criminal Law* (1789), Art. CX.

[91] Above, pp. 297–300.

stage he still accepted Dr. Paley's interpretation of a feature of the English system of criminal justice which both he and other reformers repudiated some twenty-five years later. Paley contended that capital statutes had never been intended to be put fully into effect, but to be instrumental in spreading the terror of example merely by being enforced in certain cases only; and that consequently the discrepancy between law and practice, far from being unintentional, was the outcome of the deliberate policy of the Legislature.[92] Romilly reproduces *verbatim* the relevant passage of Paley's book and, although he states that he does not necessarily agree with Paley in his praise of this system, he nevertheless acknowledges the accuracy of Paley's interpretation of the 'history of the administration of justice in England'.[93] It may well be that, concerned as he then was with a critical discussion of Madan's postulate that all capital laws should be fully implemented, Romilly did not thoroughly examine Paley's doctrine. Moreover, the inadequacy of statistical records made it extremely difficult to check the correctness of Paley's data. But in 1810, though the information at his disposal was still very inadequate, Romilly emphatically rejected this interpretation.[94]

Further inquiries into penal matters

Romilly's *Observations* made a great impression on his friends. Thus Lord Lansdowne wrote to him: 'The principles of penal law is the subject of all others upon which I am most ignorant, and most unread. However, your arguments, and the authorities to which you refer, incline me to think that a revision of our penal law is not only desirable, but necessary, for the purpose of making it agreeable to the spirit of the times, and such as can be executed'.[95] The pamphlet was well reviewed by some periodicals, but as Romilly himself states, it evoked little interest among a wider public and no more than a hundred copies of it were sold.[96]

Undeterred by this lack of response Romilly continued his

[92] Above, pp. 253–254.
[93] *Op. cit.*, note 47 at p. 73.
[94] Below, pp. 325–326.
[95] *Memoirs*, Vol. 1, Letter XLII, p. 328.
[96] *Ibid.*, p. 90.

inquiries into penal matters. In 1788, when in Paris, he visited the hospital and prison of Bicêtre.[97] He continued to accumulate notes on the reform of the English system of criminal justice. In a series of letters written to an imaginary friend holding the office of Lord Chancellor he outlined forty-three different reforms, some in general terms only, but most in great detail.[98] How broad was Romilly's approach to the question of criminal law reform may well be seen from the subjects of these various essays. They are as follows[99]:—

> (1) On the Promulgation of Laws. (2) On a Written Code of Laws. (3) Project of a New Code. (4) On unauthorised Reports of Judicial Proceedings. (5) On certain Rules of Evidence. (6) On the Imposition of Taxes on Law Proceedings. (7) On irrevocable Laws. (8) On the Law of Libel. (9) On Apprenticeships. (10) On Bankrupts. (11) On the Poor-Laws. (12) On Divorces among the Poor. (13) On

[97] Following Mirabeau's suggestion he put his impressions in writing but the *Lettre d'un Voyageur Anglais sur la Prison de Bicêtre*—the French version of the account—was suppressed by the Paris police; see *ibid.*, p. 97. It was afterwards published in English in the periodical the *Repository*, edited by Benjamin Vaughan. The opening paragraph of this stirring account reads as follows: 'We have had the courage to visit *Bicêtre*. For myself, however, I cannot claim much praise for that courage, because, when I formed the decision of going thither, I had no idea of the horrors which it contains. I knew, indeed, as every one else does, that it consisted of a hospital and a prison; but I did not know that, at *Bicêtre*, a hospital means a place calculated to generate disease; and a prison, a nursery of crimes'. And it ends with these words: 'Amidst all horrid spectacles which this house contains there is but one thing to admire; it is, that no secret is made of them, but that they are every day exposed to public inspection; and yet the only advantage that can result from this publicity is, a remedy for such enormities, and none, alas! is, or even seems likely to be administered'; 'An Extract of a Letter, containing an Account of Bicêtre', taken from the French, *Repository* (1788), Vol. 2 (Miscellaneous Articles), pp. *9–14*.

[98] *Memoirs*, Vol. 3, pp. 369–376. Romilly started to write these letters during a holiday at Cowes in August, 1807; it was to him 'a source of great enjoyment'; *ibid.*, Vol. 2, p. 228.

[99] *Memoirs*, Vol. 3, note 1 at pp. 372–373. These papers have unfortunately never been published. Romilly considered them unfit for publication, but in his will left the final decision on this subject to his friend, Whishaw. After carefully examining them Whishaw came to the conclusion that 'under all circumstances of the case, the publication of them was no longer a matter of importance, and, unless accompanied or preceded by a more general publication, was, on the whole, not advisable. The amendment of the Criminal Law had made great progress in public opinion, had engaged the attention of Parliament and the executive government, and several of the proposed measures had been anticipated by the Legislature'. Whishaw consulted some friends on this point, especially Sir James Mackintosh, who shared his opinion. The papers on criminal law were for a time in the hands of Lord Brougham, who later returned them to the family: *ibid.*, Vol. 1, pp. xv–xvi.

Superstition. (14) On Judicial Superstition. (15) Attempts to Reform Defects and Abuses in Criminal Law. (16) On a Public Prosecutor. (17) On Ignominious Punishments. (18) On Cruel Punishments. (19) On Military Punishments. (20) On the regard to be had to Sex, Age, and Condition of Life, in inflicting Punishment. (21) On Punishments to Children. (22) On Transportation. (23) On Conspiracies to convict innocent Men. (24) On Confession and Denial after Conviction. (25) On Perjury. (26) On the Punishment of Perjury. (27) On Shoplifting. (28) On Petty Treason and Murder. (29) On Appeals of Death. (30) Account of a Criminal Trial in Scotland. (31) On Suicide. (32) On Blasphemy. (33) On Bigamy. (34) On Felony. (35) On the Clergy as amenable to Criminal Law. (36) On Forestalling and Regrating. (37) On Laws against unusual Crimes. (38) On allowing Counsel to Persons accused. (39) On Compensation to Persons wrongfully accused. (40) On the Policy of giving Rewards on Conviction. (41) On frequent Public Executions. (42) Observations on Eliza Fenning's case. (43) Observations on Bentham on Punishment.

In August, 1808, Dumont, who had already published three volumes of Bentham's works, showed Romilly the manuscript of Bentham's treatise on punishments. Much impressed, Romilly noted in his *Memoirs* that this work '. . . appears to me to have very extraordinary merit, and to be likely to be more popular than most of Bentham's writings, and to produce very good effects. I strongly exhorted Dumont to finish it without delay, and to publish it, if possible, in the ensuing winter; and he has promised to do so. Since the work of Beccaria, nothing has appeared on the subject of Criminal Law, which has made any impression on the public. This work will, I think, probably make a very deep impression '.[1]

His exposition of growing anomalies in the administration of criminal justice

The full statement of Romilly's views on criminal law is contained in a speech he delivered in the House of Commons on February 9, 1810.[2] When in 1785 Romilly anonymously published his first tract on this subject, he was little known outside the small circle of his intimate friends. In 1810, however, he was already a highly respected public figure and

[1] *Ibid.*, Vol. 2, pp. 252–253.

[2] On this debate see below, pp. 503–505.

his speech could not fail to evoke widespread interest.[3] It stands out as one of the most important statements on the subject of the reform of criminal law ever made in Parliament and one of the best Romilly delivered on any subject.[4] Couched in concise and restrained but yet expressive language, it contains a wealth of factual information and reveals a deep insight into the working of the machinery of justice. At the time of its delivery it made a profound impression both on Parliament and on public opinion. Today it still retains its high place in English penological literature, and deserves to be studied by all interested in the history of English Criminal justice.

Since this speech was not fully recorded in *Parliamentary Debates*,[5] the 'Society for the Diffusion of Knowledge upon the Punishment of Death and the Improvement of Prison

[3] Romilly took silk in 1800 and two years later was already one of the recognised leaders of the Chancery bar with an extensive practice. His success in politics was equally striking. On December 27, 1803, Sir Gilbert Elliot (afterwards first Earl of Minto) wrote to his wife: 'We had a Christmas dinner, the day before yesterday, of twenty-eight people, and an assembly in the evening. The principal personage at dinner was Mr. Romilly, whom you may remember my liking very much as a friend of Mirabeau's. He is now nearly at the head of the Court of Chancery, and bids as fair for Chancellor as anybody at the bar. He is universally respected, and is remarkably pleasing as well as able . . .'; *Life and Letters of Sir Gilbert Elliot* (edited by the Countess of Minto, 1874), Vol. 3, p. 264. In 1805 Bishop Barrington made him Chancellor of the county palatine of Durham. In 1806 he became Solicitor-General in the administration of 'All the Talents', and was knighted. A few weeks later he took his seat in Parliament as member for Queensborough. He was on the committee for the impeachment of Lord Melville and delivered a remarkable speech in Westminster Hall summing up the evidence. He also took part in the work of the Royal Commission of Inquiry into the conduct of the Princess of Wales and represented the Prince in the proceedings relating to the guardianship of Mary Seymour.

Though he held government office for only just over thirteen months, he succeeded in piloting through Parliament a number of important Bills, notably those relating to the law of bankruptcy and to the freehold property of traders (46 Geo. 3, c. 135; 47 Geo. 3, sess. 2, c. 74; and 49 Geo. 3, c. 121). For a survey of these law reforms see Lord Brougham's article in the *Edinburgh Review* (1811–1812), Vol. 19, pp. 408–414; also reproduced in his *Contributions to the Edinburgh Review* (1856), Vol. 3, pp. 103–111. In 1807, when a change in the administration took place, he delivered a very important speech on a constitutional matter; see *Speeches* (1820), Vol. 1, p. 32; see also *ibid.*, p. 15, for a speech supporting the abolition of the slave trade. He initiated his campaign in Parliament for the reform of criminal law in 1808; on this see below, p. 497 *et seq.*

[4] This is acknowledged by Brougham, who gives it as one of the reasons why in his speech on law reform he did not touch upon the subject of criminal law; *Speeches of Henry Lord Brougham* (1838), Vol. 2, p. 321.

[5] (1810), Vol. 15, *H. C.*, Feb. 9, cols. 366–373.

Discipline' requested Basil Montagu to publish it in pamphlet form. Apart from a much fuller version of Romilly's speech, this pamphlet contains records of the debates in the House of Commons on that day and on May 1, 1810, as well as of that in the House of Lords on May 30 of the same year.[6] It is significant of the interest that Romilly's speech evoked that a year later Montagu's pamphlet was reproduced *in extenso* as an appendix to *Parliamentary Debates.*[7] According to the editor of *Parliamentary Debates* this course had been adopted 'in compliance with the wishes of several subscribers'. Independently of the version issued by Montagu, in 1810 Romilly himself published his speech, with some additions and notes, as a pamphlet entitled *Observations on the Criminal Law of England as it relates to Capital Punishments, and on the Mode in which it is administered.*[8]

The originality and convincing force of Romilly's inquiry are largely due to his empirical approach to the subject. He lays emphasis first and foremost on the administrative side of the problem, showing the unsettling influence on the administration of criminal justice of a system of criminal law based on capital punishment. Attention has been drawn already to the striking disparity between laws on the Statute-book and the same laws in operation.[9] 'This mode of administering justice', writes Romilly, 'is supposed by some persons to be a regular, matured, and well-digested system. They imagine that the state of things which we see existing is exactly that which was originally intended; that laws have been enacted which were never meant to be regularly enforced, but were to stand as objects of terror in our statute-book, and to be called

[6] This important pamphlet is entitled *Debates in the year* 1810, *upon Sir Romilly's bills for abolishing the punishment of death for stealing to the amount of forty shillings in a dwelling house, for stealing to the amount of five shillings privately in a shop, and for stealing on navigable rivers.* On Basil Montagu and the 'Society' see below, pp. 348–350.

[7] (1811), Vol. 19, Appendix, cols. i–cxxii.

[8] The pamphlet was reprinted in 1811 and again in 1813. It is reproduced in full in Romilly's *Speeches* (1820), Vol. 1, pp. 108–194. All ensuing references are made to this edition.

In his *Memoirs* Romilly notes that the first edition was of 1,500 copies and the second of 500; Vol. 2, p. 363. He also notes that many of his friends urged him to publish his speech.

[9] Above, Chap. 5, p. 138 *et seq.*

into action only occasionally and under extraordinary circumstances, at the discretion of the judges'.[10] Was this a correct assumption? In 1785 he was inclined to accept it[11] but later, in an effort to find the answer, he sought more information. His approach can be defined as an attempt to ascertain on the basis of statistical data whether the ratio of capital convictions to executions was constant over a prolonged period of years, or whether it underwent modifications, and if so, whether towards increased severity or progressive relaxation; and also, if the latter tendency prevailed, what were its implications.

This task, made difficult by the extreme scarcity of data, Romilly brilliantly carried out. As a basis for comparison he took the tables relating to the period 1749–1772, compiled by Sir Stephen Janssen and reproduced by John Howard,[12] and the returns which from 1805 onwards have been regularly published under the authority of the Secretary of State for the Home Department. Comparing these two periods Romilly reached the conclusion that whereas in the second part of the eighteenth century from 50 to 75 per cent. of offenders capitally convicted had been actually executed, early in the nineteenth century the percentage fell to between 10 and 15. With respect to particular offences he was able to ascertain that in the earlier period the ratio of executions to capital convictions for minor capital offences was about equal to that for all capital offences. During the later period, however, out of 1,872 persons committed for trial to Newgate charged with stealing in dwelling-houses or shop-lifting, only one was ultimately executed. Moreover, the data relating to the number of executions, which at the time he was speaking was much lower than in the eighteenth century, was somewhat misleading. It was computed on the basis of capital convictions for all offences including murder, arson and forgery. The incidence of executions for lesser crimes was even lower and became very low indeed with respect to offences against property unaccompanied by aggravating circumstances, such

[10] *Speeches* (1820), Vol. 1, p. 109.
[11] Above, p. 320.
[12] *State of the Prisons in England and Wales* (3rd ed., 1784), Tables 9 and 10, pp. 482-483; see also above, pp. 145–146.

as stealing privately in shops, dwelling-houses, or on board ships, all of which carried the death penalty.[13] These investigations led Romilly to conclude that 'there probably never was a law made in this country which the legislation that passed it did not intend should be strictly enforced'[14]; and further that 'the present method of administering the law is not, as has been by some imagined, a system maturely formed and deliberately established, but that it is a practice which has gradually prevailed, as the laws have become less adapted to the state of society in which we live'.

Having thus exposed the fallacy of regarding as normal the disparity between capital laws and their administration in practice, Romilly proceeds to describe some of the most serious failings of such a system and to refute Paley's doctrine. A vacillating justice, awarded on the basis of variable and unforseeable criteria, undermines, he states, the authority of the law. Quoting the well-known passage from Blackstone's *Commentaries* in which he praises the determinate character of English law[15] Romilly makes this comment upon it: 'And yet with what truth can it be said that the species of punishment is ascertained for every offence, when in so great a number of felonies it remains in practice with the judge to say whether the criminal shall suffer death, transportation or imprisonment?'[16]

Drawing upon the rich experience he had acquired at the bar, Romilly further states that circumstances, which might influence a judge in deciding which offenders ought to suffer death, are both variable and unpredictable.[17] 'It has often

[13] For a more detailed analysis of this trend, see above, p. 156.

[14] In order to show how persistent this trend was, Romilly, quoting Hale, stated that at a certain period even 5 Eliz. c. 20, which made it a capital offence to be found in the company of gypsies for a month had been enforced and that thirteen persons were executed for that offence at one assizes alone; on this statute see below, note 54 at p. 443, and Appendix 1, p. 622.

[15] 4 Comm. 377.

[16] *Op. cit.*, note at pp. 117–118.

[17] At the same time Romilly insisted that 'No man can have frequently attended our criminal courts, and have been an attentive observer of what was passing there, without having been deeply impressed with the great anxiety which the Judges feel to discharge most faithfully their important duties to the public. Their perfect impartiality, their earnest desire in every case to prevent a failure of justice, to punish guilt and to protect innocence, and the total absence with them of all definitions between the rich and the poor, the powerful and the unprotected, are matters upon which all men are agreed'.

happened, it necessarily must have happened, that the very same circumstance which is considered by one judge as matter of extenuation, is deemed by another a high aggravation of the crime . . . and it is not merely the particular circumstances attending the crime, it is the crime itself, which different judges sometimes consider in quite different points of view.' [18]

Another consequence was, he contends, that the juries were often unable to fulfil the most important of their functions,

[18] *Op. cit.*, pp. 122–124. As an illustration Romilly quotes the following case: 'Not a great many years ago, upon the Norfolk Circuit, a larceny was committed by two men in a poultry-yard, but only one of them was apprehended; the other, having escaped into a distant part of the country, had eluded all pursuit. At the next assizes the apprehended thief was tried and convicted, but Lord Loughborough, before whom he was tried, thinking the offence a very slight one, sentenced him to only a few months' imprisonment. The news of this sentence having reached the accomplice in his retreat, he immediately returned, and surrendered himself to take his trial at the next assizes. The next assizes came; but unfortunately for the prisoner it was a different judge who presided; and still more unfortunately, Mr. Justice Gould, who happened to be the judge, though of a very mild and indulgent disposition, had observed, or thought he had observed, that men who set out with stealing fowls, generally end by committing the most atrocious crimes; and building a sort of system upon this observation had made it a rule to punish this offence with very great severity; and he accordingly, to the great astonishment of this unhappy man, sentenced him to be transported. While one was taking his departure for Botany Bay, the term of the other's imprisonment had expired . . .'; *ibid.*, pp. 124–125.

In his *Memoirs* he further records a case tried by Lord Ellenborough which was brought to his knowledge by Lord Lauderdale, who heard it directly from Lord Ellenborough himself. Ellenborough said that in rare instances it was necessary to allow the law to take its course in cases of privately stealing in shops, and that he had himself left a man for execution at Worcester for that offence. The story is told by Romilly in the following words: 'The man (Lord Ellenborough said) had, when he came to the Bar, lolled out his tongue and acted the part of an idiot; that he saw the prisoner was counterfeiting idiocy, bade him be on his guard; that the man, however, still went on in the same way; whereupon Lord Ellenborough having put it to the jury to say whether the prisoner was really of weak mind, and they having found that he was not, and having convicted him, left him for execution. Upon which Lord Lauderdale asked the Chief Justice what law there was which punished with death the counterfeiting of idiocy in a Court of Justice; and told him that he thought his story was a stronger illustration of my doctrines than any of the instances which I had mentioned'; Vol. 2, p. 331.

During a debate in the House of Lords in 1810, Lord Eldon quoted the following case tried before him and thus explained the reasons which induced him to leave the offender for execution: 'During the short time I had the honour to be Chief Justice of the Common Pleas this remarkable case occurred before me. A man was indicted for stealing a horse, of the small value of seven shillings and sixpence, and which he had sold for that sum to a horse-butcher. The jury found him guilty, and you will be surprised perhaps to learn that for so trifling an offence I suffered the law to take its course. The punishment of death, for this offence only, might appear extremely harsh; but, my Lords, in this instance I was guided by the nature of the evidence in the

namely, to decide upon facts on which the lives of their fellow-subjects were to depend.[19]

course of the trial, the detail of which I have now fresh upon my memory. It appeared, I think, that on the prisoner were found skeleton keys of all the turnpike-gates within twenty miles of London, which he had manifestly procured for the purpose of carrying on the regular business of a horse-stealer'; H. Twiss, *The Public and Private Life of Lord Chancellor Eldon* (1844), Vol. 2, pp. 120–121.

In his review of Romilly's tract, Brougham dwelt at length on this point: '. . . When a person is put upon his trial for a crime, it seems a very obvious proposition that the truth or falsehood of the charge brought against him should be the point, and the only point, submitted to the consideration of the tribunal before which he is tried. . . . Yet, nothing can be more wide of the proceedings which, in fact, take place under the prevalence of the present system. The charge preferred in the indictment is frequently different from the charge inquired into by the Court. The culprit is accused of having stolen to the amount of five shillings in a shop; and it is *possible* that nothing beyond this charge may come before the Court which is to try it. But it is also very possible that other matter may arise out of the judicial investigation; and that this incidental matter may be so important in its influence upon the ultimate result of the trial, as nearly to supersede the original subject of inquiry. The prisoner may turn out to be a person of abandoned character, generally; he may prove to have been frequently before tried for a similar offence; he may have attempted to defend himself by suborning perjured evidence. If these things appear against him, the Court considers them; although one of them—that one which most frequently occurs, is a specific crime known in law, and severely punishable. So, if a person is tried for robbery, the felonous and forcible taking is not the only matter inquired of: A question arises often much more material to his fate, whether any act of violence was committed by him. Again, the punishment awarded by the sentence is not always that which the law attaches to the crime charged. When one has been suspected of murder, but the proof of this charge fails, he may be convicted of stealing forty shillings in a dwelling; and the offence which cannot be proved—nay, which cannot be mentioned on the trial—may decide the sentence. A person charged with privately stealing in a shop or dwelling, and nominally tried for that offence, but found, in the course of the trial, to be a man of general bad character, or to have set up a perjured *alibi* in his defence, is sentenced to death; not evidently because the law makes the crime charged a capital felony (for this *denunciation* is never attended to in courts), but because he has been found, or supposed, to be guilty of that for which he never was tried, and which no law ever made capital—of having a bad character, which is not punishable at all—or of suborning perjury, which is punishable as a misdemeanour. . . . Very different, however, is the evil of which we have been complaining in our criminal procedure; and it is an evil by no means justified by any necessity. The letter of the law says shoplifting is a capital felony. The practice of the courts says, it shall not be punished capitally, except it be accompanied with certain aggravations. Then, why not put those aggravations in issue, as well as the act of shoplifting itself? But is there any sense in thus counfounding together distinct offences? . . . why should we, in this one case, confound the two crimes together, and, out of a clergyable felony (as in practice it has become) and a misdemeanour, create, by some strange process of judicial compounding, something quite different from both, a capital felony? Nothing surely can be more rude or clumsy than such a connivance—nothing more repugnant to all clear and distinct principle': *Edinburgh Review* (1811–1812), Vol. 19, pp. 398 and 402.

[19] 'The circumstance of aggravation', he observes, 'whatever it be, for which the judge inflicts the punishment of death, in reality constitutes the crime for

Romilly was not opposed to vesting discretionary powers in the courts, nor did he recommend that the precise punishment appointed for each offence 'in its exact foundation of guilt should always be marked out by the law'. But, he adds, 'there is a wide difference between investing the judges with the power to determine the degree in which the same species of punishment may be inflicted, and leaving it dependent on their will whether the offender shall be put to death, or shall only suffer a six months' imprisonment'. He disagrees with Paley that aggravating circumstances justifying the infliction of capital punishment cannot be laid down by law or described with sufficient precision. He also strongly criticises Paley's assertion that it is safer if 'laws be not known, because, if known, they might be evaded'.

On the basis of *Session Papers* relating to London he further ascertained that in 1781–82, only thirty-two years after the passing of the Act of King William and only sixteen years after that of Queen Anne, and although the value of money had hardly diminished, of the thirty-three persons indicted at the Old Bailey for stealing privately in shops to the value of five shillings, only one was convicted; twelve were acquitted while another twenty were found guilty, but the value of the stolen property was found to be below the five shillings. Again, of fifty-two persons tried in the same year at the Old Bailey for stealing to the value of forty shillings in dwelling-houses, only six were convicted, twenty-three acquitted and twenty-three convicted of larceny but not on the capital charge, the jury having found the stolen property to be below the value of forty shillings. These remarkable instances of

which he suffers. If, for example, the judges made it an invariable rule to leave for execution every man convicted of highway robbery, who had struck or done any injury to the person of the party robbed, and to inflict only the punishment of transportation for robbery unattended with such violence, the effect would be the same as if the crimes of mere robbery, and of robbery with violence offered to the person, so distinct in themselves, were distinguished by written laws, and were made punishable, the one with death, and the other with transportation. The effect would be the same with respect to the punishments, but by no means the same with respect to the mode of trial. Because, if the law had considered them as distinct offences, it would be the province of the jury to decide whether the circumstances of aggravation, which altered the nature and description of the crime, did or did not exist; in the present system, it is the judge alone on whom that important office is devolved. . . . The same observation may be made upon every other circumstance of aggravation which decides the fate of convicted criminals'. *Op. cit.*, pp. 135–136.

'pious perjury' indicated the futility of enacting laws whose severity would occasion the disapproval of public opinion. Instead of being enforced, such laws were inevitably mitigated in practice, often in such a way as to raise serious constitutional issues. Again, the royal prerogative of mercy was thus called upon to perform a function for which it was never designed.[20] He disagrees with Paley that the exercise of this power 'ought to be regarded as a judicial act'.[21]

During a debate on transportation and prisons[22] Romilly defined the threefold object of punishment as being first, to deter from crime by the terror of example; secondly, to make it impossible for the offender to commit further offences either for a time specified in the sentence, or for ever; thirdly, to reform the offender. In his pamphlet, however, he puts particular stress on the first of these functions. 'The sole object of human punishments, as has been often said, but can hardly be too often repeated, is the prevention of crime; and to this end, they operate principally by the terror of example.'[23] A system of criminal justice under which a punishment fixed by law is given effect only in ten cases out of every hundred necessarily defeats this fundamental function of punishment. He defines the then prevailing practice as 'a lottery of justice', and makes the arresting observation that non-executed law is like the law of a foreign country and consequently has no effect. Certainty of punishment rather than its severity is an important means of preventing crime. 'So evident is the truth of that maxim', he writes, 'that if it were possible that punishment, as the consequence of guilt, could be reduced to an absolute certainty, a very slight penalty would be sufficient to prevent almost every species of crime, except those which arise from sudden gusts of ungovernable passion.'[24] But whereas in his previous pamphlet of 1785 he

[20] On this matter see above, p. 116.

[21] See above, note 78 at pp. 131–132.

[22] *Parl. Deb.* (1810), Vol. 16, H. C., May 9, col. 944.

[23] But elsewhere, probably under the influence of Bentham (see on this below, p. 396) Romilly remarks that 'it is extremely to be desired that all punishments should be exactly analysed, and that it should be clearly ascertained what is the nature and quantity of the suffering contained in each, that Legislations and Judges may with certainty know what will be the effect of the sentences which they ordain or pronounce'.

[24] *Op. cit.*, p. 127.

contended that punishments could only be made certain by being made proportionate to the gravity of offences,[25] he now also envisages the need for a 'vigilant and enlightened police, rational rules of evidence and clear and unambiguous laws'. This was indeed a very substantial departure from his original position, but on the other hand it should not be over-stressed. It should be noted that Romilly confines himself to this very general statement, upon which he does not enlarge, whereas a later debate in Parliament unmistakably reveals that his fundamental distrust of police on constitutional grounds had not been dispelled.[26]

Finally, Romilly contends that although not executed, capital laws 'form a kind of standard of cruelty, to justify harsh and excessive exercise of authority', and thus become obstacles to social progress. They also tend to increase the scale of all other punishments.[27]

Favourable reception of Romilly's 'Observations on Criminal Laws'

After Romilly had delivered his speech in Parliament he received the following letter from Francis Horner:—

> '. . . It appears to me to be very important that you should publish your speech of last night, if you can possibly find leisure for it while it is still fresh in your mind. The irresistible argument for your particular bills, which is founded upon the returns, will not be seen in all its force, unless the numbers are all set down; and then I am quite persuaded, that, upon the subject of a reform of the criminal law, the public is quite ready for instruction, if delivered to them with the authority of your name, and with the attractions which your topics of reasoning and illustration cast over the argument. It is because you cannot know this so well as others, that I take the liberty of suggesting to you to make this exertion, always an irksome one, but which will be greatly and immediately useful. It will tend very much to make your future progress, in the same subject, more easy. Nothing

[25] Above, p. 318.

[26] Debate on Ryder's motion of 1812 to appoint a Select Committee of Inquiry into the State of the Nightly Watch and Police of the Metropolis; *Parl. Deb.* (1812), Vol. 21, H. C., Jan. 18, cols. 196–222, and Romilly's *Speeches* (1820) Vol. 1, p. 365 *et seq.*

[27] On the accuracy of this view see above, pp. 18–19.

> seems to me so certain now, as that parliament in all these matters of legislative improvement follows only the public opinion; . . . On the subject of criminal law, the prejudices are all among the lawyers; the public in general seem to have none, and at the same time take a lively interest always in such discussions . . .' [28]

As it has been shown already, the interest which Romilly's pamphlet evoked was indeed great and widespread.[29] Although Romilly specifically referred to the repeal of three statutes only, the pamphlet was denounced by his opponents as a declaration of policy, a first step in a wider scheme of reform. Those who favoured such a reform held a similar view. For several years the pamphlet was debated in many quarters and thus greatly helped to stimulate public interest in this subject.[30] Characteristic of the attitude of leading periodicals of the period is the following extract from an article in the *Monthly Review* [31]:

> 'Unpretending as the tract is in every respect, its effect on the mind is not inferior to that which would have been produced by the boasted arts and address of oratory. Most persons have been in the habit of considering our present system, if not as imposing in appearance, as at least innocent and not inconvenient in practice: but let them sit down to the perusal of those pages, and few of them will rise without their sentiments having undergone a complete revolution. The scene which before did not offend will appear replete with confusion, and with all the varieties of deformity and disorder; and that which had been deemed harmless will be perceived to have been the source of numberless mischiefs, of cruel injustice to individuals, and grievous injuries to society . . .

[28] *Memoirs and Correspondence of Francis Horner, M.P.* (ed. by Leonard Horner, 1853), Vol. 2, pp. 4–5.

[29] Thus Mackintosh relates in his *Memoirs* (July 18, 1810): '. . . The other packet was from Basil Montagu, with a letter from himself, and one from his wife. The parcel contained several publications of his own, and one of Sir S. Romilly on Capital Punishments. You know how much the subject and the author interest me. It does the very highest honour to his moral character, which I think stands higher than that of any other conspicuous Englishman now alive. Probity, independence, humanity and liberality breathe through every word; considered merely as a composition, accuracy, perspicuity, discretion and good taste are its chief merits'; *Memoirs of the Life of The Right Hon. Sir James Mackintosh* (ed. by R. J. Mackintosh, 1835), Vol. 2, p. 34.

[30] For the attitude of Parliament, see below, pp. 503–509.

[31] (1810), Vol. 61, p. 311.

with regard to the author's animadversions on Dr. Paley's vindication of our criminal law, we must confess that in our opinion no refutation was ever more decisive, or triumph more complete; . . .'

The *European Magazine* published a note on similar lines,[32] whereas in the *Monthly Magazine* there appeared an interesting letter from a reader who contended that 'the people at large, are, generally speaking, much against the punishment of death' for minor offences.[33] Strong and steady support to Romilly's efforts to alleviate the severity of criminal law and to improve the penal system was given by the *Philanthropist*.[34] In the *Monthly Repository of Theology and General Literature*[35] there appeared a leading article on 'Capital Punishments' in which the author examines the question on the basis of the following three premises: (1) punishment is not intended to be a retribution for a past action, but a preventive of a similar action in the future; (2) capital punishment is unjustifiable where it produces no good effect; (3) even if attended by some good effect, it is unjustifiable if that effect could have been obtained by less drastic measures. In agreement with Romilly the author concludes that criminal laws should be revised and capital punishment for a great number of offences be replaced by solitary confinement combined with hard labour. In a striking letter published in the same issue[36] a reader singles out two subjects on which, according to him, 'enlightened Englishmen should now fix their steady attention' namely the improvement of penal laws and religious emancipation. He suggests that parliamentary candidates should pledge themselves to support 'a revision of the penal code and the emancipation of conscience'. In subsequent issues, the same periodical took further steps to promote the cause of criminal law reform by presenting the problem of capital punishment in the form of eight propositions[37] and was quoting a number

[32] (1810), Vol. 57, pp. 211–212.
[33] *Monthly Magazine or British Register* (1811), Vol. 31, p. 415.
[34] (1811), Vol. 1, pp. 66–77, 143–156, 228–236, 391–399; (1812), Vol. 2, pp. 202–206, 206–208. On this periodical and its founder, see below, note 18 at p. 349.
[35] (1811), Vol. 6, pp. 641–645 and 709–711.
[36] *Ibid.*, p. 607.
[37] 'Collection of Facts relating to Criminal Law', *ibid.* (1812), Vol. 7, pp. 26–30, 84–87 and 161–163.

of authorities in their support.[38] The *Eclectic Review*[39] reviewed Romilly's pamphlet in a short but forcible article urging the elimination of 'some, at least of the bloody stains which deform the criminal jurisprudence of our country', and welcoming it as a convincing demonstration that the 'profuse enactment of capital punishments—whether carried into execution or dispensed with,—is, in every view of it, impolitic, inhuman and unjust'. The *Edinburgh Review* in a vigorous article by Brougham enthusiastically praised Romilly's 'beautiful and interesting tract'. The opposition to Romilly's proposal was in the view of the author yet another manifestation of the retrograde forces which then impeded progress in all its forms.[40]

Significant was the attitude of the *Quarterly Review*.[41] Its article, although published after Romilly's three Bills had already been rejected by Parliament, none the less gives its unqualified support to Romilly's thesis. It agrees that 'the letter of the penal law, and the administration of it, as to the statutes already cited, are as widely at variance with each other as life and death can be'; and that this, 'being a practice, why should it not be a law? It is a wholesome irregularity; why not adopt it into the public code?'[42] The

[38] The propositions were formulated as follows: '*Proposition I*: The frequency and number of capital punishments in England degrade the English character in the eyes of foreigners; *Proposition II*: Severe laws restrain men from prosecuting offences; *Proposition III*: Experience has not shown that capital punishments tend to the elimination of crimes; *Proposition IV*: By the severity of the laws, and the discretionary power in judges, murders may sometimes be committed under the forms of law; *Proposition V*: The punishment of death for offences less than murder often incites offenders to commit murder, hoping thereby to escape, and knowing that if they be detected they cannot suffer more that death; *Proposition VI*: The punishment of death, considered as the affair of a moment, is not so powerful a restraint from crimes as other punishments of a visibly longer duration; *Proposition VII*: If the other lawful ends of punishment may be answered along with the reformation of the criminal, then the mode of punishment ought to be adopted by which the criminal will be reformed: this mode embraces the greatest sum of good, and experience has shown it to be practicable; *Proposition VIII*: When very severe punishments are denounced against numerous offences, they cannot be in all cases inflicted without cruelty; and yet if they may be remitted in some cases, it is necessary that much should be left to the discretion of the judges, which will be variously exercised in similar cases, they having the appearance of caprice, of partiality, and of injustice'.

[39] (1810), Vol. 6 (1), pp. 370–372.

[40] (1811–1812), Vol. 19, pp. 389–415. The article is reproduced in Brougham's *Contributions to the Edinburgh Review* (1856), Vol. 3, pp. 79–111.

[41] (1812), Vol. 7, pp. 159–179.

[42] *Ibid.*, pp. 160 and 163.

article further disagrees that 'the threat of death is of use, under all the infrequency of it; that men fear what may be inflicted be it ever so seldom'. It also very ingeniously attempts to show that the difference of views between Paley and Romilly was not so wide as it would seem, the law having been remitted much less frequently in Paley's time.[43] At the same time it makes it plain that it would not support any mitigation of the law beyond the repeal of the three statutes specified by Romilly and warns its readers against the fallacious reasoning of extremists advocating an extensive repeal of the death penalty.[44] Some years later the same periodical adopted an attitude of extreme hostility towards any project of reform in criminal law.[45]

The *Antijacobin Review* was one of the very few, if not the only, periodical hostile to Romilly's proposals.[46] Romilly's initiative was according to it 'marked more strongly by zeal than by judgment'. Quoting the increase of the incidence of privately stealing since that offence ceased to carry the death penalty[47] the review adds: 'We should be glad to see the same reform of our criminal code: such a reform, however, should be the result of a deliberate and comprehensive view of the whole system, considered in relation to the actual state of society, and to the manners and morals of the age; it is a work, greatly beyond the capacity of an individual, however gifted, and should proceed from the combined operation, and united wisdom and experience, of the best qualified persons'.[48]

Finally it should be noted that apart from giving rise to a wide discussion in the leading periodicals of the period, Romilly's pamphlet also stimulated the appearance of a number of tracts, the majority of which, like his *Observations*, urged a reform of criminal law.[49] The favourable reaction, as

[43] *Ibid.*, pp. 164 and 171.

[44] See below, p. 391 and note 95 at pp. 553–554.

[45] Below, p. 553.

[46] (1811), Vol. 38, pp. 222–223.

[47] On this fact, which became one of the most debatable issues between the reformers and their opponents, see below, pp. 501–503.

[48] A year earlier, however, in a review in the same periodical of Dr. S. Parr's *Characters of the late Charles James Fox*, the author acknowledged that the laws were urgently in need of revision and even suggested the abolition of the death penalty for forgery, which was then on the increase despite the fact that it carried capital punishment; *Antijacobin Review* (1810), Vol. 35, pp. 262–270.

[49] See for instance: Anti-Draco, *Five Letters to Sir Samuel Romilly, M.P., on the Subject of his Motion respecting the Penal Laws* (1810); *Hints for a Reform*

expressed in the most influential periodicals of the period, would seem to corroborate the view expressed by Dr. Samuel Parr that ' . . . the public sentiment and the public language of our countrymen have long been in favour of great and numerous changes in our penal system . . .' [50]

§ 3. SOME EXPRESSIONS OF DOUBT AS TO THE MERITS OF THE PENAL SYSTEM

Dr. Johnson

Eden and Romilly were the first to evolve a definite programme of reform. But the inordinate and uniform severity of criminal law was deplored by a great many enlightened men of the period. Twenty years before the publication of Eden's *Principles of Penal Law*, at a time when the doctrine of maximum severity was still vigorously upheld, Dr. Samuel Johnson wrote in the *Rambler* an eloquent and closely reasoned plea for a radical change in the system of punishment.[51] The reputation of the *Rambler*, writes Leslie Stephen, ' was not won by a concession to the fashions of the day, but to the influence of a strong judgment uttering itself through uncouth forms '.[52] Of this, the issue devoted to criminal law is an outstanding example. Johnson himself was well aware that his views on this subject were much in advance of his time. ' This scheme of invigorating the laws by relaxation, and extirpating wickedness by lenity ', he writes, ' is so remote from common practice, that I might reasonably fear

in the Criminal Law, in a Letter addressed to Sir Samuel Romilly, M.P., by a Late Member of Parliament (1811). (For a review of this tract see the *Critical Review* (1811), 3rd Ser., Vol. 22, pp. 208–210.) See also George Ensor, *Defects of the English Laws and Tribunals* (1812), Part 1, Chap. 13 (Severity of the Laws—The Consequences—Paley's Opinions considered), pp. 149–186. Romilly's influence on Ensor is striking.

[50] *Characters of the late Charles James Fox* (1809), Vol. 2, p. 453.

[51] The *Rambler* (ed. of 1809), Vol. 3, No. 114, April 20, 1751, pp. 13–18.

[52] ' Dr. Johnson's Writings ', *Hours in a Library* (1892), Vol. 2, p. 8.

The *Rambler* was founded by Johnson; it was issued every Tuesday and Saturday from March 1750 to March 1752. At first the articles did not evoke much interest and only about five hundred copies of each number were sold. But when the flyleaves were collected and reprinted it became exceedingly popular. Thirteen thousand copies were sold in England alone and separate editions were prepared for Scotland and Ireland; Macaulay, ' Samuel Johnson ', *Works* (ed. by Lady Trevelyan, 1866), Vol. 7, p. 337.

to expose it to the public . . .'[53] But he was not afraid of being called a 'projector'.[54] He held that laws ought to be continually readjusted to the changing needs and manners of society,[55] and was highly critical of a system which 'confounds cruelty with firmness'. The perusal of the laws 'by which the measures of vindictive and coercive justice are established, will discover so many disproportions between crimes and punishments, such capricious distinctions of guilt, and such confusion of remissness and severity, as can scarcely be believed to have been produced by public wisdom, sincerely and calmly studious of public happiness'. Punishments, the excessive severity of which is 'contrary to our ideas of adequate retribution' must inevitably lead to impunity.[56]

[53] *Op. cit.*, p. 18. John Brown, whose *Estimate of the Manners and the Principles of the Times* met with so notable a success (first published in 1757, it reached a seventh edition in 1758)—disposes of the subject in the following sentence: 'The Lenity of our Laws in capital Cases; our Compassion for convicted Criminals; even the general Humanity of our Highwaymen and Robbers, compared with those of other Countries; these are concurrent proofs, that the spirit of Humanity is natural to our Nation'; (1757), p. 21.

[54] In an article in the *Adventurer* he wrote: 'Whatever is attempted without previous certainty of success, may be considered as a *Project*, and amongst narrow minds may, therefore, expose its author to censure and contempt; and if the liberty of laughing be once indulged, every man will laugh at what he does not understand, every *Project* will be considered as madness, and every great or new design will be censured as a *Project*'; *Adventurer* (ed. of 1778), Vol. 3, No. 99, October 16, 1753, p. 248.

In 1753–54 Johnson contributed a number of articles to this periodical established by his friend J. Hawkesworth; they were signed with the letter 'T'; James Boswell, *Life of Samuel Johnson* (ed. by J. W. Croker, 1859), Vol. 1, p. 300.

[55] In a letter to Boswell, dated February 3, 1776, he wrote: 'Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes'; *ibid.*, Vol. 6, p. 39.

[56] Retribution as the object of punishment was rejected by opponents of law reform, such as Madan and Paley (above, p. 240 and p. 250), as well as by its most zealous supporters, such as Eden (above, p. 303), Romilly (above, p. 330), and Bentham (below, pp. 381–382).

The doctrine of general prevention as the only object of punishment which they all upheld was thus restated by J. Priestley: 'The object of the criminal law, is to lessen the number of crimes in future, and thereby to give every man a sense of his personal security; and, if this could be done without the actual punishment of any criminal, so much evil would be prevented as his punishment implies. Consequently, punishment has no reference to the degree of moral turpitude in the criminal'; 'Lectures on History and General Policy', *Theological and Miscellaneous Works* (ed. by J. T. Rutt, 1817–1831), Vol. 24, p. 287. It was challenged by Lord Kames, 'History of the Criminal Law', *Historical Law Tracts* (2nd ed. 1761), pp. 1–57; to some extent by Adam Smith, *The Theory of Moral Sentiments* (1793), Vol. 1, p. 106 *et seq.*, and *Lectures on Justice, Police, Revenue and Arms* (ed. by Edwin Cannan, 1896), pp. 136 and

But if he rejected this system it was not only on the ground of what he calls 'prudential principles', but also because he believed that many offenders could be reformed. None of the offences where 'a piece of money' is involved should be punished by death. 'This terror should be reserved as the last resort of authority, as the strongest and most operative of prohibitory sanctions, and placed before the treasure of life, to guard from invasion what cannot be restored'.

But while definitely in favour of alleviating the severity of criminal law, particularly in respect to offences against property,[57] Johnson was against abolishing public executions. 'The age is running after innovation', he said in a talk with Sir William Scott in 1783, 'and all the business of the world is to be done in a new way; men are to be hanged in a new way; Tyburn itself is not safe from the fury of innovation'.[58]

Johnson also held very strong views on the law relating to

137; and also by William Hazlitt in a remarkable paper 'On the Punishment of Death', *Complete Works* (ed. by P. P. Howe, 1931), Vol. 19, pp. 324–329.

For a lucid exposition of the concept of retributory justice see Lord Woodhouslee (Alexander Fraser Tytler), 'On the Principles of Criminal Jurisprudence, as unfolded in Lord Kames' Essay on the History of the Criminal Law; with an Examination of the Theory of Montesquieu and Beccaria, relative to Crimes and Punishments', *Memoirs of the Life and Writings of the Hon. Henry Home of Kames* (1807), Vol. 1, pp. 73–103. 'The foundation of criminal law', he writes, 'is retributive justice, that great principle which regulates the redressing of wrongs, and the avenging of injuries' (p. 79); 'All penal laws are wise, equitable and politic, solely according to their conformity or departure from the standard of a just retribution' (pp. 99–100); the severity of the criminal law was due solely to 'our departing from the just principle of commensurating the vengeance of the law to the moral guilt of the offender; and from our resorting to the secondary end of punishment, the prevention of crimes, instead of the primary, which is the avenging them' (p. 86). To consider punishment an evil is 'a paltry sophistry' (p. 94).

[57] For his intervention in the case of Dr. Dodd, sentenced to death for forgery, and the remarkable petition which he drafted in an effort to secure the commutation of Dodd's sentence see below, Chap. 14, and particularly pp. 456–464 and 471–472.

[58] When it was remarked that the abolition of public executions would be an improvement, he replied: 'It is *not* an improvement; they object, that the old method drew together a number of spectators. Sir, executions are intended to draw spectators. If they do not draw spectators, they don't answer their purpose. The old method was most satisfactory to all parties; the public was gratified by a procession: a criminal was supported by it. Why is all this to be swept away?' Boswell, *op. cit.*, Vol. 8, p. 179. Boswell adds: 'I perfectly agree with Dr. Johnson upon this head, and I am persuaded that executions now, the solemn procession being discontinued, have not nearly the effect which they formerly had'; *ibid.* Both Eden (above, note 26 at p. 305) and Bentham (below, note 6 at pp. 383–384) were in favour of public executions.

debtors and the state of prisons in general.[59] In reply to a letter to the *Idler* criticising the system of imprisonment for debts,[60] Johnson wrote an article on January 6, 1759, condemning both the law and its administration.[61] The tone of this article is akin to that of Burke's speech to the Bristol electors on the same subject.[62]

Burke, Fox and Pitt

The cause of criminal law reform also found allies among the leading statesmen of the period. In his *Essay towards Abridgement of the English History* Edmund Burke exposes as unfounded 'that species of eternity' which is often attributed to the English law and shows that on the contrary 'we have entirely altered the whole frame of our jurisprudence since the Conquest'.[63] His concern about the state of criminal law was pronounced. He thus favoured a reform of the prison and transportation systems[64] and of the law relating to imprisonment for debt.[65] But he was particularly emphatic about the urgent need for the repeal of obsolete statutes and for a revision of those imposing capital punishment.

[59] 'The misery of gaols is not half their evil: they are filled with every corruption which poverty and wickedness can generate between them; with all the shameless and profligate enormities that can be produced by the impudence of ignominy, the rage of want, and the malignity of despair. In a prison the awe of publick eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious. Every one fortifies himself as he can against his own sensibility, endeavours to practise on others the arts which are practised on himself, and gains the kindness of his associates by similitude of manners. Thus some sink amidst their misery, and others survive only to propagate villainy'; *Idler* (ed. by Harrison, 1787), Vol. 1, No. 38, January 6, 1759, p. 56.

Like the *Rambler*, the *Idler* was founded by Johnson. It appeared weekly from 1758–1760, and had a very wide circulation.

[60] *Ibid.*, No. 22, September 16, 1758, p. 33.

[61] *Ibid.*, No. 38, January 6, 1759, pp. 55–56.

[62] At the time Johnson was writing, 20,000 debtors were in prison.

[63] *Works* (Bohn, 1856), Vol. 6, p. 415.

[64] See his reference to John Howard's work in 'Speech at Bristol previous to the Election, 1780', *ibid.*, Vol. 2, p. 142. See also his motion of 1785 to inquire into 'The state of convicts sentenced to Transportation', *Parl. Hist.* (1785), Vol. 25, cols. 391–392, where he severely criticised the lack of distinction between 'trivial crimes, and those of greater enormity', and the indiscriminate sentencing to transportation of offenders, 'however inequal their transgressions, or different their circumstances'; *ibid.*, cols. 430–432.

[65] 'Speech at Bristol previous to the Election, 1780', *op. cit* pp. 140–142.

His views on this subject were expressed in unequivocal terms in 1789, during a debate on the proposal to increase penalties for the destruction of trees and other plants. He then recommended 'a revision of the whole criminal law, which, in its present state, he thought abominable',[66] and also severely criticised the lack of deliberation and the ease with which Parliament usually created new capital offences.[67] But many years earlier he had already taken part in a debate on the repeal of some capital statutes singled out by a Parliamentary Committee,[68] and during another debate, in 1778, on the second reading of a 'Bill for the Relief of Protestant Dissenters', he had declared that he would 'have the laws tuned in unison with the manners;—very dissonant are a gentle country and cruel laws; very dissonant, that your reason is furious but your passions moderate, and that you are always equitable except in your courts of justice'.[69] After the Gordon riots of 1780, which he unreservedly condemned, he nevertheless pleaded for a moderate and judicious punishment of the guilty.[70] In letters addressed to Lord Thurlow, then Lord Chancellor, to Lord Bathurst and to Sir Grey Cooper,[71] as well as in two papers,[72] he made a number of forcible remarks on the danger of disproportionate severity and too frequent executions. He insisted that the Riot Act was somewhat too rigid, that some offenders did not know their offence to be capital and that in every case such

[66] *Parl. Hist.* (1789–1791), Vol. 28, cols. 146–147. For this interesting debate see below, pp. 484–486.

[67] See below, pp. 35–36. James Prior rightly remarks that 'on this subject, as on many others, he was in advance of his time; and we can now look back with satisfaction to his opinions which have had their influence on others, and thus corrected the sanguinary spirit of our code. He alluded to it in private society even more frequently than in public'; *Life of Edmund Burke* (5th ed., 1854), p. 290.

[68] Below, pp. 435 and 442.

[69] 'Speech on the second reading of a Bill for the relief of Protestant Dissenters', *op. cit.*, Vol. 6, p. 106.

[70] He was personally in danger and his house was threatened with destruction; see on this J. Paul de Castro, *The Gordon Riots* (1926), pp. 64, 65 and 81. On June 8 Mrs. Montagu wrote to Mrs. Vesey: '. . . You alarm me greatly for Mr. Burke . . . I wish the mob would consider that Nature does not make such a man once in a century. Pray write every post no matter for franks'; quoted by de Castro, *op. cit.*, p. 177.

[71] 'Letters with reflexions on the Executions of the Rioters in 1780', *op. cit.*, Vol. 5, pp. 513–515.

[72] 'Some Thoughts on the Approaching Executions'; 'Some Additional Reflections on the Executions'; *ibid.*, pp. 515–518 and 519–521.

extenuating circumstances as sex, age and degree of malice should be taken into consideration. No more than six offenders should be selected for execution and should be put to death, on the same day, in six different places and in a most solemn manner. The rest should be detained for varying periods of time in houses of correction, or should be directed to serve in the navy, for '. . . it is certain that a great havoc among criminals hardens, rather than subdues, the minds of people inclined to the same crimes; and therefore fails of answering its purpose as an example. Men, who see their lives respected and thought of value by others, come to respect that gift of God themselves'.

Another statesman highly critical of current criminal laws was Charles James Fox. Although all his biographers note the zeal with which he supported various projects of reform,[73] little reference can be found to his attitude to criminal law.[74] This is largely to be explained by the fact that Fox never made a speech on this subject comparable with his statements in favour of the abolition of the slave trade, of religious emancipation, or of the reform of the law of libel. Some of his interventions are not even recorded in *Parliamentary History* or incorporated in his collected speeches. In 1770, Fox supported Sir William Meredith's motion for the appointment of a Committee to inquire into the state of criminal law and took an active part in the debate on the Committee's recommendations to repeal certain capital statutes.[75] He also pressed for the repeal of 43 Eliz., c. 13, an emergency Act passed to check a local outburst of lawlessness which continued in force although the circumstances which had caused it to be enacted had ceased to exist.[76] The Bill was adopted by the

[73] 'But with all these shortcomings', writes J. L. Hammond, 'he remains one of the chief heroes in the gallery of English freedom'; *Charles James Fox* (1903), p. 25. In 1806 Fox helped Wilberforce to carry through a Bill restricting the slave trade, and on June 10 of the same year moved that the House should 'proceed to take effectual measures for abolishing' the African slave trade. The motion was adopted. 'If, during the almost forty years that I have now had the honour of a seat in Parliament', he said, 'I had been so fortunate as to accomplish that, and that only, I should think I had done enough, and could retire from public life with comfort, and conscious satisfaction, that I had done my duty'; E. Lascelles, *The Life of Charles James Fox* (1936), pp. 324–325.

[74] See however Sir George Otto Trevelyan, *The Early History of Charles James Fox* (1880), p. 431.

[75] Below, note 6 at p. 427 and p. 444.

[76] On this statute see Appendix 1, p. 641.

Commons but rejected by the House of Lords.[77] In 1792, during a debate on the Middlesex Justices Bill, Fox again argued that the criminal law should be revised. 'As to certain sanguinary statutes', he said, 'that were to be found in our laws, he had always been of opinion that to leave them standing in our code was a disgrace to our statute-book—that their inhumanity was manifest, their absurdity ridiculous, and that to attempt to execute some of them would be a daring mockery of common sense and would rouse the indignation of the public'.[78] Dr. Samuel Parr was certainly expressing the feelings of many when he wrote that they should 'ever deplore the causes which prevented Mr. Fox from having any opportunity to direct the whole force of his mind to the redress' of this defect.[79]

It should be noted, however, that on constitutional grounds Fox strongly opposed both the establishment of an effective police force and any extension of the power of magistrates.[80]

The need to reform the criminal law was also recognised by William Pitt. He imparted his views on this subject to Wilberforce who mentioned them in one of his speeches in the House of Commons.[81] The accuracy of this statement cannot be doubted. Another indication of his attitude is provided by the Westminster Police Bill which Sir Archibald Macdonald, then Solicitor-General in Pitt's government,[82] brought in on

[77] A few years later Fox thus referred to this unsuccessful attempt: 'There is a statute against rogues and vagabonds, under the title of notorious rogues and vagabonds in the counties of Cumberland and Northumberland, declaring them felony without benefit of clergy. That question had been debated in that House, and by his exertion, and the very able support of a noble friend of his (Lord Porchester), that House had passed a bill for the repeal of that act, being of opinion that to be a rogue and a vagabond in Cumberland and Northumberland, was no greater offence than in Middlesex or any other County; and a man should not be hanged for it in one place, while he was only whipped for it in another. However, the Peers had greater reverence for antiquity, and more profound discernment with respect to the nature and character of a notorious rogue in Cumberland than the House of Commons, and therefore the bill of repeal was rejected by their lordships'; *Parl. Hist.* (1791–92), Vol. 29, col. 1471.

[78] In 1796 Fox opposed the extension of 25 Geo. 2, c. 37 to offenders found guilty of burglary and robbery; see below, p. 479.

[79] *Characters of the late Charles James Fox* (1809), Vol. 2, pp. 519–520. Parr published his book under the pseudonym of 'Philopatris Varvicensis'.

[80] *Op. cit.*, cols. 1181–1182, 1464–1465 and 1469–1473.

[81] *Parl. Deb.* (1811), Vol. 19, Appendix, cols. LXXIV–LXXVII.

[82] On Sir Archibald Macdonald see below, note 71 at p. 545.

June 28, 1785.[83] The purpose of this notable Bill was to establish a more effective police force. When introducing it Sir Archibald Macdonald asked the House to reflect upon the 'crowds that every two or three months fell a sacrifice to the justice of their country, with whose weight . . . the gallows groaned',[84] and expressed his 'conviction that the present laws, and the mode of executing them now in use, were inadequate . . . extreme severity, instead of operating as a prevention to crimes, rather tended to inflame and promote them, by adding desperation to villainy'; but he was convinced that a system might be evolved which would 'render detection certain, and punishment with a moderate degree of severity, unavoidable'.[85] This statement coming as it did from the Solicitor-General in Pitt's government could hardly have been made without his agreement.[86]

But two years later Pitt's attitude underwent a change and in 1787 he strongly deprecated the suggestion of setting up a commission of inquiry into the criminal law on the ground that it would discredit the existing system.[87] The fact that Macdonald's Police Bill had to be withdrawn owing to the opposition of the City might have accounted at least in part for his unwillingness to mitigate the severity of the law.[88] But the main reason for this change of attitude lay no doubt in altered political conditions. Pitt, writes Lord Rosebery in his brilliant biography, 'faced the cataclysm (of the French Revolution), and made everything subservient to the task of averting it. All reforms were put on one side, till the

[83] The full title of which was: *A Bill for the Further Prevention of Crime and for the more speedy Detection and Punishment of Offenders against the Peace in the Cities of London and Westminster, the Borough of Southwark, and certain parts adjacent to them*; see *Parl. Hist.* (1785–86), Vol. 25, cols. 888–913.

[84] He also said that eighteen out of every twenty offenders hanged in London were under the age of twenty-one.

[85] *Ibid.*, col. 889.

[86] His political connection with Pitt was very close. It dated from 1781, when Pitt had entered the House of Commons; E. Foss, *Judges of England* (1864), Vol. 8, p. 330.

[87] Below, pp. 446–447.

[88] *Parl. Hist.* (1785–86), Vol. 25, 'Petition from the Lord Mayor and Aldermen', cols. 900–901, and 901–903.

That he foresaw the formidable strength of the opposition and thought it impracticable to pursue the project is also not to be excluded. Thus J. Holland Rose points out that this reason has been overlooked by some historians who criticised Pitt for abandoning his project of parliamentary reform; *William Pitt and the National Revival* (1911), pp. 203–205.

barometer should rise to a more promising level'.[89] In spite of urgent appeals he did little to improve the penal system [90] and in later years was responsible for a number of measures restraining political freedom conceived in the spirit of what Holland Rose calls a 'policy of repression'.[91] That he was none the less convinced of the need for restraint in imposing penalties is indicated by his Mutiny Bill of 1797 which proposed making the relevant offences aggravated misdemeanours, to be punished by a fine, imprisonment or transportation.[92]

Wilberforce

In 1787 Wilberforce observed: 'The barbarous system of hanging has been tried too long, and with the success which might have been expected from it. The most effectual way to prevent the greater crimes is by punishing the smaller, and by endeavouring to repress that general spirit of licentiousness, which is the parent of every species of vice'.[93] Although absorbed by the arduous task of leading the movement for the abolition of the slave trade, Wilberforce also evinced much interest in penal matters. A consistent supporter of Romilly,[94] after Romilly's death he continued to lend his support to Mackintosh and Fowell Buxton [95] and in 1819 served on the important Select Committee on Criminal Laws of which Mackintosh was the Chairman. He was also an active member of 'The Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders'.[96]

[89] *Pitt* (1891), p. 281. '. . . It is, no doubt, true that the changed conditions of the world compelled him to give up his first task of educating his followers, and to appeal rather to their natural instincts or prejudices. . . . But Pitt could only perceive the heavens darkened, and the sound of a rushing mighty wind that filled all Europe'; *ibid.*, pp. 285 and 280.

[90] See *Parl. Hist.* (1785–86), Vol. 25, cols. 430–432, when this matter was raised by Burke and Lord Beauchamp; see further Sir Charles Bunbury's motion of 1791, *Parl. Hist.* (1789–91), Vol. 28, cols. 1221–1225. Pitt's replies were unconvincing and indicative of a lack of a constructive policy. See also on this J. Holland Rose, *William Pitt and the National Revival* (1911), pp. 433–443.

[91] J. Holland Rose, *William Pitt and the Great War* (1911), pp. 190–194.

[92] Below, pp. 487–488.

[93] *Life of William Wilberforce* (ed. by his sons, 1838), Vol. 1, p. 131. On a somewhat inconsistent Bill on this subject which he brought in in 1786, see below, pp. 476–479.

[94] See *op. cit.*, Vol. 3, pp. 440, 444; and below, pp. 504–505 and 519.

[95] Below, pp. 534 and note 48 at p. 539.

[96] On this Society see below, p. 597.

One of the *Reports* of that Society records that he proposed a resolution, seconded by Earl Blessington, that 'a well-regulated prison for the correction and reformation of Criminal Youth' be established.[97] To the cause of criminal law reform he gave not only his own support but also that of his group 'the Saints', as they were called. H. W. Carless Davis notes that the influence of 'the Saints' was out of all proportion to their numbers. Nearly every member of the group was a man of affluence and good connections; their 'collective influence . . . was great when they decided to join battle on a moral or religious issue'.[98] On many occasions they united their efforts not only with protestants of every denomination, but also with Benthamites and extreme radicals.[99] John Howard, who was a Dissenter, and Elizabeth Fry and William Allen—the Quakers, were influenced by Wilberforce's movement.

Blackstone

The extent to which Sir William Blackstone was critical of English criminal law is not always fully appreciated.[1] Book IV of his *Commentaries*, devoted to criminal law and procedure, begins with a chapter in which he considers 'the *power*, the *end*, and the *measure* of human punishment'.[2]

[97] *Fourth Report of the Committee of the Society for the Improvement of Prison Discipline* (1822), pp. 10–11.

[98] *The Age of Grey and Peel* (1929), pp. 149–150. For an interesting account of the activities of the Clapham Sect see F. A. von Hayek's introduction to H. Thornton's *Enquiry into the Nature and Effects of the Paper Credit of Great Britain, 1802* (1939), pp. 21–36. Henry Thornton was a prominent member of the group, best remembered as a financial expert; he was also an ardent prison reformer.

[99] 'It was enough', writes Professor Elie Halévy, 'if their friends were animated by a sincere and practical zeal for reformation of abuses, and the crusade against ignorance and vice'; *A History of the English People in 1815* (1924), Vol. 1, p. 383.

[1] To the bibliographical references on Blackstone given by Sir William Holdsworth, *H. E. L.*, Vol. 12, footnote 2, p. 703, the following three books recently published in the United States may be added: Lewis C. Warden, *The Life of Blackstone* (Virginia, 1938); a more thorough and well-balanced book by David A. Lockmiller, *Sir William Blackstone* (University of North Carolina Press, 1938); and the interesting though somewhat overstrained study by Daniel J. Boorstin, *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries* (Harvard University Press, 1941). See also Sir Ernest Barker's essay 'Blackstone on the British Constitution', *Essays on Government* (1945), pp. 121–154.

[2] 4 Comm. 7.

Although his approach was not original, for he was strongly influenced by Montesquieu and in particular by Beccaria,[3] it is noteworthy that Blackstone was the first legal author to give distinct treatment to the subject which in all earlier treatises had been disposed of in a few sentences,[4] and that he upheld some of the most progressive tenets of Beccaria's doctrine.[5]

Blackstone rejects the concept that the object of punishment is expiation for a past offence, holding that it is to ensure protection against the recurrence of similar offences in the future. To attain this object it is not enough to impose penalties likely to deter would-be offenders or capable of depriving them of the power to commit further mischief. He insists on the reformative function of punishment,[6] an emphasis uncommon even among the reformers.[7] He further holds that 'the quantity of punishment can never be absolutely determined by any standing invariable rule', but should be adapted to the circumstances peculiar to each case. To evolve a scale of offences with a corresponding scale of punishments may perhaps be 'too romantic an idea', but the principal divisions should none the less be marked and 'penalties of the first degree (should not be assigned) to offences of an inferior rank'.[8] He agrees with the general principle that the facility with which an offence can be committed, its frequency and the degree of temptation to commit it, should be taken into account in assessing the severity of punishment,[9] but objects to repressing crime 'at any rate and

[3] Sir William Holdsworth states 'that it was Beccaria's book which helped Blackstone to crystallize his ideas, and that it was Beccaria's influence which helped to give a more critical tone to his treatment of the English criminal law than to his treatment of any other part of English law'; *H. E. L.*, Vol. 11, p. 578. On Beccaria see above, pp. 277–286.

[4] This omission is noted by Bentham; see below, p. 377. For Hale's treatment see 1 P.C. 12–13. Nothing is said about punishment in the leading textbooks of Blackstone's time.

[5] But he disagreed with Beccaria on a number of important issues, such as for instance the royal prerogative of mercy; see above, pp. 128–129.

[6] 4 Comm. 11.

[7] For Romilly's formula see above, p. 330.

[8] *Op. cit.*, 18.

[9] It is on this ground, for instance, that he justifies the imposition of a higher punishment for privately stealing from the person to the value of 12 pence (capital punishment), than for carrying off a load of corn from an open field (transportation); *ibid.*, p. 16; see also p. 242.

by any measures '.[10] In Chapter 18,[11] in full agreement with Beccaria, he lays stress on the effectiveness of ' preventive ' as opposed to ' punishing ' justice.

In comparison with the general tone of Blackstone's work, his remarks on statutes imposing capital punishment are much more critical.[12] He felt that greater care should be taken in passing capital statutes, that they should be periodically surveyed and that their great number was causing a general disinclination to put them into effect.[13] It has been mentioned that he considered the reformation of offenders one of the chief objects of punishment. He further contends that with a thorough reorganisation of the prison system, ' . . . such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes '.[14] Blackstone's authority was repeatedly quoted by reformers in support of their cause and it is significant that at one stage Lord Ellenborough thought it necessary to insist that much greater weight should be attached to Dr. Paley's views on this subject than to those of Blackstone.[15]

[10] He adopts Beccaria's views on the effectiveness of moderate punishments on account of their certainty.

[11] *Ibid.*, 251 *et seq.*

[12] See for instance *ibid.*, 10, 16, 17, 18, 88, 155, 237. For his criticism of corruption of blood and the hope that it will be abolished see *ibid.*, 387–388.

[13] *Ibid.*, 4–5 and 18–19, where he speaks about ' pious perjury '. In *R.* v. *John Paty* (1770), 2 Black. 721–722, which Blackstone tried in 1770, the defendant, a boy of eighteen years, was found guilty of feloniously shooting and killing ' one mare, of mixed red and white colour, and one brown stone colt, the goods and chattels of one Mathew Batten, against the form of the statute ', and was sentenced to death. Blackstone respited the judgment until the next assizes on the ground that the statute (9 Geo. 1, c. 22) referred to ' cattle ', but that the indictment did not state that the mare and the colt were cattle within the meaning of the Act. The prisoner was ' reprieved for transportation ' and afterwards ' received a free pardon '.

[14] *Ibid.*, 372. Elsewhere he states: ' A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) as likewise prove a manifest defect either in the wisdom of the legislature, or the strength of the executive power '; *ibid.*, 17.

Together with John Howard and Eden, Blackstone took an active part in drafting 19 Geo. 3, c. 74, which, though not implemented, marks a stage in the history of the prison system. In a charge to a Grand Jury he referred to the project of correcting prisoners as '. . . well worth the Trouble of an Experiment '; see James Clitherow's ' Preface ' to his edition of Blackstone's *Reports* (1781), Vol. 1, p. xxii. For an exchange of views on this subject between Bentham and Blackstone see below, note 93 at p. 380.

[15] See above, p. 258.

'The Society for the Diffusion of Knowledge upon the Punishment of Death and the Improvement of Prison Discipline'

'It is a kind of quackery in government', writes Blackstone, 'and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.'[16] This note of concern can be detected in the writing of many contemporary authors of varying talent and influence.[17] The

[16] 4 Comm. 17–18.

[17] In Oliver Goldsmith's *The Vicar of Wakefield* Dr. Primrose says: 'All our possessions are paled up with new edicts every day, and hung round with gibbets to scare every invader'. William Cowper complains that London is 'more prompt t'avenge than to prevent the breach of law;—That she is rigid in denouncing death on petty robbers' (Extract from the poem *Task*). In 1815 in a remarkable essay 'On the Punishment of Death' Shelley wrote: 'The first law which it becomes a Reformer to propose and support, at the approach of a period of great political change, is the abolition of the punishment of death'; *The Prose Works* (ed. by H. B. Forman, 1880), Vol. 2, p. 247. A similar though less extreme attitude was taken by Samuel Coleridge in an article 'Punishments. Scourging Females', published in the *Courier* of May 13, 1811, and included in *Essays on his own Times* (ed. by his daughter, 1850), pp. 762–766. See also Robert Southey's essay written in 1818, 'On the Means of Improving People', *Essays, Moral and Political* (1832), Vol. 2, pp. 111–180, at p. 177, where he insists on the need for preserving a proportion between crime and punishment. On Byron's attitude see below, note 96 at p. 521.

Strong doubts as to the merits of penal system were expressed by Bernard Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn* (1725); by Jonas Hanway, *Distributive Justice and Mercy* (1781); and by Thomas Clarkson, *A Portraiture of Quakerism* (1806), Vol. 1, pp. 205–214. See also Samuel Richardson's vivid description of an execution of which he was an eye-witness in the letter No. 160 (of a collection of 173 letters printed anonymously) reproduced by A. Marks, *Tyburn Tree* (n.d.), pp. 237–240.

A drastic revision of the criminal law was urged by William Allen in the *Philanthropist* (see below, note 18 at p. 349). H. Dagge, strongly influenced by Eden, made this the main subject of his *Considerations on Criminal Law* (2nd ed. 1774), 3 vols. M. Dawes stressed the need for 'blotting from the criminal code the punishment of death for offences of human institution'; *An Essay on Crimes and Punishments with a View of and Commentary upon Beccaria, Rousseau, Voltaire, Montesquieu, Fielding and Blackstone* (1782), and so did Francis Grose in his essay 'On the Criminal Laws of England', *Olio* (1793), pp. 259–266. On March 24, 1785, the Rev. William Turner read a learned address on the same subject to the 'Manchester Philosophic Society'; see 'On Crimes and Punishments', *Memoirs of the Literary and Philosophic Society of Manchester*, Vol. 2, p. 293 *et seq.* Robert Hall deplored 'the sanguinary complexion of the criminal law'; *Works* (ed. by O. Gregory, 1832), Vol. 4, p. 42. Dr. Samuel Parr subjected the whole system to a searching and highly critical examination in the *Characters of the late Charles James Fox*

widely felt anxiety, intensified both by the growth of the philanthropic spirit and the evangelical revival, led to the establishment in 1809 of the 'Society for the Diffusion of Knowledge upon the Punishment of Death and the Improvement of Prison Discipline'. The Society was founded by William Allen, a Quaker and philanthropist,[18] and Basil Montagu, a disciple of Bentham and a friend of Romilly,[19]

(1809), Vol. 2; included in his *Works* (ed. by John Johnstone, 1828), Vol. 4, pp. 138–314.

George B. Mainwaring and particularly Patrick Colquhoun insisted that a rational system of detection and control rather than the excessive severity of the law is the most effective safeguard against crime. Among the prison reformers, Oglethorpe, Howard, James Nield, William Smith, Elizabeth Fry, Samuel Hoare and Fowell Buxton all drew attention to the great number of offenders who were being brought to the scaffold by a lack of corrective training and the corruption prevailing in prisons; see on this J. L. and B. Hammond, 'Poverty, Crime and Philanthropy', *Johnson's England* (ed. by A. S. Turberville, 1933), Vol. 1, p. 317 *et seq.*, and the Rev. Walker Lowe Clay, *The Prison Chaplain: A Memoir of the Rev. John Clay* (1861), p. 42 *et seq.* Also significant are Robert Owen's views on this subject; see Frank Podmore, *Robert Owen: A Biography* (1923), pp. 225, 226 and 651.

The radical writers of the period were all in favour of an extensive revision of the criminal law. See for instance Thomas Paine, 'The Rights of Man', *Writings* (col. by M. D. Conway, 1894), Vol. 2, p. 245, and his plea for preserving the life of Louis XVI whose execution he opposed '. . . for both moral motives and motives of public policy'; *ibid.*, vol. 3, pp. 123–124 and 125–127. See further William Hazlitt, *Complete Works* (ed. by P. P. Howe, 1931) Vol. 19, pp. 216–255 and 324–329; William Godwin, *An Enquiry concerning Political Justice* (1793), Vol. 2, pp. 705–726 and 745–759. In order to demonstrate the leniency of the laws of Scotland David Hume compared them with those of England; see his *Commentaries on the Laws of Scotland respecting Crimes* (2nd ed., 1819), Vol. 1, pp. 10–11. See also a series of tables reproduced by B. Montagu in his *Opinions of Different Authors upon the Punishment of Death* (2nd ed., 1816), Vol. 2, pp. 375–384; and with respect to Ireland, the remarkable essay 'Considerations on Punishing Crimes by Death, with Extracts from various Authors' in the *Anthologia Hibernica* (July–Dec., 1794), Vol. 4, pp. 169–175 and 244–248.

[18] William Allen (1770–1843) took an active part in numerous reforming movements. A close friend of Clarkson and Wilberforce, he supported their efforts to abolish the slave trade, did much valuable work in promoting education, and sponsored reforms in the system of punishment. The periodical *Philanthropist*, which he started in 1811, and maintained until 1817, published articles on penal matters (for some of these see above, p. 333). They were largely contributed by James Mill with whom Allen closely collaborated in spite of the religious differences. For articles on penal matters which Mill wrote for the first issue of the *Philanthropist* see Alexander Bain, *James Mill* (1882), p. 113. On William Allen much information is to be found in his *Life* (1847), 3 vols., containing diaries and correspondence.

[19] Basil Montagu (1770–1851), the second (natural) son of John Montagu, fourth Earl of Sandwich, was educated at Charterhouse and Christ's College, Cambridge. In 1789 he was admitted a member of Gray's Inn and in 1835 made a K.C. He was an authority on bankruptcy law, wrote extensively on this branch of the law, and for several years made strenuous efforts to improve it. In 1806–7 he was appointed by Lord Erskine to a commissionership in

who were inspired by the work of the 'Committee for the Abolition of the Slave Trade'[20] in this country and of the 'Philadelphia Society for Alleviating the Miseries of Public Prisons'[21] in America. In 1829 the Society was re-established under a slightly different name, central committees being set up in London, Edinburgh and Dublin.[22]

bankruptcy and from 1835 to 1846 held the office of Accountant-General in bankruptcy. He was a friend of Mackintosh, Samuel Parr and Romilly. In his views on criminal jurisprudence he was strongly influenced by Bentham.

The most important of his many tracts and books on the reform of criminal law are: *The Opinions of Different Authors upon the Punishment of Death* (1809), 2nd ed. in 3 vols. issued in 1816; *The Case of D. Shiel, condemned to die* (1810); *An Examination of Some Observations upon a passage of Dr. Paley's Moral Philosophy on the Punishment of Death* (1810); *An Enquiry into the Aspersions upon the late Ordinary of Newgate (B. Forde), with some Observations upon Newgate and upon the Punishment of Death* (1815); *The Rise and Progress of the Mitigation of Punishment of Death, 1520–1687* (1822); *Some Enquiries respecting the Punishment of Death for Crimes without Violence* (1818); *Thoughts upon the Abolition of the Punishment of Death, in Cases of Bankruptcy* (1821); *Thoughts on the Punishment of Death for Forgery* (1830). The pamphlets are somewhat repetitive but they served a useful purpose.

[20] Formed in 1787, with Granville Sharp as its first chairman; Sir Reginald Coupland, *Wilberforce* (1923), p. 88.

[21] See Basil Montagu, *An Account of the Origin and Object of the Society for the Diffusion of Knowledge upon the Punishment of Death and the Improvement of Prison Discipline* (1812). The Society published some works of Basil Montagu; a collection of articles reprinted from the *Philanthropist* (on some of these articles see above, note 34 at p. 333); a full account of some of the most important debates in Parliament on Romilly's Bills of 1811, 1813 and 1814. Two of these were later reprinted as an Appendix to *Parliamentary Debates;* see above, pp. 323–324, and below, note 90 at p. 519. The 'Constitution of the Philadelphia Society, for Alleviating the Miseries of Public Prisons' is reprinted in William Bradford's *Enquiry how far the Punishment of Death is necessary in Pennsylvania* (Philadelphia, 1793), pp. 105–107 (reprinted in England in 1795). Bradford's excellent essay was well known, and so were Dr. B. Rush's *An Inquiry into the Effects of Public Punishments upon Criminals and upon Society* (Philadelphia, 1787), a tract embodying the substance of a lecture delivered at a meeting of the 'Society for Promoting Political Enquiries' at Benjamin Franklin's house in Philadelphia; and Captain R. F. Turnbull's *A Visit to the Philadelphia Prison* (1796).

[22] 'Society for the Diffusion of Information on the Subject of Capital Punishments'. The Chairman of the London Committee was William Allen; among the members were: Fowell Buxton, Thomas Clarkson, William Crawford, Samuel Hoare, Leonard Horner, the Rev. Daniel Wilson (afterwards Bishop of Calcutta), Dr. Lushington, Basil Montagu, Lord Suffield, J. Sydney Taylor, Thomas Wood. In addition to organising lectures, conducting press campaigns and promoting petitions, the Society also published a series of five tracts on the 'Punishment of Death': No. 1, *Speech of Sir William Meredith in the House of Commons, May 19, 1777* (1831); No. 2, *Speeches of Earl Grey and Lord Grenville, in the House of Lords, April 2, 1813* (1831); No. 3, *Substance of the Speeches of S. Lushington and J. Sydney Taylor on May 30, 1831* (1831); No. 4, J. Sydney Taylor, *A Comparative View of the Punishments annexed to Crime in the United States of America and in England* (1831); No. 5, *The*

§ 4. FACTORS WHICH IMPEDED THE PROGRESS OF THE MOVEMENT FOR REFORM

The strength of the factors which impeded the progress of the movement becomes apparent when one considers the extent of the revision which Johnson suggested in 1751 and the practically unaltered state of criminal law at Romilly's death in 1819. Reference has already been made to certain factors directly connected with the administration of justice, which favoured the extension of capital punishment.[23] But the movement for the reform of criminal law was also hampered by a number of other circumstances.

Among the effects of the Industrial Revolution were the emergence of great urban agglomerations and industrial regions, the formation of a large and mobile class of wage-earners, the disintegration of some of the ancient orders of society, and the rapid accumulation of wealth by some sections of the community coinciding with the spread of poverty and economic instability, the evils of which were accentuated by the lack of a protective social policy. 'The terrible pace', writes Dr. Trevelyan, 'at which the world now jolts and clanks along was set in our island, where, first, invention was harnessed to organised capital. For fifty years that great change was left uncontrolled by the community which it was transforming. So new was the experience, that for a while the wisest were as much at fault as the most foolish. Burke for all his powers of prophecy, Pitt for all his study of Adam Smith, Fox for all his welcome to the new democracy, no more understood the English economic revolution, and no more dreamt of controlling it for the common good, than George III himself.'[24] England was in a state of transition and it is a truism that in such periods of social tension the Legislature becomes overridingly

London Jurors' Petition of 1831 (1831); see also *Introductory Remarks dated August 31, 1832*, by the Committee of the Society, and *Further Remarks, dated August 21, 1833* (1833). The Society also sponsored the publication of a collection of valuable articles originally published in the *Morning Herald*; see below, note 22 at pp. 597–598.

[23] Above, pp. 23–35.

[24] *British History in the Nineteenth Century and After* (Reprint of 1943), p. XIV. This is particularly remarkable, since, as Dr. Trevelyan points out in his other book, 'the Industrial Revolution was not an event but a process'; *History of England* (Reprint of 1936), p. 605.

preoccupied with the strengthening of the State against the danger of an anticipated wave of lawlessness, inclined to lay stress on the deterrent function of criminal law and to oppose any attempt to change the established system of criminal justice, particularly if it would entail the relaxation of its severity.[25]

The impact of the French Revolution further deepened hostility towards any project of reform. As F. E. Hutchinson remarks, 'it gave a new lease of life to threatened institutions'.[26] The regressive influence of the French Revolution was recognised by Romilly who notes in his *Memoirs*: 'Among the higher orders it has produced a horror of every kind of innovation; among the lower, a desire to try the boldest political experiments, and a distrust and contempt of all moderate reforms'.[27] The effect of the wars against Napoleon should also be mentioned. This was not a time when major domestic reforms could be introduced or even contemplated. One may even wonder at the great impetus gained by the movement for the abolition of the slave trade, though its success may in part be accounted for by the lack of scope for the reform of institutions intimately connected with the everyday life of the country.[28]

Watching the ravages committed in the name of equality and freedom by the French Revolution and the political terror

[25] Even in normal times the need to revise the criminal law is not easily conceded, for—as Sir Paul Vinogradoff puts it—'people . . . are afraid of undermining the practical premises of social security by investigating closely the psychological motives of criminals'; *Introduction to Historical Jurisprudence* (1920), p. 33.

[26] 'The Growth of Liberal Theology', *Cambridge History of English Literature* (Reprint of 1943), Vol. 12, p. 279. On the effect of the French Revolution see Lecky, *History* (repr. of 1904), Vol. 6, Chaps. 18, 19; G. P. Gooch, 'Europe and the French Revolution', *Cambridge Modern History* (1907), Vol. 8, pp. 754–771. Also very valuable is P. A. Brown's *The French Revolution in English History* (Reprint of 1923).

[27] (1840), Vol. 3, p. 399. For an arresting remark on this subject made by Wilberforce during a debate on criminal law in 1819 see below, note 53 at pp. 540–541. The fact that both Romilly and Mackintosh at some stage sympathised with the French Revolution certainly did not make their task easier. Nor did the fact that the reform of criminal law was urged by radicals.

[28] Some radical writers of the period accused the leaders of the movement for the abolition of the slave trade of consciously diverting the attention of the public from domestic and international issues. See, for instance, W. Hazlitt's essay 'Lord Eldon—Mr. Wilberforce', *The Spirit of the Age* (2nd ed., 1825), pp. 326–327. This opinion is certainly not borne out by the attitude adopted by Wilberforce towards the reform of criminal law; see on this, above, pp. 344–345.

which was its aftermath, the English people could not but feel proud of their institutions.[29] Even Bentham admitted that the government of England was 'the finest and most excellent of any the world ever yet saw'. This attitude was inevitable and it was largely justified. But it contributed to the creation of an atmosphere of complacency and self-satisfaction under the cloak of which defects in some of the most vital institutions of the State tended to be overlooked or minimised, while plans for even moderate reforms were regarded as dangerous attacks on a well-proven constitution and as attempts to replace a living tradition with visionary theoretical schemes.[30]

'Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments,

[29] In a letter to Brissot, Bentham writes: 'I am sorry you have undertaken to publish a Declaration of Rights. It is a metaphysical work—the *ne plus ultra* of metaphysics. It may have been a necessary evil—but it is nevertheless an evil. Political science is not far enough advanced for such a declaration'; *Works* (Bowring), Vol. 10, pp. 214–215. Bentham collected his critical observations on this subject in a pamphlet entitled 'Anarchical Fallacies'; *ibid.*, Vol. 2, p. 491. A few years earlier Burke called the Declaration of Rights 'the Digest of Anarchy'.

Buckle's comment on Burke is also relevant to many other of his contemporaries: 'And, when the crimes of that great revolution, instead of diminishing, continued to increase, . . . his sympathy with present suffering was so intense, that he lost all memory of the tyranny by which the sufferings were provoked'; *History of Civilisation in England* (1908), Vol. 1, p. 467.

[30] The failure of the Established Church to take a lead in any important movement for reform was also partly the outcome of these political circumstances. On the passive attitude of the Church during this period see Leslie Stephen, *English Utilitarians* (1900), Vol. 1, p. 42 *et seq.*; see also Elie Halévy, *History of the English People in 1815* (1924), Vol. 1, pp. 342–352. In 1810 seven dignitaries of the church, headed by the Archbishop of Canterbury, sided with Lord Eldon and Lord Ellenborough and voted against Romilly's Bill to abolish capital punishment for theft in shops to the value of five shillings. Romilly himself was inclined to attribute this vote to political considerations; see *Memoirs*, Vol. 2, p. 325. 'In consequence of the increased authority of Parliament', writes Professor Norman Sykes, 'one of the most important duties of the Hanoverian prelate, according to contemporary estimation, was his attendance upon the sessions of the House of Lords. In the eyes of the political administration, the fidelity of a bishop to his senatorial obligations was a matter of especial weight, and in expectation of a difficult session or upon warning of a series of crucial divisions, urgent monitions were despatched to the spiritual peers to attend in person if possible (for when the upper house was in committee proxies were not permitted), or if that were impossible, to place their proxies in the hands of such of their brethren as were of approved fidelity and parliamentary diligence'; *Church and State in England in the Eighteenth Century* (1934), p. 47.

now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.' In these exhilarating sentences Blackstone [31] was both enunciating what to him seemed a fair appraisal of a certain branch of law, and also expressing the deeply rooted self-satisfaction so prevalent in his times. On the other hand the Rev. Sydney Smith, the pugnacious polemist of the *Edinburgh Review*, drew this picture of the state of English law and the English system of justice *circa* 1802 :—

> 'The Catholics were not emancipated. The Corporation and Test Acts were unrepealed. The Game-laws were horribly oppressive; steel-traps and spring-guns were set all over the country; prisoners tried for their lives could have no counsel. Lord Eldon and the Court of Chancery pressed heavily on mankind. Libel was punished by the most cruel and vindictive imprisonments. The principles of political economy were little understood. The laws of debt and conspiracy were upon the worst footing. The enormous wickedness of the slave-trade was tolerated . . . Not a murmur against any abuse was permitted. To say a word against the suitorcide delays of the Court of Chancery, or the cruel punishments of the Game-laws, or against any abuse which a rich man inflicted and the poor man suffered, was treason against the plousiocracy, and was bitterly and steadily resented.' [32]

The truth lay somewhere between these two extremes, but the times were not conducive to an objective assessment.

[31] 3 Comm. 268.

[32] Lady Holland, *A Memoir of the Rev. Sydney Smith* (ed. by Mrs. Austin, 1869), pp. 33 and 36–37.

Chapter 11

THE REFORMERS: (2) JEREMY BENTHAM

§ 1. BENTHAM'S INFLUENCE

In the introductory note to his great speech on law reform Lord Brougham writes [1]:

> 'The age of Law Reform and the age of Jeremy Bentham are one and the same. . . . No one before him had ever seriously thought of exposing the defects in our English system of Jurisprudence. . . . Men, by common consent, had agreed in bending before the authority of former times as decisive upon every point; and confounding the question of, what is the law, which that authority alone could determine, with the question, what ought to be the law, which the wisdom of an early and an unenlightened age was manifestly unfit to solve, they had taken it for granted that the system was perfect, because it was established, and had bestowed upon the produce of ignorance and inexperience their admiration in proportion as it was defective. He it was who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the rest; and with a yet more undaunted courage, inquiring how far even its most consistent and symmetrical arrangements were framed according to the principle which should pervade a Code of Laws—their adaptation to the circumstances of society, to the wants of men, and to the promotion of human happiness. . . . None ever before Mr. Bentham took in the whole departments of legislation. None before him can be said to have treated it as a science, and by so treating, made it one. This is his pre-eminent distinction; to this praise he is most justly entitled; and it is as proud a title to fame as any philosopher ever possessed.'

[1] *Speeches* (1838), Vol. 2, pp. 287–288 and p. 291. The speech was delivered in the House of Commons, on February 7, 1828. 'The Introductions to the different Speeches', as Lord Brougham points out in the preface to this collection (Vol. 1, p. v), 'are intended to elucidate the History of the Measures discussed, and of the periods to which they relate'.

When Brougham made his speech in Parliament, Bentham, already eighty years old, was at the height of his reputation.[2] The founder and acknowledged leader of a new school of

[2] An excellent point of departure for the study of the life and works of Jeremy Bentham is provided by Sir John Macdonell's article in the *D.N.B.*, II, 268–280; and W. R. Sorley's essay on 'Bentham and the Early Utilitarians'; *Cambridge History of English Literature* (1913), Vol 11, pp. 57–73. Sir T. E. Holland's article in *The Encyclopædia Britannica* (11th ed., 1910), Vol. 3, p. 747, though necessarily brief, is very helpful. J. M. Zane's essay on 'Bentham' in *Great Jurists of the World* (ed. by Sir John Macdonell, 1913), p. 532, is utterly inadequate; F. C. Montague's 'Introduction' to a new edition of Bentham's *Fragment on Government* (repr. of 1931), pp. 1–90, is well balanced and lucid.

The most recent biography of Bentham is *The Education of Jeremy Bentham* (1931), by Charles Warren Everett. It is a delightful and instructive narrative. Legal scholars also owe a great debt to the same author for editing with exemplary care two of Bentham's MSS., *i.e.*, *A Comment on the Commentaries* (1928), and *The Limits of Jurisprudence Defined* (1945). Ch. Milner Atkinson's *Jeremy Bentham* (1905), and Coleman Phillipson's *Three Criminal Law Reformers* (1923), Part 2, Chapts. 1, p. 109 *et seq.*, and 2, p. 152 *et seq.*, are very valuable as a general introduction. Much information is also to be found in Bentham's 'Memoirs, Autobiographical Conversations and Correspondence', *Works* (Bowring, 1843), Vols. 10 and 11. See, also, J. H. Burton, 'Memoirs of Jeremy Bentham, by John Bowring', *Westminster Review* (1842), Vol. 37, pp. 265–293.

The two major works on the doctrine of Bentham and his followers are: Leslie Stephen, *The English Utilitarians* (1900), 3 Vols.; and Professor Elie Halévy, *La Formation du Radicalisme Philosophique* (Paris, 1901–1904) (Vol. 1, La Jeunesse de Bentham; Vol. 2, L'évolution de la Doctrine Utilitaire de 1789 à 1815; Vol. 3, Le Radicalisme Philosophique). An English translation of this work, *Growth of Philosophic Radicalism*, was published in 1928, but a number of notes appended to the French edition and containing highly interesting extracts from Bentham's MSS., have been omitted. For the bibliography of Bentham's works see below, note 17 at p. 363.

The following essays usefully implement Leslie Stephen's and Elie Halévy's books: W. Hazlitt's essay in *The Spirit of the Age* (2nd ed., 1825), pp. 1–27; W. Empsom, 'Memoirs of Jeremy Bentham', *Edinburgh Review* (1843), Vol. 78, pp. 460–516; H. Sidgwick, 'Bentham and Benthamism', first published in 1877, reprinted in his *Miscellaneous Essays and Addresses* (1904), pp. 135–169; see also E. Nys' note on 'Les Bentham Papers du British Museum' (1891), originally published in the *Revue de Droit International et de Legislation Comparée*; A. Seth Pringle-Pattison, 'The Philosophical Radicals', originally published in *The Quarterly Review* (July, 1901), reprinted in *The Philosophical Radicals and other Essays* (1907), pp. 3–46; J. MacCunn, 'Bentham and his Philosophy of Reform', *Six Radical Thinkers* (1907), pp. 1–35; two articles by Professor Graham Wallas: 'Jeremy Bentham', in *Political Science Quarterly* (1923), Vol. 38, pp. 45–56, and 'Bentham as Political Inventor', in the *Contemporary Review* (1926), Vol. 129, pp. 308–319; A. A. Mitchell, 'Bentham and his School' in *The Juridical Review* (1923), Vol. 35, pp. 248–284; C. K. Ogden, *Jeremy Bentham* (1932); J. L. Stocks, *Jeremy Bentham* (1933). On Bentham's appreciation from a Fabian point of view see V. Cohen, *Jeremy Bentham* (Fabian Tract No. 221, 1927).

On the connection between Bentham's doctrine, the trend of legislation and that of public opinion, Dicey's Lecture VI in *Law and Public Opinion in England* is illuminating. See also Lecture XII in Professor J. F. Dillon's *Laws and Jurisprudence of England and America* (1894), Sir Roland Knyvet

thought,[3] surrounded by a team of eminent and devoted pupils, he had the good fortune to witness the gradual adoption of his ideas.[4] Abroad, where his fame had been established much earlier than in his own country, he was

Wilson's *History of Modern English Law* (1875), Parts 2 and 3, and Professor J. Stone, *The Province and Function of Law* (1947), pp. 267–296.

Bentham's penal doctrine is examined in the above quoted book of Professor Coleman Phillipson, Part 2, Chap. 4, p. 196 *et seq.* Interesting information is also to be found in the above quoted works of Leslie Stephen, Vol. 1, pp. 263–271, and 193–206 and Elie Halévy, Vol. 1, pp. 104–129. Professor C. L. von Bar's assessment of Bentham's contribution to penal jurisprudence in his *History of Continental Criminal Law* (1916), pp. 435–436 is inadequate. As its title indicates, H. B. Andrew's *Criminal Law: Being a Commentary on Bentham on Death Punishment* (1833) examines only one aspect of Bentham's penal doctrine. Hepp's book on *Benthams Grundsätze der Kriminalpolitik* (Tübingen, 1838) could not be consulted. L. Pressat's dissertation on *Bentham Criminaliste* submitted in 1920 to the Faculty of Law of the University of Paris is of little value.

[3] John Stuart Mill, who in 1822–23 gave the adherents of that school the name 'Utilitarians', states that he did not invent the word, 'but found it in one of Galt's novels, the "Annals of the Parish", in which the Scotch clergyman, of whom the book is a supposed autobiography, is represented as warning his parishioners not to leave the Gospel and become utilitarians'; *Autobiography* (2nd. ed., 1873), pp. 79–80. It would seem, however, that this name had already occurred to Bentham in 1802. Replying to Dumont who suggested 'Benthamite', he writes: '. . . Benthamite? what sort of an animal is that?—I can't find any such word in Boyer's Dictionary. As to religion—to be sure a new religion would be an odd sort of thing without a name: accordingly there ought to be one for it—at least for the professors of it. Utilitarian (Angl.), Utilitairien (Gall.) would be the more *propre* . . .'; Letter to Dumont dated June 28, 1802; *Works* (Bowring), Vol. 10, pp. 389–390. On Bentham's language see an interesting tract issued by the Society for Pure English: G. Wallas, *Jeremy Bentham and Word Creation* (1928); see further C. K. Ogden, *Bentham's Theory of Fictions* (1932), Introduction, Parts 2, 3 and 4 *passim*.

[4] For a vivid account, based on personal experience, of how the school was recruiting its new adepts see J. A. Roebuck, *Life and Letters* (ed. by R. E. Leader, 1897), pp. 25–28. 'The utilitarian group'—remarks W. R. Sorley—'presents an appearance unknown before in English philosophy—a simple set of doctrines held in common, with various fields assigned for their application, and a band of zealous workers, labouring for the same end, and united in reverence for their master'; see 'Bentham and the Early Utilitarians', *Cambridge History of English Literature* (1913), Vol. 11, p. 57.

'From 1820–1830 I believe the most wonderful period in our history, if we look merely at the importance of people's *opinions*. The writings of Bentham produced a silent revolution in the *mode* of treating all political and moral subjects. The habits of thought were entirely new, and the whole body of political writers, without (for the most part) knowing whence the inspiration came, were full of a new spirit, and submitted all acts to a new test'; J. A. Roebuck to Francis Place (March 26, 1849), *Life and Letters of John Arthur Roebuck* (ed. by R. E. Leader, 1897), p. 217.

Bentham was, however, always dissatisfied with the slow progress of these changes and had little understanding of political and social contingencies. Typical in this respect is his attitude to Brougham. When the latter was preparing his speech on law reform, Bentham offered him 'some nice sweet

looked upon as the greatest contemporary legal philosopher, the inspiring architect of a new jurisprudence.[5]

pap of my own making: three sorts of it.—1. Evidence, 2. Judicial Establishment, 3. Codification Proposal—all to be sucked in, in order of the numbers '. This was written on September 24, 1827. On October 9, in another letter to Brougham whom he calls ' Dear Sweet Little Poppet ', Bentham announced that he would shortly put some more material at his disposal. But after Brougham had made his speech, his dissatisfaction knew no limits. On February 9, 1828 he wrote: ' Mr. Brougham's mountain is delivered and behold!—the mouse. The wisdom of the reformer could not overcome the craft of the lawyer. . . . ' And a few years later he told Brougham that he needed a dose of galap instead of pap, for he could not even spell the ' greatest happiness principle; non-disappointment principle; ends of justice—main end, giving execution and effect to the substantive branch of law . . .'; *Works* (Bowring), Vol. 10, pp. 575, 576 and 588; and Vol. 11, p. 37. In 1830 Bentham sent to *Globe* a note addressed to Brougham in which he strongly criticised his pupil's projects: ' The administration of justice in England ', he writes, ' needs improvement. In this we are both agreed. But for this purpose you have one plan, I another. In this way we disagree. . . . Your plan has received the accession of government; be it accordingly styled *the government plan.* Mine has not received any such accession, be it accordingly styled *the individual plan* '; *Globe* (May 25, 1830). A year earlier *The Westminster Review* (July–Oct., 1829), Vol. 11, p. 47, contended that Brougham was no longer the leader of the movement for law reform and accused him of being too ' flexible '. For Bentham's other criticisms of Brougham's Local Courts Bill (1830) see A. Aspinall, *Lord Brougham and the Whig Party* (1927), note 1 at p. 231, where extracts from Bentham's MSS. at University College are quoted.

[5] His influence on the French penal code of 1810 was profound. ' Préparé (the code) quelques années après la publication des traités de Bentham, qui firent une si profonde sensation parmi des publicistes, ce Code dut naturellement s'empreindre des principes de cet auteur ' state Chauveau and Hélie in their authoritative commentary *Théorie du Code Pénal* (6th ed. by E. Villey, 1887), Vol. 1, p. 20. Similarly R. Garraud remarks that Bentham's penal doctrines are ' au fond des dispositions du Code pénal de 1810 '; *Traité Théorique et Pratique du Droit Pénal Français* (3rd ed., 1913), Vol. 1, note 6 at pp. 165–166.

Edward Livingston, the great codifier, who in 1821 was entrusted with the task of framing the criminal code for the State of Louisiana was, as he himself acknowledges, profoundly influenced by Bentham; see on this below, note 32 at p. 577; so was Macaulay who framed the Indian penal code; see Sir Courtenay Ilbert, *Legislative Methods and Forms* (1901), p. 126 and Halévy, *The Growth of Philosophic Radicalism* (1928), p. 510.

Also significant of Bentham's international influence is the fact that in 1821 he was asked by Count de Toreno, who described him as ' the luminary of legislation and the benefactor of mankind ', to write a report on the new penal code which was then being submitted for the consideration of the Spanish Cortes; *Works* (Bowring), Vol. 8, p. 487 *et seq.* On this interesting episode and on other instances of Bentham's influence in Spain see C. S. Kenny ' A Spanish View of Bentham's Spanish Influence ' and ' A Spanish Apostle of Benthamism ' in *The Law Quarterly Review* (1895), Vol. 11, pp. 48–63 and pp. 175–184. According to Bossange, quoted by Bowring, more than 50,000 copies of Dumont's edition of Bentham's works had been sold on the Continent; *Works* (Bowring), Vol. 11, p. 80. Bentham himself informed a Russian admiral in Paris that 40,000 volumes of his works had been sold to South America; *ibid.*, p. 33. For a more comprehensive assessment of Bentham's influence abroad see Professor E. L. Kayser, *The Grand Social*

Bentham died in 1832,[6] the year of the Reform Act which gave a new impetus to the vast movement of law reform and initiated what Dicey calls 'the period of Benthamism'.[7] A few months after his death Macaulay paid him the following tribute: 'A great man has gone from among us, full of years, of good works, and of deserved honours. In some of the highest departments in which the human intellect can exert itself he has not left his equal or his second behind him. From his contemporaries he has had, according to the usual lot, more or less than justice. He has had blind flatterers and blind detractors—flatterers who could see nothing but perfection in his style, detractors who could see nothing but nonsense in his matter. He will now have judges. Posterity will pronounce its calm and impartial decision: and that decision will, we firmly believe, place in the same rank with Galileo, and with Locke, the man who found jurisprudence a gibberish and left it a science'.[8]

Although as Dr. C. K. Allen pointedly remarks, it is the ironic fate of a successful reformer that when his reforms have

Enterprise. A Study of Jeremy Bentham in his Relation to Liberal Nationalism (New York, 1932), pp. 82–90.

When Talleyrand gave Bentham's *Traités de Legislation* to Napoleon, he returned it next morning observing: 'Ah! c'est un ouvrage de génie'. When Bowring remarked to Talleyrand that 'of all modern writers Bentham was the one from whom most had been stolen without acknowledgment', Talleyrand added '. . . et pillé de tout le monde il est toujours riche'.

[6] When he was more than eighty-two, Bentham, to quote his own words, was still 'codifying like any dragon'; *Works* (Bowring), Vol. 11, p. 33. J. L. Stocks aptly points out that though 'the Benthamites lost their leader two days before they got their Reform Bill; but they had their marching orders. They knew that Bentham was not yet finished with, and that the Reform of Parliament was not an end but a beginning'; *Jeremy Bentham* (1933), p. 17.

It is a well-known fact that Bentham led a very retiring life; but as Louis Reybaud pointedly remarks in his essay on Bentham, '. . . la solitude de Bentham ne ressemblait pas aux autres solitudes; elle se peuplait, elle s'animait. Au point de vue de l'action, il comptait, pour peu de chose dans une société dont il s'isolait volontairement; mais comme impulsion, il ne demeurait étranger à rien de ce qui se faisait au dehors. Son influence fut décisive en plus d'une mesure et sur plus d'un événement'; *Etudes sur les Réformateurs* (7th ed., 1864), Vol. 2, p. 166.

[7] *Law and Public Opinion* (Repr. of 1930), p. 126; see also W. Graham, *English Political Philosophy from Hobbes to Maine* (1899), pp. 177 and 180, and C. H. S. Fifoot, *English Law and its Background* (1932), pp. 155–157.

[8] 'Mirabeau', *Works* (ed. by Lady Trevelyan, 1866), Vol. 5, p. 613. See also the warm and well-deserved tribute Macaulay pays to the services rendered by Dumont to Bentham and to jurisprudence in general; *ibid.*

been realised, he ceases to be interesting,[9] the judgment passed on Bentham by his contemporaries still remains substantially unchallenged. The fundamental limitations of his doctrine, mainly originating in his neglect of history and in his simplification of social and political, as well as psychological processes, have long been exposed.[10] None the less, legal historians and jurisprudential writers rightly acclaim the unique contribution to the reform of law and its administration made by this greatest of English legal reformers.[11]

[9] ' The Young Bentham ', *Legal Duties and other Essays in Jurisprudence* (1931), p. 120.

[10] John Stuart Mill was the first leading utilitarian to point out some crucial weaknesses in Bentham's method and doctrine. His remarkable essay on ' Bentham ' originally published in *The London and Westminster Review* (August, 1838), is reprinted in *Dissertations and Discussions* (3rd ed., 1875). Vol. 1, pp. 330–392. See also Sir James Mackintosh's judicious remarks on the same subject in his ' Dissertation on the Progress of Ethical Philosophy ', *Miscellaneous Works* (1846), Vol. 1, pp. 192–194.

With the emergence of the historical school and the development of sociology and psychology, the limitations of Bentham's doctrine were fully exposed. For the cogent criticisms of the historical school see Sir Frederick Pollock, *An Introduction to the History of Science and Politics* (1890), p. 96 *et seq.*

As an example of criticisms advanced from the sociological point of view see Professor Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (transl. from German by W. L. Moll, Introduction by Roscoe Pound, 1936), p. 209. Ehrlich lays stress on the relativity of Bentham's guiding formula, *i.e.*, the greatest possible happiness of the *greatest number* (our italics). ' To the Gracchi ', he writes, ' they (the greatest number) were several hundred thousand proletarians among the Roman commonality; to Ulrich von Hutten, the German order of knights, which certainly was not more numerous; to Bentham himself, the middle classes of the urban bourgeoisie; to Marx, the millions of the laboring classes. If one had demanded of the Gracchi that they should grant to the non-Italic peregrine equal rights with the citizens, or of Hutten that he should grant to the peasants equal rights with the knights of the Empire, they would have considered such a proposal most unjust '.— ' Anyone ', writes Guido de Ruggiero, ' could adopt the principle of utility as his own weapon without bestowing another thought upon the old *maître d'armes* who had taught him to use it '; *The History of European Liberalism* (1927), p. 103.

As regards the psychological aspects of his doctrine the statement of Professor Graham Wallas may appropriately be quoted: ' He was a born psychologist, born, unfortunately, before the discovery of modern psychology '; see ' Jeremy Bentham ', in the *Political Science Quarterly* (1923), Vol. 38, p. 47. Hence the confidence of utilitarians in their psychological doctrines; typical of this attitude is James Mill's remark of 1817, that had he time, he could write a book which ' would make the human mind as plain as the road from Charing Cross to St. Paul's '; quoted by A. Seth Pringle-Pattison, *The Philosophical Radicals and Other Essays* (1907), p. 20.

[11] Stephen remarks that Bentham's theories ' have had a degree of practical influence upon the legislation of his own and various other countries comparable only to those of Adam Smith and his successors upon commerce ';

Impossible as this would have appeared to Bentham, most of his proposed improvements in the law and the machinery of justice have actually been introduced, although the fundamental tenets of his doctrine have by no means been universally adopted.[12] His *Table of the Springs of Action* and *Felicific Calculus* may ring like artificial conceptions[13]; but his projected changes in the law have become an integral part of the legal system of this country.[14]

H.C.L., Vol. 2, p. 216. Sir Henry Sumner Maine writes: ' I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence '; *Lectures on the Early History of Institutions* (7th ed., repr. of 1905), p. 397. Lord Bryce states that one of the three major causes of the vast reforms effected in every branch of law during the sixty-seven years following the Reform Bill of 1832, was ' the general enlightenment of mind due to the play of speculative thought upon practical questions which marked the end of the last and the beginning of this century, and of which the most conspicuous apostles were Adam Smith in the sphere of economics and Jeremy Bentham in the sphere of legal reform; *Studies in History and Jurisprudence* (1901), Vol. 2, p. 365. Dicey calls him ' the inventor and patentee of legal reforms '; *Law and Public Opinion in England* (repr. of 1930), p. 131; Sir Thomas Erskine Holland states that ' to trace the results of his teaching in England alone would be to write a history of the legislation of half a century '; *Encyclopædia Britannica* (11th ed., 1910), Vol. 3, p. 749; Holdsworth refers to his ' great position amongst the Makers of English Law '; *Some Makers of English Law* (1938), p. 253.

[12] It is interesting to note that the tendency to separate Bentham's plans for reform from his philosophical doctrine had already been noticed by J. Hill Burton: ' His general principle has received few adherents, in comparison with the number who have adopted his detailed applications of it. There is no project of change, or plan of legislative reform, in which he has not kept the greatest-happiness principle in his eye as the end to which it has been adapted, yet there are many who accede to his practical measures, while they repudiate this general principle '; see ' Introduction to the Study of the Works of Jeremy Bentham ', in Bentham's *Works* (Bowring), Vol. 1, p. 20.

[13] ' The real reason why we find the conception artificial ', writes W. C. Mitchell, ' is that we have another stock of ideas about behaviour with which Bentham's ideas are incompatible '; see his article ' Bentham's Felicific Calculus ', in the *Political Science Quarterly* (1918), Vol. 33, p. 183. In Bentham's defence it must be stated that as C. W. Everett rightly points out in *The Education of Jeremy Bentham* (1931), p. 191, he never pretended that all pains and pleasures could be measured, but only believed that enough of them could be measured to ' give a rational basis for criminal law '.

Bentham himself acknowledges that in matters of psychology he was influenced by David Hartley's *Observations on Man, his Fame, his Duty, and his Expectations* (1749). Halévy is inclined to think that the term ' psychology ' was used for the first time by Hartley.

[14] J. H. Burton compiled both a list of reforms which had been suggested by Bentham and afterwards adopted by the Legislature, and another comprising proposals which either were not adopted or only partially adopted, but which were widely supported. For these truly impressive lists see *Benthamiana* (1843), note * at pp. 350–351. It may be noted that the first list is not exhaustive, and that since Burton wrote, a number of proposals included in the second have also been adopted. Illuminating on this point is Sir Roland K. Wilson's *History of Modern English Law* (1875). This almost forgotten

It is significant of the importance Bentham attached to matters bearing upon criminal law and its administration that he described his *Introduction to the Principles of Morals and Legislation* [15]—a treatise embodying the essence of his philosophy—as possessed of '. . . no other distinction than that of serving as an introduction to a plea for a penal code, *in terminis*, designed to follow them, in the same volume '.[16]

book is very instructive; Dicey acknowledges that it greatly helped him in drafting the general outline of his *Law and Public Opinion in England*. Some basic reforms suggested by Bentham which have since been adopted are listed by C. K. Ogden in *Jeremy Bentham* (1932), pp. 19–20. For a general appreciation see also Coleman Phillipson, *Three Criminal Law Reformers* (1923), p. 232 *et seq.*

Characteristic of the astounding wealth of reforms suggested by Bentham in his various writings is his 'Constitutional Code', *Works* (Bowring), Vol. 2, p. 267 *et seq.* From this code, which constitutes a draft project for the constitution of a model local government, Chadwick took the details of the New Poor Law of 1834, Parkes and Place, the details of the Municipal Reform Act of 1835 and Chadwick, the details and even the phrasing of the Act establishing a scientific system of vital statistics in 1836; see Professor Graham Wallas, 'Jeremy Bentham', in *The Political Science Quarterly* (1923), Vol. 38, p. 54; see also J. Redlich, *Local Government in England* (ed. by F. W. Hirst, 1903), Vol. 1, pp. 83–97, and H. G. Lundin, *The Influence of Jeremy Bentham on English Democratic Development* (1920), pp. 51–52 (University of Iowa Studies, First Series, Vol. 3, No. 3). 'We shall not go far wrong', writes Professor J. L. Stocks, 'if we regard him on his most positive side as the founder of the modern science of administration'; *Jeremy Bentham* (1933), p. 27. On Bentham's contribution to parliamentary procedure and the mechanism of law making see H. R. G. Greaves, 'Bentham on Legislative Procedure', *Economica* (1931), Vol. 11, pp. 308–327. On his influence on colonial constitutional law see C. K. Ogden, *op. cit.*, pp. 20–22; and G. L. Nesbitt, *Benthamite Reviewing* (New York, 1934), p. 166; on international law, see E. Nys, 'Notes inédites de Bentham sur le droit international', *Law Quarterly Review* (1885), Vol. 1, pp. 225–231; and C. J. Colombos, 'Introduction' to Bentham's *Plan for an Universal and Perpetual Peace* (1927), p. 3. [Grotius Society Publications, Texts, Vol. 1 (1921–1927).]

About 1801, when an exceptionally high number of offenders had been hanged for forging the still primitive banknotes and cheques of the period, he tried, together with Patrick Colquhoun, so to improve the method of printing, as would make forgery more difficult; Graham Wallas, 'Bentham as Political Inventor', in *The Contemporary Review* (1926), Vol. 129, p. 309.

[15] Printed in 1780; first published in 1789.

[16] It seems that Bentham preferred the term 'penal' to 'criminal'; '*Criminal law*' he writes, 'is a portion altogether undetermined of penal law'; see 'A view of a Complete Code of Laws', *Works* (Bowring), Vol. 3, p. 157.

He also contends that the demarcation line between the civil and the penal code is not as clear as it is generally assumed. 'There exist', he writes, 'between these two branches of jurisprudence a most intimate connexion; they penetrate each other at all points. All these words—*rights*, *obligations*, *services*, *offences*—which necessarily enter into the civil laws, are equally to be found in the penal laws. But from considering the same objects in two points of view, they have come to be spoken of by two different sets of terms: *obligations*, *rights*, *services*, such are the terms employed in the civil code:

Although criminal jurisprudence was only one of several subjects which claimed Bentham's interest, his contribution to it was weighty enough to have constituted the life work of many a lesser—and yet outstanding—scholar.[17] His investigations into this sphere of law are along three main lines: First, the adjective criminal law, with special reference to the rules of evidence and trial. Secondly, the subjective criminal law, more particularly the nature and classification of offences and criminal liability. And thirdly, the question of punishment, including an examination of specific penalties and an outline of a system of crime prevention. This last-named topic falls directly within the scope of the present inquiry and will therefore be examined at greater length. But before this is attempted some reference must be made to Bentham's treatment of the matters included under the first two headings. These matters had, he maintained, a direct bearing upon the revision of criminal law, a contention fully recognised by other reformers at a later stage of the movement.[18]

injunction, *prohibition*, *offence*, such are the terms of the penal code. To understand the relation between these two codes, is to be able to translate the one set of terms into the other'; *op. cit.*, p. 160. For a similar statement and an important comment see C. K. Ogden, *Bentham's Theory of Fictions* (1932), pp. cxxx–cxxxi.

[17] An authoritative bibliography of Bentham's works has been compiled by A. Siegwart, *Bentham's Werke und ihre Publikation* (Bern, 1910) [originally published in *The Politisches Jahrbuch der Schweizerischen Eidgenossenshaft* (1910)]. See also the very useful survey compiled by C. W. Everett and appended to Elie Halévy's *Growth of Philosophic Radicalism* (1928), p. 522 *et seq.*, where Bentham's works have been arranged under the following headings: Philosophy, Civil and Penal Law, Procedure and Evidence, Constitutional Law, Political Economy, Religion, Miscellaneous. On Bentham's MSS. in the University College see Thomas Wittaker, *Report on the Bentham MSS.* (1892).

[18] Bentham devoted much attention also to the form of constitutional and civil as well as criminal law. There is obviously no direct connection between the digestion and consolidation of statutory law and the revision of capital statutes. Barrington, for instance, who pleaded for a change in the form of law was opposed to its reform. But there is a certain interdependence which should not be overlooked. Eden had already pointed out that the chaotic state of the statutory law made a comprehensive revision of capital provisions extremely difficult, if not impossible. In 1819 an important Parliamentary Committee on criminal laws stated that the digestion and re-arrangement of certain groups of statutes should be carried out simultaneously with their revision; note 85 at p. 551. On the other hand, the opponents of reform held that no revision of capital statutes should be attempted until the huge task of consolidating statutory criminal law had been completed; note 95 at p. 554. This may well have been advanced partly with a view to postponing revision. The chaotic state of law was undeniably a grave handicap to any such attempt, though

§ 2. THE REFORM OF CRIMINAL LAW TO BE ACCOMPANIED BY THE REFORM OF CRIMINAL PROCEDURE

It may well be affirmed that Bentham's most original contribution was to the adjective criminal law, which was the subject of his inquiries from 1802–1812. A portion of the relevant MSS. was published by Dumont in French in 1823,

Sir Robert Peel showed afterwards that both these tasks could be carried out simultaneously; below, p. 569.

Bentham had already touched upon the question of the form of law at the time of his well-known attack on Blackstone. There is a striking passage in the *Comment on the Commentaries* (ed. by C. W. Everett, 1928), p. 143, where, referring to 1 Edw. 6, c. 12, which made it a non-clergyable felony to steal horses, Bentham states that it would give him ' a certain satisfaction ' to throw such statutes into the fire. He puts forward his own draft of the two relevant sentences, running to forty-six words instead of the existing 628, and adds: ' I have thought somewhat on the subject, and scruple not to avow this persuasion: that a decent attention, together with an adherence to the common modes of phraseology and not the technical, might reduce the whole compass of the Statute Law a proportion not very much inferior: of the Common Law in a proportion ten or twenty times as great '. In another tract entitled *Draught of a Code for the Organisation of the Judicial Establishment in France*, published in 1790, Bentham devotes a whole paragraph to ' sleeping Laws ' and urges their repeal; *Works* (Bowring), Vol. 4, pp. 397–398.

At an early stage of his researches into this subject Bentham was much impressed by Barrington's *Observations on the more ancient Statutes*. In this book Barrington draws attention to the defective drafting of so many statutes and the existence of numerous obsolete provisions, and pleads for a ' new modelling ' of statutes. ' His book ', writes Bentham, ' was a great treasure; and when I saw the placid little man in the Strand, I used to look at him with prodigious veneration . . . the book is everything, apropos of everything. I wrote volumes upon this volume '; *Works* (Bowring), Vol. 10, p. 121. Bentham certainly exaggerated Barrington's importance; elsewhere he mentions him together with Montesquieu, Beccaria and Helvétius, while in the *Fragment on Government* he makes an advantageous comparison of him with Blackstone; *ibid.*, p. 54 and Vol. 1, note (gg), at p. 239. Subsequently he pleaded not only for consolidation and the abrogation of obsolete statutes, but even more so for a general codification. His main arguments in favour of it are laid down in two tracts: ' Papers relative to Codification and Public Instruction ' (1817), and ' Codification Proposal ' (1822); *Works* (Bowring), Vol. 4, p. 451 *et seq.* and p. 535 *et seq.* The attitude of Romilly was much more moderate. See his ' Papers relative to Codification, etc.', *Edinburgh Review* (1817–1818), Vol. 29, pp. 217–237. John Austin, however, was in full agreement with Bentham's point of view; *Lectures on Jurisprudence* (repr. of 1931), Vol. 2, pp. 1021–1039.

In 1812 Bentham wrote a letter to Lord Sidmouth offering to prepare a *Penal Code* with a Commentary of *Reasons* gratuitously; ' Correspondence ', *Works* (Bowring), Vol. 10, pp. 469–471. Though this project was not adopted, Bentham gave an impetus to the work of digestion and consolidation. When Brougham became Lord Chancellor, he set up a number of commissions of inquiry into this matter; see Sir Thomas Erskine Holland, *Essays upon the Form of the Law* (1870), p. 53. In India, the Codification of 1833 was largely inspired by Bentham and Mill; see above, note 5 at p. 358. ' With all drawbacks, however ', writes Pollock, ' the improvements effected are such as

but this edition being intended primarily for Continental readers, Dumont omitted all references to the English system and practice. The first full edition of this work was published by John Stuart Mill in 1827.[19] It is a pioneer treatise on judicial evidence considered not as a mass of disconnected technicalities but as a system within the framework of which specific points of detail are examined in the light of broader principles.[20] Mill rightly states that Bentham 'found the philosophy of judicial procedure, including that of judicial establishments and of evidence, in a more wretched state than even any other part of the philosophy of law; he carried it at once almost to perfection. . .'.[21] Like Bentham's other writings, *Rationale of Judicial Evidence* is both expository and highly critical. It may be said that Bentham did not do full justice to English criminal procedure which was certainly much better than his remarks would seem to indicate.[22] Yet it is also true that almost all his strictures

would have seemed impossible to a lawyer of Blackstone's or Eldon's time'; *First Book of Jurisprudence* (6th ed., 1929), p. 362. The improvement in the drafting of statutes also owes much to his teaching; Holdsworth, *H.E.L.*, Vol. 11, p. 318. This subject will be examined at greater length in a subsequent volume of this *History*.

19 *Rationale of Judicial Evidence, specially applied to English Practice* (1827), 5 Vols. The skill and effort required for the successful completion of this task cannot be too strongly emphasised, particularly if due account is taken of the state of Bentham's manuscripts. Bentham, as Mill points out, 'had gone over the whole of the field several times, at intervals of some length from one another, with little reference on each occasion to what he had written on the subject at former times. Hence, it was often found that the same topic had to be treated two and even three times'; *ibid.*, Vol. 1, Preface, p. vii.

20 'It is', writes J. S. Mill, 'the first and perhaps the greatest achievement of Bentham; the entire discrediting of all technical systems; and the example which he set of treating law as no peculiar mystery, but a simple piece of practical business, wherein means were to be adopted to ends, as in any of the other arts of life'; Appendix B (attributed to J. S. Mill) to E. L. Bulwer's *England and the English* (1833), Vol. 2, p. 331.

21 J. S. Mill, 'Bentham', *Dissertations and Discussions* (3rd ed., 1875), Vol. 1, p. 374. 'If Mr. Bentham had made no contributions to the science of jurisprudence beyond the volumes which are now before us, . . . his name would deservedly be ranked among those of the most eminent promoters of law reform'; see 'On the Exclusion of Evidence', *The Jurist* (April, 1832), Vol. 8, p. 1.

22 The following passage may be quoted as an instance of such greatly exaggerated criticism: 'So far as evidence is concerned, . . . the existing system of procedure has been framed, not in pursuit of the ends of justice, but in pursuit of private sinister ends—in direct hostility to their public ends. It is time that a new system be framed, really directed to the attainment of the ends of justice'; *Rationale of Judicial Evidence* (ed. by J. S. Mill, 1827), Vol. 5, p. 740.

were well founded and that most of his suggested improvements were ultimately introduced.[23]

An analysis of this section of Bentham's work would be beyond the scope of the present inquiry. It is important to note, however, that in one respect Bentham's views on this subject were directly relevant to the movement for the reform of criminal law. English criminal procedure was essentially liberal.[24] In order fully to safeguard the rights of persons accused or suspected of crimes, rules were adopted which in some instances even made it comparatively easy for the guilty to evade justice. Suggestions that had been made from time to time to eliminate this defect had usually originated not from quarters supporting the reform of law but from those opposed to it. Thus to quote a few most characteristic instances only, Henry Fielding, who was in favour of the strict enforcement of all capital statutes and was opposed to any mitigation of punishments, suggested that the rules relating to the arrest and trial of suspected persons should also be made more strict.[25] Madan[26] and Paley[27] likewise favoured the introduction of certain changes to the disadvantage of the accused in the rules of evidence. On the other hand, the early reformers were either in favour of changes which would have made criminal procedure even more liberal,[28] or at least opposed to any endeavour to make it more stringent.[29] They failed to appreciate that as long as over-liberal criminal procedure was permitted to impede the conviction of offenders, severe penal laws would continue to be regarded as the only protection against crime.

In this respect Bentham is an outstanding exception. Insistent on the need for an extensive reform of criminal

[23] 'His (Bentham's) influence', states Holdsworth, 'is writ large on the nineteenth-century statutes relating to evidence, and on the books of a new type which then began to appear'; *Sources and Literature of English Law* (repr. of 1928), p. 121.

[24] Above, pp. 25–28, and below, pp. 714–719.

[25] Below, pp. 410–411 and 407.

[26] Above, p. 247.

[27] Below, pp. 367–368.

[28] For instance, Eden and Romilly.

[29] In his *Observations on Executive Justice* Romilly devotes a number of pages to the refutation of Madan's proposal; see above, note 56 at p. 247; a substantial part of his *Observations on the Criminal Law of England* is similarly devoted to a critical examination of Paley's views on criminal procedure.

law,[30] and anxious to prevent arbitrariness in the administration of criminal justice, he also forcibly pleads for the adoption of more stringent rules of criminal procedure as a means of preventing crime. How clearly Bentham perceived the connection between defects of the adjective, and the severity of the subjective, criminal law may be seen from the following quotation[31]:—

> 'Be the offence, be the punishment, what it may: in proportion as you exclude this or that quibble, this or that device of technical procedure, by which a certain proportion of the whole number of delinquents are saved, and the probability of punishment in case of delinquency thereby diminished, you would put it in your power to make a correspondent and proportionable reduction in the magnitude of your punishment. What is the same thing in other words; it is because your law is so full of quibbles, exclusionary rules, and other points of practice, by which impunity is given, that (the probability of punishment being subjected to constant diminution) delinquency receives proportionable increase; and, for combatting it, the only other resource remaining, and the only resource that a quibble-loving lawyer will endure to hear of, is an increase of the magnitude of the punishment. To make sure, and do at once all that can be done, the punishment which on every such occasion he runs to in preference, is the punishment of *death*: death, simple death, as being, though not the highest and most impressive which human nature is capable of being subjected to, (since afflictive death, death accompanied by torture, might to an indefinite degree, be made higher), the highest, however, which, in this age and country, men in general would endure the mention of. Under the influence of such humanity, this, then, is the sort of *repetend* that takes place. By the generation and application of penal law quibbles, and of impunity-giving rules, a demand (real or supposed) is produced for addition to the magnitude of the punishment: an addition, and in each case (sooner or later) *such* an addition, as counts in substituting to the last antecedently-established punishment (be it what it may), the punishment of death. But, by the increase given to the application of the punishment of death, increase is at the same time given to the propensity and the pretence for the application of other quibbles, and other impunity-giving rules.'

In a well-known passage Paley contests the maxim 'that it is better that ten guilty persons escape, than that one

[30] Below, pp. 389–391.

[31] *Rationale of Judicial Evidence* (ed. by J. S. Mill, 1827), Vol. 5, pp. 231–235.

innocent man should suffer '.[32] Paley's remarks were criticised by Sir Samuel Romilly.[33] Bentham, however, accepts this maxim, though only with reservations.[34] Again, there is an affinity of view between Paley and Bentham on the value of circumstantial evidence.[35] Bentham's views on the value to be attached to the evidence of accomplices are also significant and he questions the principles that no one shall be witness in his own cause, that no one shall accuse himself, that the

[32] ' If ', he writes, ' by saying it is *better*, be meant that it is more for the public advantage, the proposition, I think, cannot be maintained. The security of civil life, which is essential to the value and the enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment. The misfortune of an individual (for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by no evil intention) cannot be placed in competition with this object. I do not contend that the life or safety of the meanest subject ought, in any case to be knowingly sacrificed: no principle of judicature, no end of punishment, can ever require *that*. But when certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested; courts of justice should not be deterred from the application of these rules by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld '; *Principles of Moral and Political Philosophy* (ed. of 1817), p. 428. On Paley's penal doctrine see above, pp. 248–259.

[33] *Observations on the Criminal Law* (2nd ed., 1811), p. 90 *et seq.*; and earlier by Dr. Samuel Parr in *Characters of the late Charles James Fox* (1809), Vol. 2, pp. 405–421.

[34] ' I shall only observe ', he states in *Principles of Penal Law*, ' that all precautions which are not absolutely necessary for the protection of innocence, offer a dangerous protection to crime. I know no maxim in procedure more dangerous than that which places justice in opposition to itself—which establishes a kind of incompatibility among its duties. When it is said, for example, that it is better to allow one hundred guilty persons to escape, than to condemn one that is innocent—this supposes a dilemma which does not exist. The security of the innocent may be complete, without favouring the impunity of crime: it can only be complete upon that condition; for every offender who escapes, menaces the public safety; and to allow of this escape is not to protect innocence, but to expose it to be the victim of a new crime. To absolve a criminal is to commit by his hands the crimes of which he becomes the author '; *Works* (Bowring), Vol. 1, p. 558.

It may be noted that the maxim is somewhat differently expressed by Paley and Bentham. The first opposes ten guilty men to one innocent, whereas the latter speaks of a hundred to one. Fortescue in *De Legibus* speaks of twenty to one; Hale, of five to one. According to Professor C. K. Allen, the ten to one relation had only been adopted at the beginning of the nineteenth century; ' The Presumption of Innocence '; *Legal Duties and other Essays in Jurisprudence* (1931), p. 257.

[35] Compare Paley, *op. cit.*, pp. 427–428 with Bentham, *Rationale of Judicial Evidence* (ed. by J. S. Mill, 1827), Vol. 3, p. 219 *et seq.*

testimony of an interested party and hearsay evidence shall be excluded and finally that no one shall be tried twice for the same offence. He is inclined to think that these maxims are '. . . the principal cause of that weakness in the powers of justice, from which arises the feebleness of the police in England, and the frequency of crimes'.[36] Furthermore he strongly favours the establishment of the office of public prosecutor[37] and, in opposition to Beccaria, approves of rewards paid to informers and accomplices.[38]

No less striking is the difference of view between Bentham and Romilly on the question of police.[39] 'To the word espionage', Bentham writes, 'a stigma is attached: let us substitute the word *inspection*, which is unconnected with the same prejudices. If this inspection consist in the maintenance of an oppressive system of police, which subjects innocent actions to punishment, which condemns secretly and arbitrarily, it is natural that such a system and its agents should become odious. But if this inspection consist in the maintenance of a system of police, for the preservation of the public tranquillity and the execution of good laws, all its inspectors, and all its guardians, act a useful and salutary part: it is the vicious only who will have reason to complain; it will be formidable to them alone'.[40] Convinced of the importance of police in preventing crimes, Bentham advocated the extension of their power[41]; together with Patrick Colquhoun he also took part in the framing of an important Police Bill.[42]

Montesquieu, Beccaria and early English reformers all examined criminal procedure primarily from a broader

[36] 'Principles of Penal Law', *Works* (Bowring), Vol. 1, p. 558.

[37] *Ibid.*, p. 559.

[38] 'The Rationale of Reward', *Works* (Bowring), Vol. 2, pp. 222–225. Compare with Paley, *op. cit.*, p. 425, who shares this view.

[39] On Romilly's views see above, pp. 318–319 and 331.

[40] 'The Rationale of Reward', *Works* (Bowring), Vol. 2, p. 222. It is interesting to note that after the Gordon Riots, Lord Shelburne spoke in the House of Lords in favour of an effective police force. According to Lord Fitzmaurice, his biographer, Lansdowne House MSS. record that in 1783 Lord Shelburne told Morellet that had he remained in office the establishment of a real police force under the control of the Secretary of State would have been one of his main concerns; Lord Fitzmaurice, *Life of William Earl of Shelburne* (2nd ed., 1912), Vol. 2, note 5 at p. 60.

[41] Below, pp. 394–395.

[42] On his views on Peel's projects of reform see below, note 24 at p. 574.

constitutional point of view, *i.e.* as a guarantor of the individual rights of the subject. To these considerations Bentham added yet another. For him criminal procedure was both a bulwark against the arbitrary tendencies of the State and a means of reducing the uncertainty of punishment. In this way, for the first time in the history of English penal thought, the reform of criminal procedure was linked with that of criminal law; and while demanding a mitigation of penal laws Bentham also demanded additional safeguards against crime in the form of more stringent rules of criminal procedure.

§ 8. SUBJECTIVE APPROACH TO CRIME AND PUNISHMENT

Bentham's observations on the substantive criminal law, though often arresting, are on the whole less notable than those on the adjective law or on punishment. It should be remembered, however, that Bentham was examining the nature of criminal acts at a time when the knowledge of human personality was still very rudimentary. It is consequently not surprising that his inquiries into such extremely complex matters as 'circumstances influencing sensibility', 'intentionality', 'consciousness', 'motives' or 'human dispositions'[43] may often appear superficial and misleading.

Again, as regards the classification of offences it may be observed that Bentham attempted to solve an intrinsically insoluble problem. And though at one place he acknowledges that complete success in this field was as yet unattainable,[44] he confidently puts forward what he calls a 'map of universal delinquency, laid down upon the principle of utility'.[45] It

[43] These are the titles of the relevant chapters of 'Principles of Morals and Legislation', *Work* (Bowring), Vol. 1, pp. 21–68.

[44] *Ibid.*, note * at p. 97.

[45] *Ibid.*, p. 139. J. S. Mill thus relates his impressions when at the early age of fifteen he read for the first time this section of Bentham's work: 'But what struck me at that time most of all, was the Classification of Offences, which is much more clear, compact and imposing in Dumont's *rédaction* than in the original work of Bentham from which it was taken. Logic and the dialectics of Plato, which had formed so large a part of my previous training, had given me a strong relish for accurate classification. This taste had been strengthened and enlightened by the study of botany, on the principles of what is called the Natural Method, which I had taken up with great zeal, though only as an amusement, during my stay in France; and when I found scientific classification applied to the great and complex subject of Punishable Acts, under the guidance of the ethical principles of Pleasurable and Painful Consequences, followed out in the method of detail

is a major weakness of Bentham's classification that, as he himself states, it was evolved strictly in accordance with a preconceived principle. The great number and complexity of motives underlying many offences, the differences in the degrees of guilt and danger involved in them and the multitude of individual and social interests which they injure, all militate against such a rigid approach.[46] On the other hand, Bentham's achievement in this field is indisputably superior to the very rudimentary division of criminal acts outlined by Montesquieu,[47] and afterwards adopted with little change by Beccaria.[48]

Circumstances influencing sensibility to be taken into account when framing penal laws

In its essence Bentham's philosophy is individualistic,[49] and his approach, both to criminal acts and to punishment, consequently primarily subjective.[50] A few examples will suffice to make this clear. Bentham thus states that pain and pleasure—the two springs of action on which he bases his whole system [51]—are produced by the action of certain causes. Their intensity, however, need not necessarily be proportionate

introduced into these subjects by Bentham, I felt taken up to an eminence from which I could survey a vast mental domain, and see stretching out into the distance intellectual results beyond all computation. As I proceeded further, there seemed to be added to this intellectual clearness, the most inspiring prospects of practical improvement in human affairs '; *Autobiography* (2nd ed., 1873), pp. 65–66.

[46] Professor W. Graham rightly remarks that whereas that section of Bentham's book in which he expounds his doctrine of punishment deserves unqualified praise, ' the like cannot be said of his long and tedious classification of offences filling nearly half the book; full of repetitions, most of the classifications being obvious or easily gathered from actual legal systems '; *English Political Philosophy from Hobbes to Maine* (1899), p. 189.

[47] Above, pp. 272–274.

[48] Above, p. 283.

[49] Dicey, *Law and Public Opinion in England* (repr. of 1930), p. 126. See also A. Held, *Zwei Bücher zur Sozialen Geschichte Englands* (1881), p. 254 *et seq.*, where he shows how Bentham has '. . . den politischen Individualismus zur schärfsten Ausbildung entwickelt, die überhaupt nur denkbar ist '. But as Professor W. Friedmann aptly observes, ' the sensualist and individualist Bentham did infinitely more, in practice, to mitigate the sufferings of men then the stern idealist and moralist Kant . . . '; *Legal Theory* (1944), p. 200. See also below, note 48 at pp. 394–395.

[50] This subject well deserves special study.

[51] Th. Jouffroy calls Bentham's doctrine ' Système Égoiste '; *Cours de Droit Naturel* (Paris, 1835), Vol. 2, p. 1 *et seq.* But Herbert Spencer points out that since the ' greatest happiness principle ' is the guiding principle of Bentham's philosophy, it deserves to be called altruistic; *Data of Ethics* (1879), p. 220 *et seq.*

to the strength of these causes but is determined by a number of other factors which he calls 'circumstances influencing sensibility', and of which he distinguishes thirty-two.[52] He names for instance sex, age, health, strength, bodily imperfection, temperament, mental state, moral sensibility and intellectual powers, the degree of knowledge acquired, education, rank, usual occupation, financial circumstances. He further attempts to assess the import of each of these circumstances by examining both their component elements and the relation in which they stand to one another. In respect of age, Bentham singles out five periods: infancy, adolescence, maturity, decline and decrepitude. By financial circumstances, he understands the relation that a person's means bear to his wants. The assessment of means he bases on three circumstances: private property, earned income, and external support; wants depend on four circumstances: usual expenditure, help to be given to dependants, any particular and unusual expense, and the strength of expectations. He examines each of these elements in turn, and concludes by appraising their cumulative effect on human sensibility.

From these very long and tedious inquiries Bentham draws most important conclusions. 'As it is not possible', he writes, 'to calculate the movement of a vessel, without knowing the circumstances which influence its speed; such as the force of the winds, the resistance of the water, the shape of the vessel, the weight of its burden, etc.; in the same manner, one cannot work with certainty in matters of legislation, without considering all the circumstances which influence sensibility'.[53] He develops this vital principle[54] by pointing out that circumstances influencing sensibility should be taken into account (1) when estimating the evil of an offence[55]; (2) when selecting

[52] 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, p. 22.

[53] *Ibid.*, p. 33. As M. Guyau points out when examining Bentham's theory, '. . . pour ramener ce fait à la loi, pour expliquer la *différence de la sensibilité*, il faut tenir compte des *circonstances qui influent sur la sensibilité*'; *La Morale Anglaise Contemporaine* (1879), p. 46.

[54] Bentham, *op. cit.*, pp. 33–35.

[55] A certain action may be a serious insult to a woman, whilst it may be indifferent to a man. A certain corporal injury, if done to a sick person, may endanger his life, but may be of no consequence to a person in good health. An imputation which may ruin the future or the honour of one individual may be harmless to another.

a suitable satisfaction to an injured person[56]; (8) when estimating the impression a punishment is likely to make upon a delinquent[57]; (4) and finally when adopting laws of another country.[58] It is hardly necessary to insist on the penological import of these remarks, emphasising as they do the difference between a nominal and a real offence, a nominal and a real satisfaction, a nominal and a real punishment, and indicating the various factors which are at the root of these differences.

Subjective approach to criminal liability

Proceeding further to the question of liability in criminal acts,[59] Bentham lists a number of factors which should be considered 'in every transaction . . . which is examined with a view to punishment'.[60] These factors are: the act itself; the accompanying circumstances; the intention of the perpetrator; his degree of understanding or his perceptive faculties, to be inferred from the nature of the act or from circumstances peculiar to it; the particular motive or motives at its root and the general disposition of which it is indicative. Bentham examines each of these elements with great minuteness, and though in the light of modern psychology many of his propositions are unacceptable, this does not detract from the value of his analysis as a pioneer attempt at a systematic

[56] The same nominal satisfaction is not the same real satisfaction, when the sensibility materially differs. A financial compensation for an affront may be agreeable or otherwise, according to the rank, the fortune, or the prejudice of a person. A pardon publicly asked may be a sufficient satisfaction if expressed to the injured person by his superior or equal, but not necessarily so if the aggressor is his inferior.

[57] The same nominal punishment is not the same real punishment, when the sensibility is different. Banishment would be a very unequal punishment in the case of a young and an old man; a bachelor and a father of a family; a workman without means of subsistence outside his own country and a rich man, who only needs to change the scene of his pleasures. Imprisonment would be an unequal punishment in the case of a man and a woman; a rich man whose family would not suffer by his absence and a man who lives by his labour, and who would leave his family in poverty.

[58] The sensibility of the two people being essentially different, the same law verbally would not be the same law really. Incidentally, this passage taken together with Bentham's 'Essay on the Influence of Time and Place in Matters of Legislation', *ibid.*, pp. 169–194, show that contrary to what some of his critics contend, he does not entirely disregard the importance of the historical factor.

[59] Or equally in omissions.

[60] 'Principles of Morals and Legislation', *ibid.*, p. 36 *et seq.*

inquiry into the rules determining the criminal liability of a normal person.[61] Without going into details of Bentham's theory, it should be noted that his approach is again subjective, an endeavour to assess the mental element in crime by investigating the mental processes of an accused person. According to a modern writer, one of the rules governing criminal liability is that the accused person must be proved to have realised at the time that his conduct would, or might, produce results of a certain kind; in other words, that he must have foreseen that certain consequences were likely to follow on his acts and omissions.[62] In this respect Bentham's analysis of what he calls 'the different influences of the articles of intentionality and consciousness' is illuminating. He discerns six contingencies determining the form, intensity and relationship of these two elements.[63] Equally striking are his remarks on the intention and attempt in criminal acts, and his analysis of motives showing that none are either constantly good or constantly bad, and describing the conflict and pressure of motives against the background of what he calls the general disposition of each individual.

Bentham concludes his considerations on liability by examining the extent and nature of the mischief produced by different criminal acts. It has already been pointed out that the approach to this matter was then particularly crude. To Paley for instance, whose attitude was typical, almost all offences were equally mischievous.[64] In this sphere again, Bentham was a precursor. He distinguishes various degrees of mischief to be determined by the extent of alarm and danger produced by or inherent in, an offence. He also considers 'the alarm or danger as may be apt to result from the future behaviour of the same agent', thus anticipating the modern Italian school which holds that in selecting penal measures account should be taken of the *pericolosità* of the

[61] The next legal author to discuss these matters was John Austin; see for instance his *Lectures on Jurisprudence* (repr. of 1929), Vol. 1, p. 461. For the first modern treatment see Stephen, *H.C.L.*, Vol. 2, p. 94 *et seq.*

[62] J. W. C. Turner, 'The Mental Element in Crimes at Common Law', *Modern Approach to Criminal Law* (ed. by L. Radzinowicz and J. W. C. Turner, 1945), p. 199.

[63] Bentham, *op. cit.*, p. 74.

[64] Above, pp. 251–252.

offender, *i.e.* the probability of his committing further offences.[65]

Punishment also to be governed by factors other than the gravity of the offence

Since the degree of alarm and danger produced by any given offence is not exclusively determined by its gravity but is also dependent on a number of other factors, these factors should be taken into account when assessing the nature and measure of the punishment to be imposed. Enlarging upon this proposition, Bentham singles out four determining factors: the ease or difficulty of preventing the crime; the greater or less facility with which it can be concealed[66]; the personal circumstances of the offender; and the character of the offender. He argues that the last-named element cannot be inferred merely from the nature of the offence. 'The character of a man'—he writes—'will appear more or less dangerous, according as the tutelary motives appear to have more or less influence over him, when compared with the force of the seductive motives.'[67] It should be taken into account both because it determines the offender's *pericolosità* and because it indicates his sensibility, and therefore his probable reaction to punishment.[68] He further outlines a number of circumstances which in his opinion would help in the assessment of the character and criminal disposition of offenders.

In the *Essay on the Promulgation of the Laws, and Promulgation of the Reasons Thereof*, followed by a *Specimen of a Penal Code*,[69] Bentham singles out one offence, which he calls 'Simple Personal Injuries',[70] and states how in various circumstances it should be punished. He specifies as many as

[65] The Prevention of Crime Act of 1908 and a number of other contemporary English statutes are based on this principle.

[66] In accordance with these first two factors Bentham contends elsewhere, in opposition to Eden but in agreement with Blackstone, that the severity of punishment should be increased in the same proportion as the temptation to commit relevant crimes increases; see on this below, pp. 384–385.

[67] Bentham, *op. cit.*, p. 77.

[68] Above, pp. 372–373.

[69] *Works* (Bowring), Vol. 1, pp. 158–168. This tract is not included under the heading 'Penal Law' in C. W. Everett's classification of Bentham's works, appended to Elie Halévy's *Growth of Philosophic Radicalism* (1928).

[70] He distinguishes this offence from irreparable corporal injuries and from mental injuries.

five different penalties and gives the courts the option to choose any one of them, as well as what he calls 'the discretion' to impose two or more, as the case may be.[71] He then lists fifteen aggravating circumstances, such as the character of the offender, his relation to the injured person, and the *modus operandi*, all of which should be taken into account by the courts when selecting a suitable punishment.

Thus the subjective approach to criminal acts led Bentham to an equally subjective approach to punishment. He urged the adoption of a principle which in modern French criminal science has been called *le principe de l'individualisation de la peine*,[72] a truism today, but a bold innovation at that time.[73] 'The *same punishment* for the *same offence* is often said', he writes. 'This adage has an appearance of justice and impartiality, which reduces superficial minds. To give it a reasonable meaning, it would be necessary to determine beforehand what is meant by the same punishments and the same offences'.[74] And he further points out that 'an inflexible law . . . would be doubly vicious, as inefficacious, or as tyrannical. Too severe for some, too lenient for others; always sinning by excess or defect; under an appearance of equality, it would hide the most monstrous inequality'. This concept of flexible punishment stood in striking contrast to the doctrines of Montesquieu[75] and Beccaria[76]; nor could it be reconciled with excessively severe and rigid laws which allowed for no adjustment of penalties to individual circumstances, except by the royal prerogative of mercy.[77] Referring to Montesquieu's contention that in England murder is less often committed than robbery — both capital offences—because the death penalty for the former is

[71] He did not hesitate to vest so wide a power with the courts for, as he remarks in another tract, 'the character of the English judges has, in general, been above all suspicion and reproach'; 'Essay on the Influence of Time and Place in Matters of Legislation'; *Works* (Bowring), Vol. 1, p. 187.

[72] Above, note 42 at p. 14.

[73] This important aspect of Bentham's doctrine has not been sufficiently appreciated. See for instance Leslie Stephen's *English Utilitarians* (1900), Vol. 1, p. 263 *et seq.* (Bentham's doctrine of criminal law), and Coleman Phillipson, *Three Criminal Law Reformers* (1923), p. 196. (Bentham's views on Penal Law.)

[74] 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, p. 33.

[75] Above, p. 272.

[76] Above, p. 127. See also French code of 1791, above, p. 295.

[77] Above, p. 116.

practically always carried out while that for the latter is usually commuted,[78] Bentham observes[79]: 'This expectation of favour, no doubt, contributes to the effect of which he speaks; but why should this manifest imperfection in the laws remain, that it may be corrected by an arbitrary act of the sovereign? If an uncertain advantage produces this measure of good, a certain advantage would operate more surely'.

§ 4. CONSIDERATIONS ON PUNISHMENT

Early influences and writings

When Bentham began to study and write on penal matters the knowledge of penology was still in its infancy. Blackstone's opening chapter 'Of the Nature of Crimes; and their Punishment' is significant as a recognition of the importance of the subject and because it provided an argument in favour of the reform of criminal law. But it was of a general character and based primarily on other writers' views.[80] Eden's treatment of punishment was slight, amounting to little more than an indication of broad principles.[81] Dagge[82] did not go beyond Eden. Romilly based his plea for revision of capital statutes on the principle of certain and proportionate punishment.[83]

'It can not but have been observed', writes Bentham in one of his early works, 'that nothing is more commonly to be met with, not only whole chapters but whole volumes and those authoritative too, in which from the beginning to the end there is not so much as a syllable hinted about punishment, and which notwithstanding are full of assorted matter which is called law. This makes a seeming inconsistency, which it will be well worth our while to endeavour to remove . . .'.[84] This sentence well defines the task that Bentham set himself to accomplish. He was of course well acquainted with, and recognised the importance of, the works of Montesquieu and Beccaria. 'Before Montesquieu', he writes, 'a

[78] See above, note 14 at p. 271.
[79] 'Principles of Penal Law', *Works* (Bowring), Vol. 1, note xx at p. 401.
[80] On Blackstone see above, pp. 345–347.
[81] Above, pp. 303–304.
[82] See *Considerations on Criminal Law* (2nd ed., 1774), Vols. 1 and 2, *passim*.
[83] Above, pp. 330–331.
[84] *The Limits of Jurisprudence Defined* (ed. by C. W. Everett, 1945), pp. 285–286.

man who had a distant country given him to make laws for, would have made short work of it. . . . Since Montesquieu, the number of documents which a legislator would require is considerably enlarged. " Send the people ", he will say, " to me or me to the people; lay open to me the whole tenor of their life and conversation; paint to me the face and geography of the country; give me as close and minute a view as possible of their present laws, their manners, and their religion ".'[85] None the less he criticises him on two accounts. First, because in his opinion the science of legislation is much more simple than Montesquieu would seem to indicate; ' . . . the principle of utility ', he remarks, ' directs all reasons to a single centre: the reasons which apply to the detail of arrangements are only subordinate views of utility '.[86] And secondly, because of Montesquieu's limitations as a reformer. ' Montesquieu sets out upon the censorial plan: but long before the conclusion, as if he had forgot his first design, he throws off the censor and puts on the antiquarian '.[87] His affinity with Beccaria is much greater. He acknowledges that Beccaria drew his attention to the principle of the greatest happiness of the greatest number,[88] and considers his book ' the first of any account that is uniformly censorial, concludes as it sets

[85] ' Of the Influence of Time and Place in Matters of Legislation ', *Works* (Bowring), Vol. 1, note xx at p. 173.

[86] ' Essay on the Promulgation of the Laws ', *ibid.*, p. 162.

[87] ' Principles of Morals and Legislation ', *ibid.*, note x at p. 150.

[88] Other writers whose influence in this respect he acknowledges are Priestley and Helvétius, who writes that it is '. . . dans la practique des actions utiles au plus grand nombre que consiste la justice '; *De l'Esprit* (new ed., 1784), Vol. 1, *Discours* II, Chap. 24, p. 255. See on this Elie Halévy, *The Growth of Philosophic Radicalism* (1928), p. 21, and C. W. Everett, *The Education of Jeremy Bentham* (1931), pp. 47, 48 and 111. Actually, this formula was used by many others and may even be traced to Bacon, who writes: ' The end and scope which laws should have in view, and to which they should direct their decrees and sanctions, is no other than the happiness of the citizens '; *Works* (ed. by J. Spedding, R. L. Ellis and D. D. Heath, 1877), Vol. 5, p. 89. E. L. Kayser gives some interesting quotations showing how often Milton made use of this formula; *The Grand Social Enterprise, A Study of Jeremy Bentham in his Relation to Liberal Nationalism* (1932), p. 17.

Also the utilitarian approach was by no means new. It can be found in the writings of many English philosophers, such as Richard Cumberland, Paley, Malthus as well as political philosophers so different in their general outlook as Burke, Godwin, Mackintosh and Paine. E. Albee remarks that '. . . utilitarianism had been so distinctly in the air for more than a generation before he (Bentham) published his *Principles of Morals and Legislation* that he could not possibly have failed very substantially to profit by the fact '; *A History of English Utilitarianism* (1902), p. 167.

out with penal jurisprudence'.[89] These influences do not detract from the value of Bentham's contribution to the development of penal thought. Montague rightly points out that he 'was no mere copyist, no mere elaborator of little details left unfinished by his predecessors. Beccaria had indicated certain axioms with the light touch of an essayist; Bentham grasped them with astonishing firmness, gave them their sharpest definition, and developed them into numberless consequences . . . The debt of Bentham to Beccaria was only that debt which every student, however capable, must acknowledge to students who have gone before him in his walk of science'.[90]

Bentham published his first tract on penal matters in 1778.

[89] 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, note x at p. 150. According to Bentham, any writings on jurisprudence could have only one of two objects: to ascertain what the law is, or what it ought to be. The former he calls books of *expository* jurisprudence and the latter—of *censorial* jurisprudence, or in other words books on the *art of legislation*; *ibid.*, p. 148. See also, *A Fragment on Government* (ed. by F. C. Montague, repr. of 1931), pp. 98–99. In the same work, Bentham thus refers to Beccaria: 'When Beccaria came, he was received by the intelligent as an Angel from heaven would be by the faithful. He may be styled the father of *Censorial Jurisprudence*. Montesquieu's was a work of the mixed kind. Before Montesquieu all was unmixed barbarism'; *ibid.*, note 2 at p. 105.

[90] See F. C. Montague's valuable 'Introduction' to Bentham's *Fragment on Government* (repr. of 1931), p. 32. Lecky observes that though Beccaria was the first to start the movement for the reform of criminal law, '. . . in England, the philosophical element of the movement was nobly represented by Bentham, who in genius was certainly superior to Beccaria, and whose influence, though perhaps not so great, was also European'; *History of the Rise and Influence of the Spirit of Rationalism in Europe* (new ed., 1882), Vol. 1, p. 349.

In a Note in which he briefly compares Bentham's inquiries with 'those who are considered as oracles in this branch of science', Dumont states that 'between these scattered ideas, and vague conceptions, which have not yet received a name, and a regular catalogue in which these qualities are distinctly presented to us, with names and definitions, there is a wide interval'; see 'Note by Dumont' in 'Principles of Penal Law', *Works* (Bowring), Vol. 1, p. 406. Elsewhere Dumont even more strongly insists on the value of Bentham's contribution; see his 'Advertisement' to the 'Rationale of Punishment', *ibid.*, pp. 389–390.

In a letter dated June 26, 1778 d'Alembert wrote to Bentham: 'It is indeed high time that the human race should be freed from all the absurdities, or rather, all the atrocities of our criminal jurisprudence; and if we may not speedily hope to see this great change, it is a happiness for which philosophers like you are preparing the way by your writings—useful as they are to society, and honourable to yourself'; see Bentham's 'Memoirs and Correspondence', *Works* (Bowring), Vol. 10, p. 87. Leslie Stephen aptly points out that Bentham's contribution to penal jurisprudence should be assessed also in relation to 'the haphazard brutalities and inconsistencies of English criminal law'; *English Utilitarians* (1900), Vol. 1, pp. 267–268.

It is a critical examination of a Bill relating to the prison system which William Eden had then introduced in Parliament and in the framing of which he had been assisted by Sir William Blackstone and John Howard.[91] This tract, entitled *A View of the Hard-Labour Bill*[92] is interesting inasmuch as it shows Bentham's realisation—unaided by any practical experience—that the value of a prison system depends equally on broad regulations and on countless provisions touching upon every detail of prison life.[93] The Bill was passed in 1779 but never became operative.[94] This failure prompted Bentham to embark upon the formidable project of a 'panopticon' which claimed so much of his time and energy, and which heavily taxed his financial resources.[95] Campaigning for the adoption of this project greatly enlarged his knowledge of penitentiary matters and he published a number of pamphlets describing

[91] See also above, p. 303 and note 14 at p. 347.

[92] *Works* (Bowring), Vol. 4, pp. 1–35.

[93] Sir James Mackintosh refers to it as that 'most excellent tract, . . . which, concurring with the spirit excited by Howard's inquiries, laid the foundation of just reasoning on reformatory punishment'; see 'Dissertation on the Progress of Ethical Philosophy', *Miscellaneous Works* (1846), Vol. 1, p. 189. This is an exaggerated appreciation. Bentham sent this tract to Blackstone who calls it 'ingenious'; he further states that some of Bentham's observations had occurred to the framers of the Bill, 'and many more are well deserving their attention'. Bentham also wrote to Eden on this subject. He very much admired Eden's introduction to the Bill but took exception to the sentence 'not disposed to propose or promote novelties', which he censored as 'the *wisdom-of-ancestors*' fallacy. In his defence Eden said that the sentence was 'merely meant to disavow that busy interference with established systems, which, except on occasions of necessity, like the present, is oftener productive of confusion than benefit'; 'Memoirs and Commentaries', *Works* (Bowring), Vol. 10, p. 86. Bentham considered Eden's letter 'very cold and civil', but referred to his book in most complimentary terms; see on this above, note 7 at p. 301.

[94] But it was not without influence on subsequent legislation and practice. See on this S. & B. Webb, *English Prisons under Local Government* (1922), p. 40.

[95] H. Sidgwick pointedly remarks that this subject '. . . fills a much larger space in Bentham's correspondence than all his codes put together. Indeed, among the numerous wrongs, great and small, on which the philosopher in his old age used to dilate with a kind of cheerful acrimony peculiar to himself, there was none which roused so much resentment as the suppression of Panopticon, which he always attributed to a personal grudge on the King's part'; see 'Bentham and Benthamism', *Miscellaneous Essays and Addresses* (1904), pp. 145–146. Bentham dwelt at length on what he calls the 'History of the War between Jeremy Bentham and George the Third. By one of the Belligerents'; he begins by stating that 'but for George III, all the prisoners in England would, years ago, have been under my management. But for George the Third, all the paupers in the country would, long ago, have been under my management'; see 'Panopticon Correspondence', *Works* (Bowring), Vol. 11, pp. 96–97.

the advantages of the system he had devised, as well as the serious defects of transportation.[96] But Bentham's penal doctrine is expounded not in these tracts but in two major works: *Introduction to the Principles of Morals and Legislation*[97] and *Rationale of Punishment*,[98] written as early as 1775 and first published in French by Dumont in 1811 under the title *Théorie des Peines et des Récompenses.*

The object and expense of punishment

The object of all punishment is to prevent crime.[99] Bentham accepts this proposition in full, stating that if the hanging of

[96] See for instance ' Panopticon; Or, the Inspection-House ' (1791); ' Panopticon *versus* New South Wales ' (1802); ' A Plea for the Constitution ' (1803); *Works* (Bowring), Vol. 4, p. 37 *et seq.*: p. 173 *et seq.* and p. 249 *et seq.* Afterwards, the Parliamentary campaign for the abolition of transportation was conducted with great vigour and vision by Sir William Molesworth, a prominent utilitarian and the chairman of the Select Committee of 1837, ' to inquire into the System of Transportation, its efficacy as a Punishment, its influence on the moral State of Society in the Penal Colonies, and how far it is susceptible of Improvement '; see on this Fawcett, *Life of the Right Hon. Sir William Molesworth* (1901), p. 140 *et seq.*

[97] *Works* (Bowring), Vol. 1, Chaps. XV–XVII, pp. 83–96.

[98] Embodied in ' Principles of Penal Law ', *ibid.*, pp. 367–580. In Bowring's edition *Principles of Penal Law* further embodies the relevant sections of *Principles of Morals and Legislation*, a tract *On Death Punishment*, written in 1830, and some other pamphlets. Bentham's penal doctrine can therefore be examined mainly on the basis of this work.

[99] ' Principles of Penal Law ', *Works* (Bowring), Vol. 1, p. 396.

In *La Formation du Radicalisme Philosophique* (1901), Vol. 1, pp. 310–311, Halévy quotes the following passage from Bentham's unpublished MSS (Univ. Coll. No. 96):

' Punishment, Its End. With respect to the Progress of Society, we may conceive three Epochs: distinguishable in idea, though running into one another imperceptibly in fact. The first, which is past, in which every man actuated by the vindictive principle, inflicted the arbitrary punishment for a received offence, more or less intense according to the greater or less violence of his passion. The second, which is present, in which the Idea of a Public being formed and established, the supreme power in the State, taking the rod of vengeance out of the hand of the Individual, uses it according to settled rules still governed however in great measure by the same principle. The third, which is yet to come, in which all traces of the vindictive principle being entirely obliterated, Prevention shall be the sole end and object of a Penal Legislation '.

Several objections can be made to this statement, and notably that when Bentham was writing, prevention and not vengeance was already the avowed object of punishment. It was on this ground alone that Madan and Paley defended capital laws. But although historically inexact, Bentham's formula does throw some light on his attitude to the problem. It should be noted further that Bentham himself did not entirely deny the existence of the element of vengeance. ' Every kind of satisfaction which involves a punishment for the criminal ', he writes, ' naturally produces a pleasure of vengeance for the party injured. This pleasure is a gain. It recalls the parable of

a man's effigy would produce the same preventive effect as the hanging of the man himself, it would be a folly and a cruelty not to do so.[1] The past offence is only a point as compared with the future, which is infinite.[2] The source of the future mischief may be either the conduct of the person who had committed the first offence or the conduct of other persons with adequate motives and opportunities to act similarly. Consequently, prevention of offences implies a *particular prevention*, applying to the delinquent himself, and a *general prevention*, applying to all members of society. With respect to an individual, the recurrence of an offence may be provided against in three ways: by depriving him of the physical power to offend; by eliminating the desire to offend; and by making him afraid to offend. In the first case there is physical incapacity, in the second—moral reformation, and in the third—intimidation or terror of the law.[3] But it is the general prevention—achieved by the force of example—that is to be regarded as the real object and justification of punishment. For however effective it may be in respect to any one delinquent, punishment is essentially an evil. It involves the evils of coercion, apprehension and suffering to the person who has to undergo it and the pain of sympathy and other derivative evils to his relatives and friends. It is also an evil to society, for as he remarks, 'it ought not to be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual—as well as the party injured himself'.

These remarks concerning the object of punishment led

Samson. It is sweetness produced from terror, honey from the lion's throat. Produced without expense, the net result of an operation necessary on the other grounds, it is an enjoyment to be cultivated like any other; for the pleasure of vengeance, considered in the abstract, is like every other pleasure, a good in itself. It is innocent so long as it is confined within legal limits, and becomes criminal only when it oversteps them'. On Bentham's views on retaliation see below, pp. 388–389.

[1] Bentham, *op. cit.*, p. 398.

[2] This striking remark is thus expressed in the French edition of Bentham's *Traités* (ed. by Dumont): 'L'affaire passée n'est qu'un point, mais l'avenir est infini'; quoted by Ch. M. Atkinson, *Jeremy Bentham* (1905), p. 142. Atkinson aptly points out that 'no part of the work is more luminous, or possesses greater living interest, than the author's enunciation of the general principles of punishment'; *ibid.*, p. 139.

[3] *Ibid.*, p. 396.

Bentham to examine what he calls the expense of punishment. He compares the pain of punishment with capital invested in the expectation of profit. The profit derived from punishment is the prevention of crime. Penal measures are usually spoken of in terms of mildness or severity. But, Bentham observes, this is an emotional approach,[4] whereas the term *expense* implies economy, and to say that a punishment should be economic is to use the language of reason. Punishment becomes too expensive when it produces more evil than good or when the same good can be obtained at the price of less suffering.[5] Since even the best system of punishment can never be a guarantee against the recurrence of all offences, its aim should be to induce men to perpetrate lesser rather than more mischievous crimes. If the punishment is to be economic it is further necessary to increase as much as possible its apparent value, thus allowing its real value to be reduced. The test of the apparent value of a punishment is the impression it makes on the delinquent about to suffer it and on any person who may be tempted to commit a similar offence; its real value can only be known when it is actually being suffered. It is the apparent value that influences the conduct of individuals and gives the profit; the real value constitutes the expense. A good penal policy should therefore aim at enhancing the apparent value of punishments.[6]

The measure of punishment

The problem of determining the extent of any punishment cannot, Bentham holds, be solved merely by making it proportionate to the crime in question. ' This ', he states, ' has

[4] He does not mention Montesquieu or Beccaria but it is evident that he refers to them.

[5] For an interesting modern example of a similar approach see W. E. Wahlberg, *Kriminalistische und nationalökonomische Gesichtspunkte* (Wien, 1872), pp. 96–101.

[6] ' 1. That a punishment that is more easily learnt, is better than one that is less easily learnt.
2. That a punishment that is more easily remembered, is better than one that is less easily remembered.
3. That a punishment that appears of greater magnitude, in comparison of what it really is, is better than one that appears of less magnitude '; Bentham, *op. cit.*, p. 399.

Convinced of the need to strengthen the effect that punishment has on imagination, Bentham puts forward a number of curious suggestions, such as that public executions should be conducted as follows: ' A scaffold painted

been said by Montesquieu, Beccaria, and many others. The maxim is, without doubt, a good one; but whilst it is thus confined to general terms, it must be confessed it is more oracular than instructive.' [7]

A punishment, he remarks, may be too small or too great, and it is equally important to avoid both extremes. In deciding on what he calls a minimum punishment, it is necessary to proceed on the principle that its 'pain' should at least be sufficient to outweigh the 'profit' of the offence. When, owing to a combination of circumstances, the temptation to commit a certain crime is particularly great, the punishment should be correspondingly more severe.[8] It will be remembered that widely differing views were held on this subject. Paley [9] and Blackstone [10] both considered increased temptation a reason for enhancing the severity of the punishment. Eden objected both to an increase and a mitigation.[11] But it was also held that since the power of seduction lessens the fault, such crimes are not indicative of an offender's real depravity. Without denying the fundamental truth of this reasoning, Bentham argues that if the pain of a punishment does not outweigh the expected profit of the crime, the punishment will become ineffective and therefore mischievous both

black, the livery of grief—the officers of justice dressed in crepe—the executioner covered with a mask, which would serve at once to augment the terror of his appearance, and to shield him from ill-founded indignation—emblems of his crime placed above the head of the criminal, to the end that the witnesses of his sufferings may know for what crimes he undergoes them: these might form a part of the principal decorations of these legal tragedies, . . . whilst all the actors in this terrible drama might move in solemn procession—serious and religious music preparing the hearts of the spectators for the important lesson they were about to receive. . . . The Judges need not consider it beneath their dignity to preside over this public scene'; *ibid.*, p. 549. He also suggests that '. . . if an abridgment of the penal code were accompanied with prints representing the characteristic punishments set apart for each crime, it would form an imposing commentary—a sensible and speaking image of the law. Each one might say, "That is what I shall suffer, if I become guilty"'; *ibid.*, p. 550.

[7] *Ibid.*, p. 399.

[8] 'To say, then, as authors of great merit and great name have said, that the punishment ought not to increase with the strength of the temptation, is as much as to say in mechanics, that the moving force or *momentum* of the *power* need not increase in proportion to the momentum of the *burthen*'; see 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, note x at p. 87.

[9] Above, pp. 250–251.

[10] Above, pp. 346–347.

[11] Above, pp. 303–304.

to society and to the delinquent. Penalties should be adjusted to every degree of temptation, but the courts should have the power to mitigate them in cases where the presence of temptation indicates the absence of a confirmed depravity, or where the offence has been committed under the influence of a benevolent stimulus.

With respect to what he calls the maximum limit of punishment, Bentham pertinently remarks that it is less clearly marked than the minimum: what is too little is more easily observed than what is too much. When a punishment particularly well calculated to answer its preventive and reformatory purposes cannot be enforced in less than a certain quantity, it may sometimes be advisable to stretch the limit of what otherwise would have been considered strictly necessary. On the other hand, it is more common to impose too severe than too lenient punishments. When a false estimate is made of a certain crime an unduly severe punishment follows automatically.

In rules III and IV which may conveniently be classed together, Bentham lays down first that when two offences come into competition, the punishment for the greater must be sufficiently severe to induce the offender to commit the lesser only.[12] And secondly, that punishment should be adjusted to every degree of each particular offence.[13] Rules VII and VIII are a significant modification of a principle laid down by Beccaria, that the severity of a punishment should decrease in the same proportion as the certainty and speed of its infliction increase. With his characteristic emphasis on the prevention of crime Bentham states, on the contrary, that punishment should be increased in proportion as it becomes more uncertain and distant.[14] Mention should also be made of rule IX where he writes that where 'the act is conclusively

[12] Offences come into competition when it is in the power of an individual to commit both at the same time. Thieves who break into a house may execute their design either by simple theft, or by theft accompanied with bodily injury, murder, or even arson.

[13] As Bentham puts it, if for stealing ten shillings an offender is punished no more than for stealing five—the stealing of the remaining five of those ten shillings is an offence for which there is no punishment at all.

[14] Elie Halévy rightly remarks that '. . . si le raisonnement de Beccaria est plus "humanitaire" que celui de Bentham, certainement il est logiquement moins rigoureux'; *La Formation du Radicalisme Philosophique* (1901), Vol. 1, p. 125.

indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit, not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender '.[15] As examples he gives fraudulent crimes, using false weights or measures, or issuing base coin. For such offenders Bentham does not propose any new penal measures but only an increase of the usual punishment. The fact that he has singled out criminal 'habit' as deserving special treatment is nevertheless significant.[16] According to rule VI the several circumstances influencing sensibility should be taken into account in the case of each 'individual offender '.[17]

The necessary qualities of punishment [18]

The first quality desirable in a punishment is *variability* both of intensity and duration. An invariable penalty must inevitably be deficient either by excess or by default; in the first case it is too expensive, in the second—ineffective. Corporal punishment is extremely variable in intensity but not so in duration, while penal servitude and imprisonment are variable in both respects. Two further qualities are *equability* and *commensurability*. A fine, for instance, is an inequable penalty, varying according to the means of the delinquent; the effect of banishment also depends on the offender's means, his age, rank and various other factors. Punishments are commensurable when their respective penal effects can be assessed and compared. The equability and commensurability of punishment are best ensured when each offence carries two penalties, differing in nature or in extent, either of which can be selected, in accordance with the circumstances of the case. *Exemplarity* and *simplicity of description* are two qualities

[15] 'Principles of Morals and Legislation', *Works* (Bowring), Vol. 1, p. 89.

[16] In a remarkable article published in 1824 in the *Encyclopædia Britannica* James Mill suggests a system strongly resembling that introduced by the Prevention of Crime Act of 1908 in respect to habitual offenders, *i.e.* punishment and preventive detention; on this article see also below, note 14 at p. 572. In general, however, Mill adhered to Bentham's doctrine on punishment; *Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations* (n.d.), pp. 14–24. These essays were first published in the *Encyclopædia Britannica*.

[17] This rule has already been examined above, pp. 372–373 and 375–377.

[18] It is interesting to note that Bentham assigns to punishment a number of qualities similar to those that he assigns to rewards; see 'The Rationale of Reward', *Works* (Bowring), Vol. 2, p. 216.

that enhance the psychological effect of a punishment by emphasising its apparent value. They thus make it possible to reduce the real value of punishment which, if not attended by visible effects, might intimidate or reform the offender himself but be of little value as a general warning or example. *Subserviency to reformation* and *efficacy with respect to disablement*, sometimes described as *incapacitation*, are also to be considered. The object of the first is to effect a change in the character and moral disposition of the offender; of the second, to deprive him of the power to commit further crimes. Imprisonment, mutilation and the death penalty all produce this effect, though in a different degree and at a different expense.

The good effect of a punishment largely depends on its *frugality* and *remissibility*, and, even more so, on its *popularity*. From the point of view of frugality, a punishment is perfect when it is attended with no superfluous pain to the person punished, and with some degree of pleasure to the injured person. Fining is an outstanding example of such a punishment. Although, once awarded, a penalty should in principle be fully carried out, a total or partial suspension may sometimes be desirable. Whipping, mutilation and the death penalty are by their nature irremissible, but not so penalties of long duration, such as banishment, or imprisonment. Bentham acknowledges that popularity is ' a very fleeting and indeterminate kind of property, which may belong to a lot of punishment one moment, and be lost by it in the next ', and that it might perhaps be more appropriate to call it ' absence of unpopularity '. He none the less considers it important that a punishment should be popular, or in other words, that it should have the support of public opinion. It will gain this support by not offending against the common standards of liberty,[19] decency,[20] humanity and religion.

[19] Bentham gives as an example the negative reaction of public opinion towards hard labour on public works and remarks that a number of contemporary pamphlets denounced it as a violation of the natural rights of man, inadmissible in a free country; he disagrees with this point of view, which was very predominant at an early stage of the movement for the reform of criminal law; see below, pp. 422–423.

[20] For instance castration as the penalty for rape was rejected on this ground, but here again Bentham disagrees; ' Principles of Penal Law ', *Works* (Bowring), Vol. 1, p. 411.

'When a penal dispensation is revolting to the public feeling, that is not of itself a sufficient reason for rejecting it, but it is a reason for subjecting it to a rigorous scrutiny. If it deserves the antipathy it excites, the causes of that antipathy may be easily detected. We shall find that the punishment in question is mis-seated, or superfluous, or disproportionate to the offence, or that it has a tendency to produce more mischief than it prevents. By this means we arrive at the seat of the error. Sentiment excites to reflection, and reflection detects the impropriety of the law'.[21]

The two other qualities which Bentham examines at greater length are those of *subserviency to compensation* and *characteristicalness*. Montesquieu, Beccaria, Eden and Romilly all maintained that instead of having recourse to excessively severe penalties, more emphasis should be put on redress and compensation, but they did not enlarge upon this general principle. Bentham is therefore the first to examine in detail all the aspects of this problem.[22] He distinguishes six different kinds of satisfaction: *pecuniary*, *attestative*—if the evil was caused by falsehood—*honorary*, *vindictive*, *substitutive*, *i.e.* at the expense of a third party responsible for the offender, and *restitution in kind*. He examines each from the point of view of whether it is full or partial, indemnifying the past or the future, and indicates measures to be applied in respect to various offences either independently or in conjunction with the main punishment. A great number of his suggestions have since been implemented.[23] By *characteristicalness* Bentham means what Beccaria called the analogy between crime and punishment, and what Montesquieu described as the principle of retaliation. Thus the same injury that the offender inflicted on his victim should be inflicted on him as punishment. Under the heading *Sources of Analogy* he examines the possibility of modelling punishment on crime, particularly in cases

[21] *Ibid.*, p. 412.

[22] *Ibid.*, pp. 371–388.

[23] Some of his proposals were somewhat eccentric. Thus as a satisfaction for offences against a person's honour he suggests that the offender should himself read aloud his sentence; that he should kneel before the injured party; should deliver a speech which would humiliate himself; should be forced to wear emblematical robes. For insulting a woman, he should be forced to wear a woman's headdress and the like insult should be inflicted on him by a woman; *ibid.*, p. 881.

of arson and poisoning[24]; of punishing corporal injury with a similar injury[25]; of cutting off of the offending member[26]; and of imposing the same disguise as that assumed by the offender at the time of the offence.[27] He points out that in spite of its great advantages, such as simplicity and expressiveness, this principle is not capable of universal adoption, first because in a great number of cases it is physically impossible to apply it, and secondly because of extenuating or else aggravating circumstances that may arise in particular cases.[28] None the less he maintains that some analogy between crime and punishment can be achieved.[29]

Bentham recognises that no punishment can have all these twelve qualities but does not consider this to be essential, their respective importance varying with each offence. He thinks it desirable that punishment for serious offences should be primarily exemplary and analogous; for lesser crimes, it should be *frugal* and designed to reform the offender. In crimes against property, punishment should when possible be capable of ensuring compensation to the injured party.

The scope to be assigned to the death penalty

Bentham surveys all punishments known to English law, divides them into eleven categories and then examines their value as measured by the above-mentioned twelve qualities.[30] These investigations are mainly relevant to the development of thought on secondary punishments. It is therefore not proposed to follow Bentham into this field, but to examine his views on capital punishment only.[31]

He discerns the following main qualities of the death penalty: in the case of murder it is analogous or equivalent

[24] *Ibid.*, pp. 407–408.

[25] Generally by mutilation and deformation; on the various modes see *ibid.*, pp. 416–418.

[26] The most common penalty of this kind is the cutting off of the murderer's right hand previous to his execution.

[27] *Ibid.*, p. 408; for further suggestions see also pp. 408–409.

[28] *Ibid.*, p. 410.

[29] See for instance above, note 20 at p. 387.

[30] On these categories see Coleman Phillipson, *Three Criminal Law Reformers* (1923), p. 207.

[31] Bentham distinguishes simple capital punishment—when no greater bodily pain is inflicted than is necessary to cause death; and afflictive—when more pain is inflicted than is necessary for that purpose. He is against all forms of afflictive capital punishment; *op. cit.*, pp. 441 and 442.

to the crime; in respect to that crime it is also popular; it makes it impossible for the same offender to cause any further mischief; and finally it is pre-eminently qualified to serve as an example.[32] On the other hand, capital punishment cannot provide compensation; it is not frugal, nor variable, nor yet remissible and its equability is problematic. Moreover even its qualities are limited in scope. *Characteristicalness* or the analogy to the crime is true only in respect to murder; if it makes it impossible for the offender to commit further crimes, the same end can also be achieved by means of life imprisonment; and if it is comparatively popular now, with the progress of civilisation it is certain to become less so and will then lead to such evils as reluctance to prosecute, righteous perjury and wide use of the royal prerogative of mercy. But, Bentham concludes, if in spite of all its defects capital punishment is to be retained 'in consideration of the effects it produces *in terrorem*, it ought to be confined to offences which in the highest degree shock the public feeling—for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers'.

It is thus seen that among English reformers, Bentham's views on the death penalty are the most advanced.[33] Eden,

[32] Bentham disagrees with Beccaria that penal servitude for life needs necessarily cause a greater suffering than capital punishment. The suffering of the offender who has committed a capital offence begins immediately after its commission; it redoubles with his apprehension and continues to increase at every stage of the trial, reaching its culmination during the interval between the sentence and the execution. Furthermore, he contends that 'death in general is regarded by most men as the greatest of all evils, and they are willing to submit to any other suffering whatever in order to avoid it'. On the other hand, he insists that its deterrent value should not be exaggerated, first, because 'death is the absence of all pleasures indeed, but at the same time of all pains', and secondly, because a certain class of offenders is not affected by the fear of it.

Bentham also disagrees with Beccaria on the right to inflict capital punishment: 'Various persons at various times have entertained doubts, concerning the right of societies to inflict capital punishment. A situation full of unhappiness, when people are agitated with doubts which are of such a nature as to admit of no solution: which is the case which happens in all instances, where, as here, the terms in which they conceive them have in reality no meaning; the word "right" where disjoined both from positive Law and from expediency is of that sort: he who persists in seeking a third sense for it must expect only to plunge himself more and more into darkness and distraction'; MSS. Univ. Coll. No. 96, quoted by Elie Halévy, *La Formation du Radicalisme Philosophique* (1901), Vol. 1, p. 311.

[33] In time they became even more extreme; see his pamphlet *Death Punishment* published in 1830, below, p. 599.

though he urged the revision of a great many statutes, favoured the retention of the death penalty for a substantial number of offences [34]; Romilly never affirmed that it should be confined to murder only [35]; nor did Mackintosh [36] or even Fowell Buxton.[37] Brougham openly disagreed with Bentham when reviewing his *Théorie des Peines et des Récompenses*. 'That', he writes, 'its range should be extremely limited, we are willing to admit; but we differ from him in the position, that for this class of men, perpetual confinement to hard labour would have more terrors than death; the total extinction of life, without chance of escape, pardon, or mitigation, ought still to be denounced against the worst offences; and, by being confined to these, will unquestionably become doubly terrible.' [38] Bentham found many opponents even among his followers and was criticised in a remarkable article which appeared in the *Westminster Review*, the organ of the utilitarians which he had founded.[39]

Emphasis on severity

Although Bentham avers that capital punishment should be imposed for murder only, he is by no means in favour of lenient penalties. As has already been pointed out, he suggests that punishment should be increased in proportion to the temptation, irrespective of the gravity of the offence; that there should be an analogy between penalty and crime and that certain forms of mutilation, including castration, may usefully be adopted. He does not evolve any comprehensive scale of punishments for all crimes,[40] but his views on this

[34] Above, note 50 at p. 311.
[35] Above, p. 315.
[36] Below, p. 535.
[37] Below, note 41 at p. 535.
[38] *Edinburgh Review* (Oct., 1813), Vol. 22, pp. 1–31, reprinted in Brougham's *Contributions to the Edinburgh Review* (1856), Vol. 3, pp. 112–149. For the passage quoted see p. 137.
[39] The *Westminster Review* referred to the already quoted Bentham's tract on *Death Punishment* published in 1830. Later some radicals connected with Bentham urged the full adoption of his views on capital punishment, maintaining that its abolition was both desirable and inevitable; see for instance extracts of articles written between 1827–1849 by Albany Fonblanque in *Life and Labours of Albany Fonblanque* (ed. by E. B. Fonblanque, 1874), pp. 353–358.
[40] He would have done so had Lord Sidmouth accepted his offer to draft a penal code; above, note 18 at p. 364.

subject can be inferred from a number of proposals that he outlines in respect to ' Simple Personal Injuries '.[41]

This relatively slight offence Bentham describes as a corporal injury not resulting in a permanent injury. He proposes a very flexible system of punishment, giving the courts the power to select a penalty in the light of the particular circumstances of each case. But some of the punishments he includes among those to be chosen from are remarkably severe; they include a fine equal in value to the offender's whole property, banishment, and forced labour for a limited period or even for life. Another striking example is provided by his proposals concerning prison system, which incidentally throw an interesting light on his views on corrective methods. Before an offender can be reformed he must repent, must aquire an aversion to the crime he has committed. But there can be no penitence without pain. Pain can most effectively be caused by solitude, darkness and hard diet, which Bentham calls the ' auxiliaries ' of imprisonment the value of which lies in their ' subserviency to reformation '. This is how he expects that ' gradual and protracted scene of suffering produced by the combination of punishments ' to operate on the mind of the offender[42]: When in solitary confinement, he is

> ' . . . abstracted from all external impressions but such as can be afforded him by the few and uninviting objects that constitute the boundaries, or compose the furniture of a chamber in a prison; and from all ideas which, by virtue of the principle of association, any other impressions are calculated to suggest.
>
> ' By darkness, the number of the impressions he is open to is still further reduced, by the striking off of all those which even the few objects in question are calculated to produce upon the sense of sight. The mind of the patient is, by this means, reduced, as it were, to a gloomy void; leaving him destitute of all support but from his own internal resources, and producing the most lively impressions of his own weakness.
>
> ' In this void, the punishment of hard diet comes and implants the slow but incessant and corroding pain of hunger; while the debility that attends the first stages of it (for the phrensy that is apt to accompany the last stages is to be always

[41] ' Essay on the Promulgation of the Laws ', with a ' Specimen of a Penal Code ', *Works* (Bowring), Vol. 1, p. 164.

[42] ' Principles of Penal Law ', *ibid.*, p. 425.

> guarded against), banishes any propensity which the patient might have left, to try such few means of activity as he is left undeprived of, to furnish himself with any of the few impressions, he is still open to receive. Meantime, that pain and this debility, however irksome, are by no means so acute as to occupy his mind entirely and prevent altogether its wandering in search of other ideas. On the contrary, he will be forcibly solicited to pay attention to any ideas which in that extreme vacancy of employment, are disposed to present themselves to his view.'

Bentham recognises that if prolonged, such a regimen could not fail to result in the madness, despair or apathy of the sufferer. He therefore suggests its adoption for short periods, varying in duration according to the greater or lesser obstinacy of the offender and his response to this ' treatment '. In order to accelerate the process of ' reformation ', he further recommends two aggravations. First the food should be both inadequate and unpalatable, for otherwise the recurring gratification afforded to the palate might neutralise the pain caused by the loss of other pleasures. And secondly some prisoners should be made to wear masks, rendered ' more or less tragical, in proportion to the enormity of the crimes of those who wear them ', a measure which he hoped would impress upon their minds the infamy of their acts.[43] These extremely severe proposals, emanating as they did from a great humanitarian, are an arresting illustration of what was then considered to be the right balance between the evil of a crime and the pain of the punishment.[44] They also show the limitations of Bentham's method of assessing the measure of punishment without taking into account complex social and political factors.[45]

Indirect means of preventing crime

At the same time Bentham clearly perceived that even the most stringent penalties will not prevent crime unless other

[43] *Ibid.*, p. 431.

[44] They also show the relative value set on what is understood by the ' reformatory ' function of punishment. A. A. Mitchell rightly points out that in Bentham's doctrine the reformatory function is of secondary importance; ' Bentham and his School ' in the *Juridical Review* (1923), Vol. 35, p. 276.

[45] The limitations of Bentham's penal doctrine from this point of view have been noted by P. Rossi. Referring to Bentham's ' instrument analytique '

non-punitive measures are also adopted. Montesquieu and Beccaria both touched upon this matter but neither of them attempted to evolve a uniform system of such measures.[46] In this field, as in so many others, Bentham was a precursor. It is not proposed to examine in detail his comprehensive system of combating crimes ' by means which prevent them ', which constitute what he calls the ' *indirect* branch of legislation '.[47] To do so would be outside the scope of the present inquiry. It is, however, necessary to draw attention to certain salient features of these proposals.[48]

Bentham is emphatic on the need to strengthen the police in order to deal with an offence as soon as it ' announces itself in various manners ', or when it is in process of being committed.[49] With the same end in view, powers vested in magistrates concerning the arrest of suspected persons and

evolved to assess the danger of criminal acts and various qualities of punishment, he writes: ' Mais une exacte application de cet instrument à chaque espèce de délits, pour en apprécier le mal relatif, n'est possible qu'à l'aide d'une parfaite connaissance de l'état social. Toute application faite d'une manière abstraite sera nécessairement fautive. Qui vous révélera la force du mal de second et de troisième ordre, (classification made by Bentham) produit par tel ou tel délit, si ce n'est l'histoire nationale? . . . Qui vous dira si le mal passager est cependant d'une durée plus ou moins longue, plus ou moins alarmante? L'histoire du pays. Elle seule a le droit de résoudre la question '; see ' Traité de Droit Pénal ', *Oeuvres* (4th ed. by Faustin Hélie, 1872), Vol. 1, p. 304. The first edition appeared in 1829.

[46] See above, note 58 at p. 283. Beccaria's proposals were more advanced than those suggested by Montesquieu.

[47] ' Principles of Penal Law ', *Works* (Bowring), Vol. 1, p. 533. Elsewhere Bentham speaks of *prophylactics*, a term significant of his approach to this matter; ' Principles of Morals and Legislation ', *ibid.*, note * at p. 133. Bentham's idea was later taken up by Enrico Ferri, who uses the expression *i sostitutivi penali*; see *Sociologia Criminale* (5th ed., 1929), Vol. 2, pp. 472–552.

[48] Incidentally these proposals show that though Bentham's doctrine was individualistic, he was not, as A. W. Benn puts it, ' for letting things alone, but for continually interfering with them, readjusting their relations, and giving them new directions. Various existing laws, no doubt, had to be repealed; but many more new laws had to be enacted; a variety of anti-social actions, hitherto committed with impunity, had to be forcibly restrained; while virtuous actions, hitherto entrusted to the precarious support of public opinion, benevolent sentiment, and religious hopes, were henceforth to be encouraged by the more certain and substantial rewards which a public-spirited Legislature would provide. In this way Benthamism seemed to promise an immense extension rather than a restriction of the functions of government '; *History of English Rationalism in the Nineteenth Century* (1906), Vol. 1, p. 291. A. T. Williams points out that the extension of the functions of government is not incompatible with basic tenets of Bentham's doctrine; *The Concept of Equality in the writings of Rousseau, Bentham, and Kant* (New York, 1907), p. 28.

[49] ' Principles of Penal Law ', *ibid.*, pp. 367 and 368.

their general supervision should be extended. He singles out twelve problems to be taken into account in framing a system of preventive measures and brings forward a number of proposals to ensure its effective operation.[50] Although some of these proposals are somewhat eccentric, the majority have long since been adopted. One of the most striking—the suggestion to establish criminal statistics—was put forward as it were incidentally, alongside numerous observations upon other subjects in Bentham's early tract *A View of the Hard-Labour Bill.* 'The ordering of these returns', he writes, 'is a measure of excellent use in furnishing *data* for the legislator to go to work upon. They will form altogether a kind of *political barometer*, by which the effect of every legislative operation relative to the subject, may be indicated and made palpable. It is not till lately that legislators have thought of providing themselves with these necessary documents. They may be compared to the bills of mortality published annually in London; indicating the moral health of the country (but a little more accurately, it is to be hoped) as these latter do the physical. It would tend still further to forward the good purposes of this measure, if the returns, as soon as filed, were to be made public, by being printed in the *Gazette*, and in the local newspapers. They might also be collected once a year, and published all together in a book.'[51]

Bentham concludes this part of his exposition by bringing the prevention of crime into relation with such broader issues

[50] Some of these are as follows: to control the course of dangerous desires and divert them towards amusements more compatible with public interest; to enable certain desires to be satisfied without, or with the least possible, prejudice to public interest; to avoid furnishing encouragements to crime; to prevent crime by giving to many persons an immediate interest in preventing it; to provide better means of tracing and identifying wanted persons; *ibid.*, p. 539.

[51] *Works* (Bowring), Vol. 4, p. 29. And in a note he adds: 'A few years ago, I began sketching out a plan for a collection of documents of this kind, to be published by authority, under the name of *bills of delinquency*, with analogy to the *bills of mortality* above spoken of: but the despair of seeing anything of this sort carried into execution, soon occasioned me to abandon it. My idea was to extend it to all persons convicted on criminal prosecutions. Indeed, if the result of all law proceedings in general were digested into tables, it might furnish useful matter for a variety of political speculations'; *ibid.* The publication of regular annual returns of crime was initiated some thirty years later, following a motion brought by Romilly. These returns were very fragmentary and did not cover, as Bentham wished, all prosecutions under criminal law.

as the standards of morality and education and the constitutional structure of the country, with the emphasis on ensuring respect for the law and preventing the abuse of authority.[52] His general conclusions are again vitiated by his tendency to simplify all social issues. He states for instance 'that by good laws almost all crimes may be reduced to acts which may be repaired by a simple pecuniary compensation; and that, when this is the case, the evil arising from crimes may be made almost entirely to cease'.[53] Nevertheless, what he describes as the 'indirect branch of legislation' stands out as the first attempt to combat delinquency by enlightened preventive measures rather than by extreme punishments.

When Dumont first published the French edition of Bentham's work on punishment, Sir Samuel Romilly thus commented upon it in his *Memoirs*[54]: 'It is executed admirably, and it never was attempted before. Penal legislation hitherto has resembled what the science of physic must have been when physicians did not know the properties and effects of the medicines they administered'. And on another occasion he said in Parliament: 'It is not to be expected, that such a publication can at once become popular. We may be too near the object to see it distinctly;—but . . . in future times, when we and our differences are alike forgotten in the grave, this acquisition to English philosophy will be claimed, and its merits duly appreciated, by this Country'.[55] This appraisal of Bentham's work has been fully confirmed by history.

[52] 'Principles of Penal Law', *ibid.*, Vol. 1, pp. 561–580.

[53] *Ibid.*, p. 580. It should be noted that though in comparison with contemporary French political philosophers Bentham was a realist, he shared with them the belief in the perfectibility of human institutions.

[54] (1840), Vol. 2, pp. 385–386; see also above, p. 322.

[55] *Speeches* (1820), Vol. 1, p. 342.

PART IV

THE BEGINNINGS OF THE MOVEMENT FOR THE REFORM OF CRIMINAL LAW

Chapter 12

THE TREND OF THE PROPOSED REFORMS: HENRY FIELDING AND THE COMMITTEE OF 1750

The beginning of the movement for the reform of criminal law is usually associated with the name of Sir Samuel Romilly. His work in this field is undoubtedly of the highest importance.[1] But in order to trace the history of the movement in all its stages, it is necessary to revert to the middle of the eighteenth century when two important parliamentary committees were set up, when the extension of the scope of the death penalty was strenuously opposed on a number of occasions, and when several attempts were also made to repeal some of the capital statutes. In the course of these early endeavours, carried out in the face of strong opposition, men had arisen worthy to be called Romilly's precursors. They laid the foundations of the new approach to criminal matters, afterwards fully developed by Romilly and his followers.

§ 1. SOCIAL EVILS OF THE PERIOD

Their gravity described by Fielding. The importance of his 'Inquiry'

The first move in Parliament to revise the criminal code was made in 1750, when the House of Commons appointed a Committee to inquire into the state of criminal laws with a view to their repeal or amendment. The achievement of this Committee can only be assessed after examining both its aims, and its results, in relation to the general conditions then prevailing in the country.

[1] H. E. Barnes rightly describes Sir Samuel Romilly as 'the first great leader in the direct and persistent agitation for the reform of the English Criminal Code'; quoted by C. G. Oakes, *Sir Samuel Romilly* (1935), p. XI. Similarly Professor Coleman Phillipson says that his 'work occupies a place of supreme importance in the evolution of English jurisprudence'; *Three Criminal Law Reformers* (1923), p. 332. For an assessment of Romilly's contribution see above, pp. 313–336, and below, pp. 497–525.

Although the rebellion of 1745 had been crushed, a feeling of anxiety and insecurity persisted. Deep apprehension was felt in many quarters that a renewed attack against the established institutions was still a possibility calling for constant vigilance.[2] The position was further aggravated by the existence in London of a vast and unruly mob, always ready to take advantage of any incident to create disorder and endanger public safety.[3] The strength of the nation was being undermined by widespread alcoholism, which also engendered a general relaxation of manners. Samuel Couling reports that in 1750 there was one public-house to every fifteen houses in the City of London, one to every eight in Westminster, one to every five in Holborn and over one to every four in St. Giles.[4] Referring to the year 1752, Smollett writes that 'the suburbs of the metropolis abounded with an incredible number of public-houses, which continually resounded with the noise of riot and intemperance: they were the haunts of idleness, fraud, and rapine, and the seminaries of drunkenness, debauchery, extravagance, and every vice incident to human nature'.[5] In 1750, 7,000 out of 12,000 quarters of wheat sold weekly in the London markets were converted into alcohol.[6] Excessive gaming on the part of large sections of the community led to an unbalanced standard of living, prejudicing both steady occupation and a healthy sense of economy; while the lack of a constructive social policy was yet another cause of a growing moral laxity.

[2] See for instance Lord Hardwicke's speech on the Mutiny Act in the House of Lords in 1799, when he said: 'We have so lately had a convincing proof of the little dependence we can have upon the people for the defence either of our religion or liberties, . . . When the late rebellion first broke out, I believe most men were convinced that if those rebels had succeeded in their attempt, popery as well as slavery would have been the certain consequence; and yet, what a faint resistance did the people make in any part of the kingdom; . . .' G. Harris, *Life of Lord Chancellor Hardwicke* (1847), Vol. 2, pp. 402–403.

[3] A typical instance was the so-called Strand Riot of July 1, 1749, a vivid description of which is given by Henry Fielding in his pamphlet *A True State of the Case of Bosavern Penlez* (1749); see also Charles Reith, *The Police Idea* (1938), pp. 31–33.

[4] S. and B. Webb, *The History of Liquor Licensing in England* (1903), p. 39.

[5] *History of England* (1848), Vol. 3, p. 81.

[6] *Gentleman's Magazine* (January, 1760), Vol. 30, p. 21. W. L. Clay states that in this year alone 11,200,000 gallons of alcohol were consumed; *The Prison Chaplain* (1861), p. 37.

These circumstances were propitious to the formation of a veritable 'classe dangereuse', composed of robbers, thieves, receivers of stolen property, astute vagrants, beggars and prostitutes. An utterly inadequate and often corrupt police, disorganised prisons—even then a public scandal—and the gravely inefficient administration of the Poor Law, all acted as direct or indirect incentives to crime.[7] A number of books give a detailed picture of the disquieting developments with which English society was then faced, and when discussing these problems one is naturally inclined to draw upon the information contained in the notable works of Sidney and Beatrice Webb,[8] Dorothy Marshall,[9] and Dorothy George.[10] But however valuable such objective re-valuations of past events may be, in order fully to grasp the underlying motives and the real significance of Parliamentary inquiries and legislative developments of a remoter period of history, it is necessary to consult contemporary authors, particularly those known to have exercised a deep influence on the moulding of public opinion.

Henry Fielding's tract *An Inquiry into the Causes of the late Increase of Robbers*, is—from this point of view—of unique importance. It is noted elsewhere that the Committee appointed by the House of Commons in 1750 carried out its investigations from February 1 of that year to June 13, 1751.[11] Fielding's tract, which is known to have met with immediate success and to have made a deep impression on public

[7] 'The state of the lowest section of London's populace at this period', writes E. Beresford Chancellor in *The XVIIIth Century in London* (1920), pp. 85–86, 'was one of much unruliness, and therefore, considering the indifference of the guardianship of the peace, of no little power. If the famous Mohocks and Hawkabites were not drawn from this class, at least it provided its quota of the disturbing element, in other directions: the orgies in the East End, particularly in the region of the Docks; the riots that so frequently disturbed the Strand and even penetrated to the sedate purlieus of Westminster, from the political Mug-House riots to the band that once projected robbing Majesty itself when on its way from the City to St. James's. Any small occasion was sufficient for the mob to assert, or try to assert, its supremacy, and the watch was but a poor defence to such unexpected and often formidable gatherings'.

[8] *The History of Liquor Licensing* (1903); *English Local Government: The Parish and the County* (196); *English Local Government: English Prisons under Local Government* (1922).

[9] *The English Poor in the Eighteenth Century* (1926).

[10] *London Life in the XVIIIth Century* (1925).

[11] Below, pp. 415–416.

opinion,[12] had been published in January, 1750,[13] that is before the Committee was constituted.[14] Referring to the appointment of this Committee 'to consider on amending the laws

[12] On October 9, 1750, the following announcement appeared in the *General Advertiser*: 'We hear that an eminent magistrate is now employed in preparing a pamphlet for the press, in which the several causes that have conspired to render robberies so frequent of late, will be laid open; the defects of our laws inquired into, and methods proposed which may discourage, and in a great measure prevent, this growing evil for the future'. On the appearance of this tract the *Monthly Review* (Jan., 1751), p. 229, wrote: 'The public hath been hitherto not a little obliged to Mr. Fielding for the entertainment his gayer performances have afforded it; but now this gentleman hath a different claim to our thanks, for services of a more substantial nature. If he has been heretofore admired for his wit and humour, he now merits equal applause as a great magistrate, a useful and active member and a true friend to his country. As few writers have shown so great and extensive a knowledge of mankind in general, so none ever had better opportunities for being perfectly acquainted with that class which is the main subject of this performance: a class of all others most necessary and useful to all, yet the most neglected and despised; we mean the labouring part of the people'. A second edition of the *Inquiry* had already appeared by April, while yet another was published in the same year in Dublin.

The *Inquiry* gave rise to heated polemics. In the beginning of February the *Advertiser* announced 'This Day is published A Letter to Henry Fielding Esqre, occasioned by his Enquiry into the causes of the late increase of Robbers etc.' About the end of that month the *True Briton* published in two numbers 'Considerations' on Fielding's tract directed against it. The *London Magazine* of February, 1751, contained an 'Abstract of Mr. Fielding's Enquiry' covering five columns, and in March the same periodical printed a long anonymous letter attacking Fielding as a 'trading author' and a 'trading justice'. About the same time B. Sedgley published *Observations on Mr. Fielding's Enquiry*, and on March 7, 1751, the *General Advertiser* announced 'A Vindication of the Rights and Privileges of the Commonalty of England, in Opposition to what has been advanced by the Author of the Enquiry, or to what may be promulgated by any Ministerial Artifices against the public Cause of Truth and Liberty. *By* Timothy Beck *the Happy Cobbler of Portugal Street*'.

[13] *D.N.B.* VI, 1285. It was dedicated to Lord Chancellor Hardwicke who took a very serious view of the state of crime; see on this above, p. 18. Fielding was in contact with Hardwicke on these matters. In 1749 he sent him his *Charge delivered to the Grand Jury, etc.* and also the draft of a bill framed by him for the better prevention of street robberies; this letter is reproduced by G. Harris in his *Life of Lord Chancellor Hardwicke* (1847), Vol. 2, p. 395.

[14] In his speech on Jan. 17, 1751, the King urged the Legislature to take drastic measures to eradicate crime; see below, p. 415. Professor Wilbur L. Cross, the author of an exhaustive biography of Fielding, states that 'the "Enquiry" appeared,—by mutual arrangement, no doubt—at the very time when the Government was ready to bring forward new criminal legislation. . . . In its political aspect, the "Enquiry" was designed to mould the public mind in favour of the Ministry's proposals'. Professor Cross notes also that in writing this tract Fielding was probably influenced by his friend Isaac Maddox, Bishop of Worcester, who on Easter Monday, 1750, delivered before the Lord Mayor and the Magistrates of London an eloquent sermon on 'The Expediency of Preventive Wisdom', in which he connected the increase of crime with current social evils; *The History of Henry Fielding* (1918), Vol. 2, p. 255.

enacted against the vices of the lower people, which were increased to a degree of robbery and murder beyond example', Horace Walpole remarks that 'Fielding, a favourite author of the age, had published an admirable treatise on the laws in question . . .'.[15] Walpole's joint mention of both these events is no accident, for Fielding's tract has a direct connection with the investigations of the Committee. Fielding looks upon delinquency as a social issue vulnerable to, and dependent on, the constantly changing structure and manners of society. In accordance with this approach, he attempts to ascertain the underlying causes of crime peculiar to his times or, as he puts it, 'to trace the evil from the very fountain-head, and to show whence it originally springs, as well as all the supplies it receives . . .'.[16] Whether or not one is in agreement with Fielding's conclusions, the permanent value of his pioneer research into the origins of crime must be fully acknowledged.

His tract is equally notable from the point of view of penal policy. The prevention and repression of crime he regarded as an important branch of state administration. He was also aware of the close interdependence between criminology and penal policy and held that to be effective, the prevention and repression of crime must be based on a thorough knowledge of its main causes. This approach is consistent with the modern trend of thought in criminal science,[17] particularly since after having brought to light what seemed to him to be the etiology of crime, Fielding formulated a number of specific proposals of penal policy which bear upon criminal procedure as well as criminal law.[18]

[15] Horace Walpole, *Memoirs of the Reign of King George the Second* (ed. by Lord Holland, 1846), Vol. 1, p. 44.

[16] 'An Inquiry into the Causes of the late Increase of Robbers', *The Works of Henry Fielding* (ed. by Leslie Stephen, 1882), Vol. 7, p. 146, at p. 269. All ensuing quotations are from this edition of the *Inquiry*.

[17] On the connection between criminology and penal policy see L. Radzinowicz and J. W. C. Turner, 'The Meaning and Scope of Criminal Science'; *The Modern Approach to Criminal Law* (Vol. 4 of English Studies in Criminal Science, 1945), pp. 16–25.

[18] Ultimately a considerable number of his recommendations became law; Cross rightly remarks: 'Taken all in all, what Fielding accomplished in the way of reform legislation by aiding the Government is most impressive. It is a fresh chapter in history. He was the man behind the scenes'; *The History of Henry Fielding* (1918), Vol. 2, p. 280.

The value of Fielding's tract as a contribution to social history is equally outstanding, being a unique piece of contemporary evidence and a striking record of the manifold factors which led to anti-social behaviour.[19] If he was able to capture and masterfully to describe those complex social trends, it is partly owing to the fact that in his capacity of magistrate he had gained a first-hand knowledge of the London underworld.[20] The *Inquiry into the Causes of the late Increase of*

[19] On Fielding as painter of morals and manners of his times see Leslie Stephen, *Hours in a Library* (1892), Vol. 2, p. 207 *et seq.* See also the address which J. R. Lowell delivered on unveiling the bust of Fielding at Shire Hall, Taunton, Somersetshire on September 4, 1883, included in his *Democracy and other Addresses* (1887), pp. 67–88. Both these writers stress the affinity between Fielding and Hogarth. On this subject see also A. Dobson, *Fielding* (1900), *passim*.

[20] Fielding was made a magistrate in December, 1748, when he was forty-one, and held this office virtually until his death on October 8, 1754. He owed the appointment to his schoolfellow and friend George Lyttleton, who in 1744 became one of the Lords of the Treasury. At that time Fielding was in difficult economic circumstances. But though his new office—stigmatised at that period by the name of *trading justice* (see on this S. and B. Webb, *English Local Government: The Parish and the County* (1906), Vol. 1, pp. 326–327)—offered many illicit temptations, he never succumbed to them. He performed his duties with integrity and most exacting industry, and thus succeeded in raising the reputation of this office, hitherto held in low esteem. On the manner in which this work had been performed by some of his predecessors see 'The Journal of a Voyage to Lisbon', *The Works of Henry Fielding* (ed. by Leslie Stephen, 1882), Vol. 7, pp. 16–17.

At that time a London magistrate genuinely bent on repressing crime was exposed to great dangers and unscrupulous personal attacks. But by his handling of the 'Strand Riot' in 1749 Fielding proved himself to be a man of no fear, determined to administer justice according to law and his convictions, who would not be intimidated either by threats or by the clamour of public opinion; see on this his tracts *A Clear State of the Case of Elizabeth Canning* (1753); and *A True State of the Case of Bosavern Penlez* (1749).

His knowledge of law and its administration was remarkable. Murphy notes that he devoted much time to study and often spent long hours over the works of 'abstruse authors'; *D.N.B.*, VI, 1283. On May 12, 1749, Fielding was unanimously elected chairman of the Quarter Sessions (this honour was conferred on him six times until, owing to illness, he was no longer able to carry out his duties) and on June 29 of the same year he delivered *A Charge to the Grand Jury of Westminster* which is a model of its kind, dignified, well constructed and supported by solid knowledge of the criminal law. W. L. M. Lee rightly observes that this charge 'reads more like the deliberate composition of a justice of assize of large experience than the work of a junior magistrate just appointed to the office'; *History of Police in England* (1901), p. 155.

In an article 'Fresh Facts about Fielding', published in *Macmillan's Magazine* (1906–1907), N.S. Vol. 2, p. 422, Austin Dobson reports that Fielding left a 'considerable library, as varied as that of Johnson, in the matter of Latin and Greek authors, as richly endowed as that of Gray, and larger than that of Goldsmith'. Dorothy George remarks that 'Fielding's magistracy marks a turning point in the social history of London'; *London*

Robbers is highly praised in all the books about Fielding [21] and is often quoted by social as well as legal historians.[22] Its value as an exposition of penal doctrine and its bearing upon the history of criminal legislation can hardly be over-emphasised.

The first impression one gains from this remarkable tract is that the author was much perturbed by the state of crime and lawlessness, which he thought would spread rapidly unless drastic measures were immediately taken. He states it as an unquestionable fact that robbers and thieves were organised in large gangs trading professionally in crime. They knew and used every conceivable method of evading the law, and if they failed in rescuing the prisoner, or in bribing or deterring the prosecutor, they could still induce some members of the legal profession to forge a defence; they also always had a great number of false witnesses ready to support them.

Causes of crime and lawlessness

Examining the causes of the increase of crime, Fielding draws attention first to what he describes as 'the vast torrent of luxury', which in its turn engenders such other dangerous

Life in the XVIIIth Century (1925), p. 6; and Charles Reith, that his work and his writings 'are the foundation stone of all subsequent legal and police reforms of later times'; *The Police Idea* (1938), pp. 24–25. On Fielding as a magistrate Professor Wilbur L. Cross writes: 'From his court, from his pen, came the information on which were framed laws for the decrease of crime. To this one end he laboured day and night, sacrificing his health and finally his life . . . his last post brought out all the finest qualities of Henry Fielding's nature and touched the close of his career with quiet heroism'; *The History of Henry Fielding* (1918), Vol. 3, p. 286.

[21] H. Child, for instance, describes the *Inquiry* as a 'weighty' contribution 'which shows how earnestly he studied and desired to remove the causes of crime'; in another passage Child observes that 'as justice of the peace, he (Fielding) had seen further than his contemporaries into the causes of crime, and into the remedies for it'; see 'Fielding and Smollett', in *Cambridge History of English Literature* (1913), Vol. 10, pp. 33 and 35. 'The year that had seen the publication of the *Inquiry*'—writes G. M. Godden—'affords proof enough of Fielding's active labours in criminal and social reform'; *Henry Fielding* (1910), p. 232. See also Professor Cross, *The History of Henry Fielding* (1918), vol. 2, p. 266 and B. M. Jones, *Henry Fielding* (1933)—a valuable study of Fielding as a magistrate and penal reformer.

[22] Dorothy George, *London Life in the XVIIIth Century* (1925), pp. 6–7; J. L. and B. Hammond, 'Poverty, Crime, Philanthropy', *Johnson's England* (ed. by A. S. Turberville, 1933), Vol. 1, pp. 313–314; Sir William Holdsworth, *H.E.L.*, Vol. 11, pp. 565–566.

vices as too frequent and too expensive amusements, drunkenness, and gaming.[23] It is important to note that while emphatic about the extreme social danger of these tendencies, Fielding is anxious to make it clear that his remarks refer to the evil consequences of luxury exclusively among what he calls the lower orders of society. The corresponding vices of the upper classes were not in his view socially dangerous.[24] This attitude, which Fielding repeatedly reaffirms, was shared by many contemporary moralists and reformers. It was largely instrumental in initiating the movement for the improvement of manners, which aimed among other things at the extension of the scope of criminal law, so as to impose penalties for certain forms of behaviour.[25]

The second major cause of the increase of crime Fielding holds to be the ineffectiveness of the Poor Law. He was not the first writer to criticise this branch of administration, which many then looked upon with the greatest apprehension.[26] But this does not detract from the value of Fielding's contribution to the subject. In a lucid and well-documented chapter[27] he examines the legal structure of the system as well as its actual operation, and concludes that it is in all respects highly defective.[28]

[23] *Op. cit.*, pp. 163–164, 171 *et seq.*, and 179 *et seq.* Referring to the current habit of gin drinking he observes that ' wretches are often brought before me, charged with theft and robbery, whom I am forced to confine before they are in a condition to be examined; and when they have afterwards become sober, I have plainly perceived, from the state of the case, that the *Gin* alone was the cause of the transgression, and have been sometimes sorry that I was obliged to commit them to prison '; *ibid.*, pp. 176–177.

[24] *Ibid.*, pp. 164 and 169–170.

[25] This subject will be examined at greater length in a subsequent volume of this *History*. Important information on the movement for the reformation of manners and its endeavour to penalise certain habits of the lower classes was collected by S. and B. Webb and included in the ' Appendix ' to their *History of Liquor Licensing* (1903), pp. 137–151.

[26] Fielding himself quotes extensively Hale's tract on this subject. This question has been very much discussed; see Dorothy Marshall, *The English Poor in the Eighteenth Century* (1926), pp. 41–56.

[27] *Op. cit.*, pp. 187–218.

[28] In support of this contention he quotes the following report of Mr. Welch, one of his most efficient and devoted collaborators in detecting crime: ' That in the parish of St. Giles's there are great numbers of houses set apart for the reception of idle persons and vagabonds, who have their lodgings there for twopence a night; that in the above parish, and in St. George, Bloomsbury, one woman alone occupies seven of these houses, all properly accommodated with miserable beds from the cellar to the garret, for such twopenny lodgers; that in these beds, several of which are in the same room, men and

The defects of criminal law and its administration, which in Fielding's view encouraged the commission of offences and undermined the authority of justice, may be grouped under the following headings: (a) The virtual impunity enjoyed by receivers of stolen goods and others who help to circulate the spoils of crime, such as brokers and pawnbrokers. (b) Inadequate control of the movements of the dangerous strata of society, and notably of vagabonds, which encourages many of them to continue their criminal careers, and makes the detection of their offences very difficult. (c) The laxity shown in the apprehension of persons suspected of crime. (d) The reluctance to initiate proceedings arising from a number of factors, such as the practice of advertising for the recovery of stolen goods,[29] fear of reprisals, and unwillingness to undergo further trouble or to incur expense. (e) The difficulty of proving offenders' guilt owing to the insufficient weight accorded to the evidence of an accomplice on the one hand, and undue credulity in the defence of *alibi* on the other, although the latter was often proved by perjury generally considered as 'a common act of Newgate friendship'; and to the rule that an interested person shall not be sworn as a witness.[30] (f) The unjustified frequency of pardons, granted in contradiction to the basic principle that 'a single pardon granted *ex mera gratiâ et favore*, is a link broken in the chain of justice, and takes away the concatenation and strength of the whole'.[31] (g) The manner of carrying out executions, which was prejudicial both to the dignity of justice and to the deterrent function of capital punishment.

women, often strangers to each other, lie promiscuously; the price of a double bed being no more than threepence, as an encouragement to them to lie together; but as these places are thus adapted to whoredom, so are they no less provided for drunkenness, gin being sold in them all at a penny a quartern; so that the smallest sum of money serves for intoxication; that in the execution of search warrants Mr. Welch rarely finds less than twenty of these houses open for the receipt of all comers at the latest hours; that in one of these houses, and that not a large one, he hath numbered fifty-eight persons of both sexes, the stench of whom was so intolerable that it compelled him in a short time to quit the place'; *ibid.*, 239.

[29] Some twenty years earlier this practice had been denounced by B. Mandeville in *An Inquiry into the Causes of the Frequent Executions at Tyburn* (1725), p. 4.

[30] *Ibid.*, p. 260. Fielding's view on these matters will be examined at greater length in a subsequent volume of this *History*.

[31] *Ibid.*, p. 263.

§ 2. REMEDIES PROPOSED BY FIELDING

The remedies which Fielding suggested—like the sources of evil already summarised—fall into two groups: those relating to social causes, and those occasioned by defects in the criminal law and the administration of justice.

Strengthening of control over the lower strata of society

Alarmed by the threat that the increase of crime and lawlessness presented to public order, he aimed first and foremost at protecting the State by so increasing its power as to make it capable of combating the anti-social tendencies of the people. Many of the measures he proposed are indeed excellent, and were later incorporated in the laws of the country; but being often unable to perceive where the roots of the problem lay, he sometimes attacked its less important off-shoots only. For instance, as a remedy for the ineffective administration of the Poor Law,[32] he recommends that fuller use be made of existing legal provisions, but fails to appreciate the fact that economic changes had affected the very basis of the whole system—the parish—which was becoming increasingly more inadequate to its task, and that the new relationship between labour and industry was bound to have a profound bearing on the entire administration of relief. Again, having noted the social danger of tolerating a vast group of vagrants and vagabonds,

[32] The administration of relief is the subject of a separate tract which Fielding published in 1753 under the title *A Proposal for making an effectual Provision for the Poor*. His project is considered by Dorothy Marshall in *The English Poor in the Eighteenth Century* (1926), p. 49, as ' perhaps the most elaborate plan for a workhouse system '. In this pamphlet Fielding proposed the erection of a ' County Work-House ' capable of holding five thousand persons ' and upwards '. He suggested that delinquents found guilty of petty theft but not yet hardened by the profession of crime—who, he held, should be dealt with by magistrates—should also be placed in these ' County Work-Houses '.

These institutions as conceived by Fielding were clearly nothing more than huge prisons based on a regimen of extreme severity which, if set up, would be liable to become centres of social danger and revolt. ' His *Proposals for erecting a county work-house* ', observes Harold Child, ' may, to modern ideas, seem repellently brutal; to his own age, they seemed sentimentally humane '; ' Fielding and Smollett ', *Cambridge History of English Literature* (1913), Vol. 10, p. 29. Fielding himself was persuaded that this project would have beneficial results; see ' A Proposal for making an effectual Provision for the Poor ', *Works* (ed. by E. Gosse, 1899), Vol. 12, pp. 63 *et seq.*

he proposes to hinder the poor from wandering by making it a serious offence.

His purely negative attitude shows itself also in his suggestions regarding the best manner of dealing with the tendency towards undue luxury, expensive amusements and excessive drinking. Fielding's method, which he describes as 'the gentlest . . . and at the same time perhaps one of the most effectual of stopping the progress of vice', relied solely on the removal of the temptation. As in previous instances, he puts forward a number of administrative measures, backed by penal sanctions, which would control the manners of the people, their social intercourse and the way in which they spent their leisure.[33] Although proposals such as those relating to the consumption of alcohol, suspicious places of amusement and extravagant gaming were fully justified, and although the removal of temptations must be a part of any social or penal policy, Fielding certainly places too much confidence in purely repressive measures. The removal of certain amenities or the prohibition of certain forms of behaviour creates a vacuum which must be filled. Hence it is necessary to foster such new diversions or pursuits as will in time help to establish a new pattern of social behaviour. The raising of the educational level of the masses provides an obvious example, but despite the glaring need in this sphere Fielding's suggestions aim solely at removing temptations by punishment and administrative control.

His proposals in the sphere of criminal law and administration were inspired by similar considerations. He is thus in favour of making the law of arrest more stringent, of changing criminal procedure so as to curtail the rights of the accused, of making the punishment of certain classes of offenders more severe and certain, of limiting the scope of the royal prerogative of mercy and of securing quicker and more exemplary executions. He does not discuss, however, the reform of the prison system,[34] the secondary punishments, the treatment of

[33] He made a number of similar proposals in his 'Charge delivered to the Grand Jury', *Works* (ed. by Leslie Stephen, 1882), Vol. 7, pp. 139–142.

[34] This despite the fact that the deplorable conditions then prevailing in prisons were brought to the public knowledge by the Parliamentary Committee of 1729, promoted primarily by General (then Mr.) Oglethorpe, and later by William Hay in the House of Commons. Referring to the Houses of Correction, Fielding writes that 'for whatever these houses were designed to be, or

juvenile offenders, the segregation of occasional delinquents, or the imprisonment of debtors. In fact, had all his proposals been adopted, they would have strengthened the administrative authorities in their struggle against actual and potential criminals, but would scarcely have helped at all in preventing the emergence of conditions propitious to the spread of crime.[35]

More rigorous enforcement of capital statutes

Perhaps the weakest part of Fielding's system is that relating to capital punishment. That this important issue is dealt with in a cursory and inconsistent manner, may probably be explained by Fielding's deep-rooted faith in strong public authority as the best safeguard against all anti-social tendencies. Bent as he was on reducing crime by extending the scope of the law, he did not realise that its grip might have been made more secure by reducing its intensity. He acknowledges that harsh penalties should only be inflicted after all preventive measures have failed.[36] But he has little to say about the numerous capital statutes then in force, except that they should be more rigorously put into effect. He both underestimated the growing strength of public opposition to many of these laws, and also failed to perceive their negative influence on criminal legislation. In supporting the capital code Fielding quotes with unreserved approval the well-known opinion of Hale,[37] and then writes: 'No man indeed of common humanity nor common sense can think the life of a man and a few shillings to be of an equal consideration, or that the law in punishing theft with death proceeds (as perhaps a private person sometimes may) with any view of vengeance. The terror of the example is the only thing proposed, and one man is sacrificed to the preservation of thousands'.[38] He makes no attempt to differentiate in the

whatever they at first were, the fact is, that they are at present, in general, no other than schools of vice, seminaries of idleness, and common sewers of nastiness and disease'; *Inquiry*, p. 214; see also *Amelia* (Book I, chaps. 3 and 4), and *Tom Jones* (Book IV, Chap. 11). Despite this, however, he did not embody any proposals for prison reform in his *Inquiry*.

[35] Except the proposals to set up an effective police force and to deal more drastically with receivers of stolen property; see on these matters above, note 20 at p. 405 and p. 407.

[36] *Inquiry*, pp. 269 and 270.

[37] On Hale's attitude see 1 P.C., 12–13.

[38] *Op. cit.*, p. 264.

matter of punishment between, for instance, first offenders and habitual criminals, or between petty pilfering and, say, arson.[39] It may thus reasonably be inferred that he was in favour of a strict enforcement of all capital statutes.[40]

Changes in the manner of executing death sentences

All the changes which Fielding suggested in the manner of carrying out executions were proposed mainly in order to increase their deterrent influence. The primary purpose of public executions was 'to add the punishment of shame to that of death'. The failure to achieve this purpose he attributes to the difficulty of uniting the ideas of death and shame. Pride being commonly the strongest passion in both heroes and dangerous rogues, 'the day appointed by law for the thief's shame is the day of glory in his own opinion. His procession to Tyburn, and his last moments there, all are triumphant; attended with the compassion of the meek and tender-hearted, and with the applause, admiration, and envy, of all bold and hardened'.[41]

[39] In the tract *A True State of the Case of Bosavern Penlez* he justifies the capital provisions of the Riot Act of 1715 under which Penlez was originally charged (he was afterwards also indicted for burglary) by the fact that a number of other, less serious, offences were also punished by death; *Works* (ed. by Leslie Stephen, 1882), vol. 6, p. 405, at p. 420.

[40] This is further corroborated by the following remark taken from his delightful 'Journal of a Voyage to Lisbon': 'Laws never inflict disgrace in resentment, nor confer honour from gratitude. For it is very hard, my lord, said a convicted felon at the bar to the late excellent Judge Burnet, to hang a poor man for stealing a horse. You are not to be hanged, sir, answered my ever honoured and beloved friend, for stealing a horse, but you are to be hanged that horses may not be stolen. In like manner it might have been said to the late Duke of Marlborough, when the parliament was so deservedly liberal to him, after the battle of Blenheim, "You receive not these honours and bounties on account of a victory past, but that other victories may be obtained" '; *Works* (ed. by Leslie Stephen, 1882), Vol. 7, p. 18. Obviously Fielding's comparison is not quite to the point, and may serve as an illustration of how much he was inclined to simplify the complex problem of the objects of punishment and its relation to crime. In a curious pamphlet which he published in 1752 under the title *Examples of the Interposition of Providence in the Detection and Punishment of Murder*—to which attention will be drawn in a subsequent volume of this *History*, dealing with the prevention and detection of crime—Fielding states that 'punishments are in so eminent a manner mild and gentle'; p. 91.

[41] *Inquiry*, p. 265; see also *The Covent Garden Journal* (March 28, 1752), where he writes: 'The real fact is, that instead of making the gallows an object of terror, our executions contribute to make it an object of contempt in the eye of a malefactor; and we sacrifice the lives of men, not for the reformation but for the diversion of the populace'.

To enhance the deterrent effect of the death penalty, Fielding proposes that (a) the execution should take place as soon as possible after the conviction; (b) it should be in some degree private; and (c) it should be in the highest degree solemn. Suitable procedure, he suggests, would therefore be for the court at the Old Bailey to adjourn for four days at the conclusion of trials, and on the day of the adjournment for gallows to be erected in the area before the Court and all prisoners brought down to receive their sentences, which should immediately be executed in the sight and presence of the judges. In support of this procedure he argues that 'nothing can, I think, be imagined (not even torture, which I am an enemy to the very thought of admitting) more terrible than such an execution; and I leave it to any man to resolve himself upon reflection, whether such a day at the Old Bailey or a holiday at Tyburn would make the strongest impression on the minds of every one'.[42]

Since immediate executions would go far to restrict the operation of the royal prerogative of mercy, and since this prerogative was the only medium then capable of adjusting inflexible capital statutes to the circumstances of individual

[42] *Inquiry*, p. 268–269. 'It is not the essence of the thing itself', he writes, 'but the dress and apparatus of it which makes an impression on the mind, especially on the minds of the multitude, to whom beauty in rags is never a desirable, nor deformity in embroidery a disagreeable object'; *ibid.*, p. 267. It is interesting to note that Bentham held similar views on this subject; see on this above, note 6 at pp. 383–384.

In his *Life of Henry Fielding* (1855), p. 247, note (2), F. Lawrence quotes this proposal and observes: 'Fielding was too sensible a man not to perceive the brutalising tendency of these shameful scenes (of public executions); but he does not appear to have felt that horror of the indiscriminate severity of the law which one would have expected. The coarse and common spectacle of a public execution he readily admitted was an unmixed evil; and for that objectionable spectacle he advocated the substitution of a more solemn and imposing show—fantastic and peculiar, but no less barbarous and revolting'. This comment is somewhat misleading. Fielding's proposal on this subject should be examined in conjunction with his general penal doctrine, of which it is an element. It has been shown already that Fielding defended penal policy based on extreme intimidation. His criticism of public executions as then practised was clearly inspired by this concept. However one may feel about this proposal, it certainly was in harmony with his general doctrine. In *The Covent Garden Journal* (March 28, 1752) Fielding notes the effect of a rumour which had it that three criminals had been executed in Newgate. 'I cannot help adding', he writes, 'that the horror which this report spread among the lower people is astonishing'.

cases, it is obvious that Fielding was opposed to any curtailment of the scope of capital punishment.[43]

Shortcomings of Fielding's doctrine

Although Fielding rightly emphasised the need to take into account what he calls the customs, manners and habits of the people in the assessment of the English constitution, he ignored this factor when considering criminal law. For instance, when reviewing the law relating to receivers of stolen goods, he points out that the offence of the accessory was then dependent on that of the principal and that there can be no accessory in petty larceny. Since petty larceny was constituted by stealing goods below the value of a shilling, he agrees that it was too trifling an offence to extend the guilt to accessories. But, he adds,[44] 'since juries have taken upon them to consider the value of goods as immaterial, and to find upon their oaths, that what is proved to be worth several shillings, and sometimes several pounds, is of the value of tenpence, this is become a matter of more consequence. For instance, if a pickpocket steals several handkerchiefs, or other things, to the value of twenty shillings, and the receiver of these, knowing them to be stolen, is discovered, and both are indicted, the one as a principal, the other as accessory, as they must be; if the jury convict the principal, and find the goods to be of as high value as a shilling, he must receive judgment of death; whereas, by finding the goods (which they do upon their oaths) to be of the value of tenpence, the thief is ordinarily sentenced to be whipped and returns immediately to his trade of picking pockets, and the accessory is of course discharged, and of course returns to his trade of receiving the booty. Thus the jury are perjured, the public highly injured, and two excellent acts of parliament defeated, that two miscreants may laugh at their prosecutors, and at the law'. Fielding was right in maintaining that such a practice undermined the prestige of law but failed to go into the question of why the juries, who represented the people and could not be accused of acting against public interest, were bent on preventing law from taking its course.

[43] See on this also above, pp. 410–411.
[44] *Inquiry*, pp. 222–223.

Elsewhere in his tract Fielding speaks of the difficulties attending prosecutions as one of the major problems of the administration of justice. He examines the factors underlying this ' remissness of prosecutors ', and cites as one of the most important the fact that prosecutors are ' tender-hearted, and cannot take away the life of a man '.[45] As in the previous instance, however, he does not inquire into the causes of the remissness but merely notes its pernicious consequences and admonishes the people duly to perform their duty as citizens by initiating proceedings even in capital cases. He holds that even if the accused were to suffer death, to abstain from prosecuting on compassionate grounds is tantamount to a misplaced humanity, prejudicial to social interest and unjustified by ' the very virtues principally inculcated in our excellent religion '.[46]

It may be stated in conclusion that Fielding laid stress on the need for evolving an effective system of crime prevention but disregarded that for a simultaneous revision of criminal law. He thus based his penal policy on two contradictory principles: the principle of intimidation, as embodied in

[45] *Ibid.*, pp. 251 and 252.

[46] It should be noted here that when as a magistrate Fielding was faced with concrete cases, he often made use of humane and enlightened measures such as dismissal with admonition, the spirit of which was much ahead of the time. Deploring the system by which ' for a theft of twopence or threepence value, a poor wretch may lie starving and confined in gaol near two months in this town (London), and in the country above half a year, before he is brought to his trial. The consequences of which are, first, that he is even thus punished infinitely above the degree of his guilt. Secondly, that he is absolutely undone, his business lost and his reputation gone for ever. Thirdly, that he is totally contaminated and corrupted by the conversation of notorious thieves . . . ', Fielding suggested summary process before a magistrate instead of committal to the Sessions, an enlightened recommendation which was later adopted.

He insisted that in cases of petty theft mild punishments should be inflicted and that persons convicted of such offences should not be sent to Newgate: ' By this slight alteration of the law, I am convinced the lives of many hundreds of His Majesty's subjects will be saved, and the first theft will often prove the last, which, at present, I am afraid, is very rarely the case '. In accordance with this principle he discharged a poor woman, mother of three small children, charged with stealing a cap valued at threepence. On another occasion he refused to commit to prison a boy of twelve, but ordered him to be whipped in private. In yet another case he ordered a mentally deranged woman, charged with the theft of some blankets, to be placed in a hospital, instead of sending her to prison. It is thus not surprising that one John Smith, who came before Fielding charged with an offence, addressed him as ' the father of goodness '; see *The Covent Garden Journal* (1752), Jan. 11; Feb. 4; Feb. 25; March 10; and April 11.

capital statutes, and the principle of prevention. Consequently his tract is a mixture of bold and creative anticipation and narrow, regressive tendencies imprinted upon his mind by the age in which he lived.[47] But despite its many glaring shortcomings, it marks a definite stage in the development of English thought on penal matters.

§ 3. THE COMMITTEE OF 1750

The appointment of the Committee

The strong need then felt for some immediate and effective move to check the increase of crime and lawlessness is reflected in two of the King's speeches. On January 17, 1750, the King called upon the Members of the House of Commons to consider measures 'for enforcing the Execution of the Laws; and for suppressing those Outrages and Violences, which are inconsistent with all good Order and Government; and endanger the Lives and Properties of my Subjects'.[48] Again at the opening of the next session of Parliament on November 14, 1751, the King said: 'I cannot conclude without recommending to you in the most earnest Manner, to consider seriously of some effectual Provisions to suppress those audacious Crimes of Robbery and Violence, which are now become so frequent, especially about this great Capital, and which have proceeded in a great Measure from that profligate Spirit of Irreligion, Idleness, Gaming, and Extravagance, which has of late extended itself, in an uncommon Degree, to the Dishonour of the Nation, and to the great Offence and Prejudice of the sober and industrious Part of my People'.[49]

As has already been mentioned at the beginning of this chapter, about a year earlier the House of Commons had appointed a Committee 'to revise and consider the Laws in being, which relate to Felonies, and other Offences against

[47] In his essay on Fielding as a novelist, J. R. Lowell remarks: 'As I have said, we must guard against falling into the anachronism of forgetting the coarseness of the age into which he was born, and whose atmosphere he breathed. It was a generation whose sense of smell was undisturbed by odours that would now evoke a sanitary commission, and its moral nostrils were of an equally masculine temper'; *Democracy and other Addresses* (1887), p. 78. This remark is equally applicable to many aspects of Fielding's penal doctrine.

[48] *Journals of the House of Commons* (1750–1754), Vol. 26, p. 3.

[49] *Ibid.*, p. 298.

the Peace; and to report their Opinion thereupon, from time to time, to the House, as to the Defects, the Repeal or Amendment, of the said Laws'. To these broad terms of reference was added six weeks later the instruction to revise and consider also 'the Laws relating to the Poor, of that Part of *Great Britain* called *England*, and report their Opinion thereupon to the House, as to the Defects, the Repeal, or Amendment of the Laws relating to the said Poor'.[50]

The Committee counted among its members statesmen of such standing as Pitt, Pelham (then Chancellor of the Exchequer), Lyttelton and Townshend (afterwards Secretaries of State), the well-known philanthropist General Oglethorpe, and Sir Dudley Ryder (the Attorney-General, afterwards Lord Chief Justice).[51] The appointment of the Committee was an official recognition of the need for reform, while the great authority and wide experience of many of its members, together with the broad terms of reference, were guarantees of a bold and thorough inquiry. The Committee's investigations lasted from February 1, 1750, to June 18, 1751, and at their conclusion three sets of resolutions were framed and reported to the House of Commons. One set dealt with the reform of the Poor Law, while the other two referred to penal matters. They were adopted and leave was given to bring in Bills based upon them.[52]

Their main proposals

The resolutions presented by the Committee may be grouped under six headings:

I. Measures to eliminate or to attenuate certain social evils productive of crime. Among the causes of these evils the following four may be distinguished: (1) '. . . a habit of

[50] *Ibid.*, pp. 27 and 123.

[51] For the full list of members see *ibid.*, pp. 27, 39, 155 and 158.

[52] The first set of nine resolutions was read out by Sir Richard Lloyd on April 1, 1751; Sir Richard and the Master of the Rolls were entrusted with the preparation of the relevant Bill; *ibid.*, pp. 159–160. On April 23, 1751, Sir Richard Lloyd reported to the House the second set of sixteen resolutions and, together with the Master of the Rolls, Mr. Bathurst and Mr. Hardinge, was entrusted with the preparation of an appropriate Bill; *ibid.*, p. 190. Finally, on June 13, 1751, Sir Richard Lloyd reported the remaining seven resolutions, all of which were adopted by the House, one of them, the sixth, being slightly amended; *ibid.*, p. 289. The *Journals* do not mention whether or not it was decided to bring in a Bill or Bills based upon this last set of recommendations.

idleness, in which the lower people have been bred often from their youth'. In this connection the Committee made certain proposals affecting the Poor Law, the defects of which they considered to be one of the causes of the increase in crime. After noting that the provision for the poor had become an increasing burden, the Committee indicated the defects in the system which they deemed to be the source of this expense: the usual expenditure of sums raised for the benefit of the poor on their maintenance only, little or no care being taken to provide for their employment; the removal of poor persons from one part of the country to another 'as to the place of their legal settlements'; and the lack of care in educating the children of the poor so as to enable them to maintain themselves. Commenting on the idle life of the poor cared for under the Poor Law, the Committee stated that the consequence of such a system was to propagate a new race of chargeable poor. In conclusion, the Committee urged the abolition of the law of settlements, the amalgamation of small parishes into greater units and the establishment of a common fund in every county. (2) The 'Multitude of Places of Entertainment for the lower Sort of People', where they 'spend their small Substance in riotous Pleasures, and in consequence are put on unlawful Methods of supplying their Wants and renewing their Pleasures'. (3) Gaming, which the Committee regarded as a great incitement to theft and robbery. (4) The lack of adequate control over certain suspicious professions and over various places where anti-social and dangerous elements usually met. The Committee thus held that thieves drew security and encouragement from the pawnbrokers who took pawns without knowing or inquiring about the pawners. The Committee also urged a speedier and more effectual way of suppressing disorderly houses.

II. Recommendations directly relating to the administration of criminal justice, one being the pressing need to improve the system of crime detection by reorganising the police. The Committee held that the watch within the City of Westminster and in certain other places in the country was in every respect defective, that there was no adequate power to enforce the rates for the watch and that the salaries paid to watchmen were too small to induce able-bodied men to undertake the

service. Their main recommendations in this respect were: (1) To evolve some appropriate provision for raising and enforcing the payment of money for securing an adequate watch. (2) In parishes where watch-rates were fixed by Acts of Parliament, to enable the justices at Quarter Sessions to order both their increase and also a certain additional rate, provided that a competent number of prominent inhabitants had complained of a deficiency in the number of watchmen. (3) To make provisions for a number of watchmen to be always ready to attend the constable on his round of the parish. (4) To make provisions for the speedy and effectual punishment of constables and watchmen who should neglect or inadequately perform their duties.

III. Proposals regarding the law of arrest and the system of trial. The Committee recommended: (1) That the power of the police should be extended and that constables and watchmen should be authorised 'to take up, and secure in their Round-House, all and every suspicious Person or Persons, that they shall find loitering and lurking about the Streets, . . . and do not give a satisfactory Account of him, her or themselves, though . . . not actually in the Commission of any Breach of the Peace, and carry such Person or Persons, so taken up, before a Justice of the Peace, as soon as conveniently may be, who shall, in case no satisfactory Account is given to him, commit him, her or them, to the House of Correction as Vagrants'. (2) That the power of the magistrates and others to search for, and to detain for a reasonable time, suspicious persons should also be extended. (3) That the procedure in cases of the indictment and presentment of misdemeanours should be improved. (4) That greater use should be made of rewards payable upon the conviction of offenders in order to stimulate prosecutions; that a reward should be paid for the apprehension of persons returning from transportation, upon their conviction; and that an easier and less expensive method of convicting such offenders should be evolved. But although favouring the payment of rewards, the Committee thought that the system of advertising rewards for the return of stolen or lost property was another cause of the increase in robberies. (5) That when the circumstances of the prosecutor warranted it, the court should 'order a

reasonable Allowance to such Prosecutor, according to their Discretion, to be paid by the Treasurer of the County'. And finally (6) that measures should be adopted to ensure a more efficient trial of offenders, and particularly the speeding up and the lowering of the expense of prosecutions.

IV. The recommendation that a more severe punishment be appointed for certain offences and notably for receiving stolen goods; breaking or attempting to break any prison [53]; rescuing or attempting to rescue any person committed by warrant from any magistrate, or seized in order to be carried before a proper magistrate for an offence.

V. The resolution relating to prisons, that 'there are great Defects in, and Abuses of the Houses of Correction'.

VI. The recommendation concerning the revision of criminal law, 'that it would be reasonable to exchange the Punishment of Death, which is now inflicted for some Sorts of Offences, into some other adequate Punishments'.[54]

The implications of these proposals

The affinity between the scope and results of the Committee's inquiry and the proposals outlined by Fielding is striking. There was first of all a remarkable similarity in the method of approach. The Committee, like Fielding, held that despite the improvements in the criminal law, crime would not be reduced until certain social causes contributive to its increase had been eliminated or at least neutralised, and that penal policy could only be fully effective if based on a sound system of crime prevention. It insisted on the importance of attacking certain sources of crime then operating in English society, as to the nature of which it was in substantial agreement with Fielding. Secondly, it suggested a considerable

[53] These offences were then very common. For instance in January, 1749, when a pickpocket had been committed to the Gatehouse, his armed friends stormed the gaol, wounded the turnkey and others who resisted them and liberated the delinquent. Recording this episode *The General Advertiser* of January 23, 1749 remarks: 'Surely, this instance of daring impudence must rouse every person of property to assemble and consult means for their own security at least; for if gaols can be forced in this manner, private houses can make but little resistance against such groups of robbers as at present infest this "great metropolis"'.

[54] *Journals of the House of Commons* (1750–1754), Vol. 26, p. 190.

number of reforms bearing upon the methods of crime-detection, the law of arrest, and the system of trial; it also proposed to change the punishment for certain particularly dangerous offences. Its aim, which was to re-organise the machinery of justice so as to enhance its efficiency in combating crime and ensuring public order, was thus similar to Fielding's. The means to achieve it was, according to Fielding, to increase the power of the State in dealing with actual and potential offenders. The recommendations of the Committee were inspired by a similar trend of thought. If adopted, they would strengthen the police force, make the procedure of bringing suspected persons to trial less liberal and the punishment of certain categories of offenders more exemplary, and also tighten the administrative control over the dangerous strata of the population, such as vagrants, pawnbrokers and persons keeping places of amusement for the lower strata of society.

But despite their many similarities, the Committee's and Fielding's ultimate conclusions were very different. Fielding was primarily preoccupied with the repressive aspects of penal policy. The Committee's outlook was much more enlightened. It not only recommended the reform of prisons and houses of correction, but emphasised the need to revise capital laws. Fielding's omission of this crucial matter made his scheme both unreal and retrogressive. By including it among its proposals, the Committee was laying foundations for an effective system of criminal justice.[55]

[55] This weakness in Fielding's project of penal reform is noted by B. M. Jones, who writes: 'Fielding's efforts were mainly directed towards making more effective the administration of the criminal law as it existed at that time. This is not surprising, when we recall the prevalence of disorder and violent crime in those days. He did his best to suggest how the underlying causes of the trouble might be removed. But, to the student of criminal law, it seems strange that such an astute and humane man did not draw more attention to the fact that the fertility of crime was increased by the very means resorted to for its suppression'; *Henry Fielding* (1933), p. 220. On the other hand one cannot agree with Jones when he states that the resolutions of the Committee of 1750 'might not unfairly be described as a summary of Fielding's *Inquiry into the Causes of the Increase of Robbers*'; *ibid.*, p. 238. As it has been pointed out, the affinity between the two was indeed very striking, but by bringing the revision of capital laws within the scope of their proposed reforms, the Committee went far beyond the mainly negative programme outlined by Fielding.

The Committee's resolution recommending the revision of capital statutes was framed very widely. It did not select any particular statute but suggested that the death penalty should be replaced by other adequate punishments in 'some sorts of offences'. This approach, which allowed for the gradual extension of the principle of exchange, was remarkably progressive, particularly so for a Committee working in the middle of the eighteenth century with no precedents to draw upon. As will be seen later, no such course was followed in subsequent attempts at reform, the tendency then being to consider the repeal of capital punishment separately for each offence or small group of offences. These tactics were no doubt dictated by the strength of the opposition with which any proposal to abrogate capital punishment had to contend and which became irreconcilable when a wider scheme of reform was suspected.[56]

It is significant of the progressive outlook of the Committee of 1750 that it realised both the need to revise capital laws, and the impossibility of doing so without the simultaneous reform of the administration of criminal justice and of certain branches of social policy, particularly of the Poor Law. Unsupported by a more efficient system of criminal justice, the abrogation or substantial limitation of the death penalty would inevitably prove disastrous, and would ultimately lead to the re-establishment of capital punishment on an even greater scale. Many social reforms had to be brought about, and effective alternative punishments devised and tested, before the death penalty could be dispensed with without depriving society of the sense of security it derived from its extensive application, and therefore before public opinion could be expected fully to support the enactment of more lenient punishments. Recognising the connection between the problem of the death penalty and the wider problems of penal and social policies, the Committee evolved reforms affecting all these spheres of state administration. Many of its recommendations were so far ahead of its time that they were not implemented until fifty or even a hundred years later.

[56] See for instance the tactics adopted by Sir Samuel Romilly; below, pp. 497–498.

The revision of capital statutes rejected by the House of Lords

Some time after the Committee had completed its inquiry a Bill implementing its resolution on the death penalty and entitled 'An Act to give Power to change the Punishment of Felony, in certain Cases, to Confinement and hard Labour in His Majesty's Dock-Yards' was submitted to the House of Commons. This Bill, better known as the 'Felons confinement in the Dock-Yards Bill', was passed by the House of Commons but rejected by the House of Lords.[57] Parliamentary records give no indication of any debate on the subject.[57a] But from the attitude of the House of Lords towards subsequent projects of reform, particularly towards those sponsored by Sir Samuel Romilly in the years 1808–1818, some explanation of why the Bill of 1752 was lost may be inferred. The House of Lords was opposed to any relaxation of the severity of criminal law. While this was undoubtedly the main reason, it was not the only one. The alternative punishment proposed by the Committee of 'confinement and hard labour in his Majesty's dockyards' had always been regarded with great dislike by Englishmen of all social strata. It was held to transform free citizens into slaves and to be incompatible with the status and dignity of free people. It was also criticised as being difficult to put into effect and as necessitating an extremely harsh system of enforcement, since the offenders enduring it would obviously try to escape. Moreover, the concentration of offenders in dockyards would constitute a danger to the community.[58]

[57] *Journals of the House of Lords* (1746–1752), Vol. 27; Feb. 14, 1752, p. 649; Feb. 18, 1752, p. 654; Feb. 25, 1752, p. 661.

[57a] For an interesting but not entirely correct contemporary comment see Horace Walpole, *Memoirs of the Reign of King George the Second* (ed. by Lord Holland, 1846), Vol. 1, pp. 255–256.

[58] The assumption that these considerations contributed to the rejection of the Bill is corroborated by Jonas Hanway. 'If I am not misinformed', he writes, 'it was about the year 1750, that an act of parliament was modelled and digested, and even passed the *Commons*, for the purpose of punishing malefactors, who had forfeited their lives, by obliging them to perform hard labour in chains, in dockyards and other public places. This bill was thrown out by the *Lords*, probably on the conviction, that the execution of it would be attended with such dangers and difficulties, as would render it a very improper experiment. It cannot be presumed that persons of such spirits as our malefactors usually are, could be restrained without an armed force; they would necessarily communicate with each other: and that this would be

This punishment was repeatedly opposed in Parliament, even by Members who were in favour of the restriction of the death penalty. As Lecky aptly observes, '. . . it is a curious illustration of the caprice of national sentiment, that English opinion in the eighteenth century allowed the execution of criminals to be treated as a popular amusement, but at the same time revolted against the continental custom of compelling chained prisoners to work in public, as utterly inconsistent with English liberty '.[59]

Thus the practical results of the first move towards the revision of criminal law were disappointing. When the House of Lords rejected the 'Felons Confinement in the Dock-Yards Bill', no further action was taken to give effect to this recommendation of the Committee of 1750. None the less this remarkable Committee was held in the highest esteem by those who in subsequent years endeavoured to attain similar ends. Nearly fifty years later Sir James Mackintosh, when moving for the appointment of a 'Select Committee on the Criminal Laws', commented with bitterness on the attitude adopted on that occasion by the House of Lords. He observed of the 'Felons Confinement in the Dock-Yards Bill' of 1752 that although the Bill was lost, 'it was not opposed by any of the great names of that day—by any of the luminaries of that House. In particular, Lord Hardwicke did not oppose the Bill, the principal object of which was the substitution of hard labour and imprisonment for the punishment of death'. He spoke, too, in terms of high praise about the members of the Committee of 1750, whom he called the 'great men, who were, in liberality, as superior to some statesmen of the present day,

attended with pernicious consequences, is not very difficult to conceive. For my own part, I apprehend, that such a punishment is not calculated for this *meridian of liberty*; that it would be displeasing to our humanity; and that the evil it might do, and the terror such malefactors might create, would militate against the peace and satisfaction of the people'; *The Defects of Police, the Cause of Immorality . . . with various Proposals for preventing Hanging and Transportation* (1775), p. 221. For Hanway's tract on capital punishment see above, note 17 at p. 348.

[59] *History of England in the Eighteenth Century* (repr. of 1904), Vol. 7, p. 322. On Bentham's views, see above, note 19 at p. 387. For a proposal to abolish the death penalty for all offences except murder and to sentence such offenders to hard labour in chains on public works see *Proposals to the Legislature for preventing the present Executions and Exportations of Convicts in a Letter to the Right Hon. Henry Pelham* (1754); by a Student in Politics. On this tract see above, pp. 32–33.

as in practical wisdom they were perhaps not inferior to them . . . Those great lawyers and statesmen will, at least, not be accused of having been rash theorists, or, according to the new word, ultra-philosophers'.[60]

[60] *Parl. Deb.* (1819), Vol. 39, cols. 780–781.

CHAPTER 13

THE COMMITTEE OF 1770 AND AN ATTEMPT TO SET UP A COMMISSION OF INQUIRY IN 1787

§ 1. INCREASE OF LAWLESSNESS AND THE SEVERITY OF PUNISHMENT

THE grave social evils described by Fielding and by the Committee of 1750 continued to spread and eventually reached alarming proportions. The incidence of crime was very high and increasing,[1] while the occurrence of some particularly revolting crimes indicated that manners were still savage.[2] As

[1] The following passage was contained in the King's speech of November 15, 1753: 'It is with the utmost regret I observe that the horrid crimes of robbery and murder are, of late, rather increased than diminished. I am sensible that works of reformation are not to be effected at once; but every body should contribute their best endeavours: and let me earnestly recommend it to you, to continue your serious attention to this important object'; *Parl. Hist.* (1753–1765), Vol. 15, col. 88. 'House breaking in London', records the *Annual Register* (1770), Vol. 13, p. 78, 'was never known to be so frequent, seldom a night passing but some house or other is entered and robbed'. Between Michaelmas 1769 and March 14, 1770, 104 houses were broken open and robbed.

[2] 'During two or three years', writes Lecky, *History of England* (repr. of 1904), Vol. 3, p. 325: 'London witnessed scenes of riot that could hardly have been surpassed in Connaught or the Highlands'. The character of extreme ruthlessness which some of these disturbances assumed may well be seen from Horace Walpole's description of the coalheavers' attack of 1768: 'Of all the tumults, the fiercest and most memorable was the following. A dispute having arisen between the coalworkers and the coalheavers, the latter of whom were chiefly Irish—nay, some of them Whiteboys, an Act of Parliament had passed the last years, subjecting the coalheavers to the jurisdiction of the alderman of the ward; an office had been erected, and one Green, who kept an alehouse, had been constituted their agent. Houston, a man who wanted to supplant Green, had incensed the coalheavers against him, and they threatened his destruction. Apprised of their design, he every night removed his wife and children out of his house. One evening he received notice that the coalheavers were coming to attack him. He had nobody with him but a maid-servant and a sailor, who by accident was drinking in the house. Green asked the sailor if he would assist him? "Yes", answered the generous tar, "I will defend any man in distress". At eight the rioters appeared, and fired on the house, lodging in one room above two hundred bullets; and when their ammunition was spent, they bought pewter pots, cut them to pieces, and fired them as ball. At length with an axe they broke out the bottom of the door; but that breach the sailor defended singly; while Green and his

a reaction to this lawlessness, criminal justice became even more stringent. During the twenty years from 1750 to 1769, 909 offenders were capitally convicted, of whom 551 were executed, for crimes committed in London and Middlesex only. In the year 1770 alone, 91 capital verdicts were given and 49 offenders were put to death.[3] It was at this critical stage that the initiative of the Committee of 1750 was taken up again and a new attempt made to bring about the revision of certain capital statutes.

maid kept a constant fire, and killed eighteen of the besiegers. . . . I should scarce have ventured this narrative, had not all the circumstances been proved in a court of justice. Yet how many reflections must the whole story create in minds not conversant in a vast capital—free, ungoverned, unpoliced, and indifferent to everything but its pleasures and factions! Who will believe that such a scene of outrage could happen in the residence of Government?—that the siege lasted nine hours, and that no Guards were sent to the relief of the besieged till five in the morning? Who will believe that while such Anarchy reigned at one end of the Metropolis, it made so little impression at the Court end that it was scarce mentioned? Though in London myself, all I heard was that a man had been attacked in his house, and had killed three of the rioters . . . Green was forced to conceal himself from their rage; but his sister, giving a supper to her friends for joy of her brother's safety, her house was attacked by those assassins, their faces covered with black crepe, who tore her into the street, and murdered her '; *Memoirs of the Reign of King George the Third* (1894), Vol. 3, pp. 148–149. This incident provides an outstanding illustration of the then common outbursts of violent criminality and the lack of an adequate police force. The men who attacked Green were tried under the Waltham Black Act and seven of them were executed; see on this above, pp. 54–56.

[3] Computed on the basis of the material contained in Appendices Nos. 2 and 3, pp. 135–145, to the ' Report from Sel. Comm. on Criminal Laws ' (1819), 585; *Parl. Papers* (1819), Vol. 8 (Reports, 1819). The *London Evening Post* (October, 1782), notes: ' Yesterday morning about nine o'clock, the following malefactors were brought out of Newgate and carried to Tyburn in three carts, where they were executed according to their sentences—*viz.*, Henry Berthaud, for feloniously personating one, Mark Groves, the proprietor of 100£/three per cent. annuities, and transferring the same as if he was the real owner thereof; William Jones, *alias* Filch, *alias* Parker, for stealing, in a warehouse in the Castle and Falcon in Aldersgate Street, a deal box containing a quantity of haberdashery goods; Peter Ferrier, accomplice with Charles Kelly, executed for burglary in the house of Mrs. Pollard, in Great Queen Street; William Odern, for robbing Elizabeth Burrell and Martha Crowten in Spitalsfield; Charles Woollett, for robbing Bernard and John Cheale, on the highway, of a metal watch; John Graham, for feloniously altering the principal sum of a banknote of fifty pounds, with intent to defraud Christopher Alderson; Charlotte Goodall and John Edmonds, for stealing in the dwelling-house of Mrs. Fortescue, at Tottenham, where she lived as servant, a great quantity of plate, linen, etc.; Thomas Cludenboul, for assaulting Robert Chiltern on the highway, and robbing him of a gold watch; John Weatherley and John Lafee, for feloniously and treasonably coining and counterfeiting the silver money of the realm called shillings and sixpences. They all behaved very penitent '.

§ 2. THE MOTION OF SIR WILLIAM MEREDITH

Once more the initiative came from the House of Commons. On November 27, 1770, Sir William Meredith moved for an inquiry 'into the state of the Criminal Laws of the kingdom'.[4]

It was essential, he said, to leave no one in doubt that equal justice was administered to every delinquent and that no one was as severely punished for a minor theft committed in extreme necessity, as was another for, say, a murder. In England, he contended, the reverse was true: '. . . In all, the penalty is hanging; in larcenies and petty thefts, as well as in treason and murder'. Such a system, he felt, undermined the authority of the law and resulted in an increase rather than a decrease in crime.

He urged the adoption of a penal policy aiming at the reformation of the offender, and referred to certain other European States whose policy was 'to punish crimes and yet render the criminal useful to the community'.[5] Sir William Meredith's motion 'That a Committee be appointed to consider of so much of the Criminal Laws as relate to Capital Offences; and to report the same, with their opinion thereupon, to the House' was agreed to, and a Committee was accordingly appointed on November 27, 1770.[6]

§ 3. RECOMMENDATIONS OF THE COMMITTEE

Eight capital statutes singled out for repeal

On May 6, 1771 Sir Charles Bunbury reported to the House of Commons that the Committee's investigations had led them to

[4] 'Motion in the Commons for a Committee on so much of the Criminal Laws as relate to Capital Offences'; *Parl. Hist.* (1765–1771), Vol. 16, cols. 1124–1127.

[5] Meredith criticised the capital laws also on the ground that they were a 'fertile source of depopulation'. The incidence of executions—although high—did not warrant such an opinion. Perhaps this argument could have been more appropriately adduced in respect to the system of transportation; but this too is open to doubt.

[6] Sir George Trevelyan observes that in taking this step Meredith anticipated Romilly. He also notes that Meredith's motion was seconded by Charles Fox; *The Early History of Charles James Fox* (1880), p. 431.

Meredith was matriculated at Christ Church, Oxford, in 1742–43, and was made D.C.L. in 1749. In 1752 the title and family estates descended to him by the death of his grandfather Sir William Meredith, the second baronet. He sat in Parliament for twenty-six years, first as a Member for Wigan (1754–1761) and after for Liverpool (1761–1780). Apparently when young he sympathised with Jacobitism but later became an active whig and a follower of

ask for the repeal of the death penalty provided under four statutes.[7] The report was ordered to be considered on May 20, but Parliament was prorogued before that date. On January 31, 1772 the Committee was re-appointed,[8] and after further deliberations recommended the repeal of four additional capital statutes,[9] making eight in all: (1) 7 Hen. 7, c. 1—'The Penalty of a Captain or Soldier retained to serve the King in his intended Wars, not doing their Duties' (1487);

Lord Rockingham. When the latter formed a ministry Meredith became a Lord of the Admiralty (1765) but resigned from that office in 1766. His political prestige was irreparably damaged when owing to the instability of his character he changed the attitude towards the Court and became Comptroller of the Household and a Privy Councillor. 'Sir William', writes Horace Walpole, 'was not long after this gained to the Court by a White Stick; and though he again relinquished it, as he said, on principle, he lost more on the side of judgment than he recovered on that of conscience; and left it more doubtful whether he was an upright than a very unsettled man'; *Memoirs of the Reign of King George the Third* (ed. by G. F. Russell Barker, 1894), Vol. 4, p. 44; see also his *Last Journals* (ed. by A. F. Steuart, 1910), Vol. 2, p. 81, where he says that Meredith was 'treated by both sides with equal contempt'; and Albemarle, *Memoirs of the Marquis of Rockingham* (1852), Vol. 2, pp. 64–65.

Nevertheless Meredith is well remembered for the very active part he had taken in the work of Parliament and particularly for the strong support he had given to enlightened and liberal measures. Thus in Wilke's affair he not only defended the rights of the Freeholders of Middlesex but also opposed the practice of general warrants. He made forcible speeches on this subject in the House of Commons and published vigorous pamphlets; one in reply to Charles Lloyd's tract was entitled *A Reply to the Defence of the Majority* (1764) and another, *A Letter to Dr. Blackstone, by the Author of the 'Question Stated'* (1770). He also held very progressive views on the subject of religious emancipation; see, for instance, his letter on this question in the *Gentleman's Magazine* (1773), Vol. 43, pp. 216–217.

On penal matters he held very strong and consistent views. During the debate in the House of Commons on the question of the reprieve of two Irishmen—Macquirk and Balf—both sentenced to death for murder, Meredith strongly supported Boyle Walshingham who urged that their lives should be spared. On this debate Horace Walpole writes: 'Sir William Meredith, a man remarkably averse to punishments that reached the lives of criminals, joined in the same humane sentiments'; *Memoirs of the Reign of King George the Third* (1894), Vol. 3, pp. 207–208.

Meredith's most important speech on the reform of criminal law was that of 1777, delivered during the debate on the Bill to make arson in dockyards a capital offence; see below, pp. 474–476. Horace Walpole says that '. . . practice formed him (Meredith) to a manner of speaking that had weight and was worth attending to by those who had patience for it'; *op. cit.*, Vol. 1, p. 279. With the dissolution of Parliament in 1780 Meredith ceased to play a part in the political life of the country. He died in France on January 2, 1790. He lived in great extravagance and in 1779 he was obliged to sell the family property at Henbury for £24,000.

[7] *Journals of the House of Commons* (1770–1772), Vol. 33, p. 365. On Bunbury see below, note 59 at p. 444 and pp. 473–474.

[8] *Ibid.*, p. 442.

[9] *Ibid.*, March 24, 1772, p. 612.

(2) 1 & 2 Ph. & M. c. 4—'An Act against certain Persons calling themselves *Egyptians*' (1554); (3) 5 Eliz. c. 20—'An Act for further Punishment of Vagabonds, calling themselves *Egyptians*' (1562); (4) 35 Eliz. c. 1—'An Act to retain the Queen's Majesty's Subjects in their due Obedience' (1593); (5) 9 Anne, c. 16—'An Act to make an Attempt on the Life of a Privy Counsellor, in the Execution of his Office, to be Felony without Benefit of Clergy' (1710); (6) 9 Geo. 2, c. 29—'An Act for building a Bridge cross the River *Thames*, from the *New Palace Yard* in the City of *Westminster*, to the opposite Shore in the County of *Surrey*' (1736); (7) 21 Jac. c. 27—'An Act to prevent the Destroying and Murthering of Bastard Children' (1623); (8) 39 Eliz. c. 9—'An Act for taking away of Clergy from Offenders against a certain Statute made in the third Year of the Reign of King *Henry* the Seventh, concerning the Taking away of Women against their Wills unlawfully' (1597).

During the debate in the House of Commons which followed a few days later,[10] Harbord expressed his dissatisfaction, in a short but forcible speech, with the then existing state of the criminal law, observing that several laws which had been enacted as temporary measures still remained in force, although the original causes had long since ceased to exist, whereas others imposed punishments entirely inadequate to the respective crimes. When enforced these laws were a grievance, and if not enforced, 'exposed our magistrates and judges to the charge of dispensing with law and disregarding their oath, which enjoined a strict observance of the law; that hence many criminals escaped the punishments due to their crimes, the magistrates fluctuating between the fear of the imputation of cruelty or of perjury'.

Observations on the Committee's proposals

The list of statutes which the Committee presented for revision was the first of its kind in the history of the movement for criminal law reform. Before examining the debate which followed it may therefore be relevant to make a few observations on the nature of the statutes concerned. The first thing

[10] *Parl. Hist.* (1771–1774), Vol. 17, April 19, 1772, cols. 448–458.

to be noted is the absence of any capital statute relating to crimes against property, even if committed without violence or burglarious breaking in. At the time when the proposals of Sir Charles Bunbury's Committee were formulated, numerous statutes were in force appointing capital punishment for a variety of minor thefts, such as, for instance, pocket-picking.[11] Since none of these statutes was included in the list, the Committee probably felt that the abolition of the death penalty even for the less serious economic offences could not yet be contemplated.[12]

Otherwise the list was most heterogeneous: two statutes were concerned with the punishment of gipsies, one with the protection of a bridge, one with a political offence, and yet another with offences against morality and sex. The subject of the remaining two was the punishment of two widely different forms of murder: attempted murder of a privy councillor in the execution of his office and the murder of a bastard child by its mother. These statutes seem to have had little in common except that they had long since fallen into disuse. It is clear that the Committee's approach to the reform of criminal law was very cautious.[13]

§ 4. PROPOSALS REJECTED BY THE HOUSE OF COMMONS:

(1) MURDER OF BASTARD CHILDREN BY THEIR MOTHERS (21 JAC. 1, C. 27).

The House of Commons did not adopt this list in its entirety, but after a lively discussion rejected two of the proposals it embodied.

Salient features of the Act

The first statute which—after a debate—was removed from the list of those to be revised was 21 Jac. 1, c. 27, entitled 'An Act to prevent the Destroying and Murthering of Bastard Children'. This was indeed a remarkable law not only

[11] 8 Eliz. c. 4.

[12] Nor was any reference made to any of the extremely severe provisions of the Waltham Black Act; see on this statute above, pp. 49–79.

[13] The *Parliamentary History* contains no information as to why the Committee selected these particular Acts from among the approximately two hundred capital Acts then in force. On an earlier suggestion to repeal some of these Acts see above, note 13 at pp. 263–264.

because it was capital but also because certain important issues of criminal jurisprudence were involved in it. According to the preamble the reason for passing the law was that 'Women that have been delivered of Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury, and conceal the Death of their Children, and after, if the Child be found dead, . . . alledge that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murthered by the said Women'. To prevent this mischief 21 Jac. 1, c. 27, enacted 'That if any Woman . . . be delivered of any Issue of her Body, . . . which being born alive, should by the Laws of this Realm be a Bastard, and that she endeavour privately, either by drowning or secret burying thereof, or any other Way, either by herself or the procuring of others, so to conceal the Death thereof, as that it may not come to Light whether it were born alive or not, but be concealed: In every such Case the said Mother so offending shall suffer Death as in Case of Murther, except such Mother can make Proof by one Witness at the least, that the Child (whose Death was by her so intended to be concealed) was born dead'.

The statute was one of the few in English criminal law which were framed contrary to the principle of presumption of innocence. It declared that concealment of the birth of a bastard child constituted a presumption of the mother's guilt in having murdered that child. Moreover the *onus probandi* was put on the accused, for the mother could escape this very serious accusation only by proving that the child whose birth she had tried to conceal had been born dead. The legal structure of the Act was thus defined by Kelyng who, together with Bridgeman, C.B., and Wylde, Recorder of London, tried the case of *Ann Davis* indicted under 21 Jac. 1, c. 27: '. . . For Murder was an Offence at Common Law; and the Statute declareth, that where the Child is concealed, it shall be taken to be born alive, and if it be dead it shall be taken, that it was murdered, and so the Statute does not make a new Offence, but maketh a Concealment to be an undeniable Evidence that she murdered it[14]; . . .'.

[14] (1662), Kel. 32.

The Act was defended by Blackstone who, while admitting its extreme severity, endeavoured to justify it by the state of the law on this subject in other countries and also on the ground that great precautions were always taken before a verdict of guilty was given. 'This law'—he writes [15]—'which savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French. But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child whose death is concealed, was therefore killed by its parent) is admitted to convict the prisoner'.[16] Much more outspoken criticism comes from Barrington: 'This hath by many been considered as a law of severity, because it substitutes presumption of guilt, in the room of actual proof against the criminal. I should conceive that it arose from the difficulty of proving the offence against the mother, rather than an intention to make the bare concealment arising from a mistaken shame amount to a capital felony. I conclude it must have frequently happened in these prosecutions, that the child being found dead (perhaps in the mother's room), she insisted upon its having been born in that state, of which no witness being able to prove the contrary, she was of course acquitted. If the dead child, however, was discovered with any apparent marks of violence upon it, I should apprehend that this, with other circumstances, might have proved the guilt, even at common law, without the intervention of this statute; and I rather mention this, as I should think, no execution should be permitted, unless the criminal, convicted under this act, would have been guilty of murder by the common law, as she is otherwise to suffer merely from the presumption *arising from the circumstance of*

[15] 4 Comm. 198.

[16] According to Paley, this statute, 'though a harsh law, was . . . well calculated to put a stop to the crime'; *Principles of Moral and Political Philosophy* (ed. of 1917), p. 426.

concealment, of which it is believed there is no other instance in the English law '.[17]

Apart from being incompatible with the fundamental principle of presumption of innocence, 21 Jac. 1, c. 27, also raised delicate moral issues. Under 18 Eliz. c. 3, two justices residing in or next the limits of the parish in which a bastard was born, were empowered to order the punishment of the mother and reputed father and could also order them to pay for the upkeep of the child. Failing such payment the father or mother could be committed to the common gaol, unless or until security were given for the performance of this order or for their appearing at the next general sessions of the peace.[18] The Act referred to both the father and mother, but in view of the difficulty—and often impossibility—of ascertaining the identity of the father, its economic and penal consequences were in fact borne by the mother.[19] As Sir George Nicholls remarks, ' the penalties are imposed alike on both the parents, but the burthen would fall with most certainty and most heavily on the mother '.[20] Yet another statute, 7 Jac. 1, c. 4, s. 7, provided that when an illegitimate child becomes chargeable to the parish the mother can be committed to the house of correction for one year and in the case of a second offence, until such time as she finds securities never again to commit the offence. The inevitable effect of these laws was to make 21 Jac. 1, c. 27, even more severe and socially unjustifiable.

The courts and the Act

21 Jac. 1, c. 27, was hardly ever put into operation although at that time the English Legislature was not alone in considering the crime to which it related a very serious one.[21] The cumulative effect of the decisions given in cases tried under the Act was to narrow considerably its scope. Thus

[17] *Observations on the more ancient Statutes* (3rd ed. 1769), pp. 488–489.

[18] The statute does not mention the punishment to be awarded in such cases; according to Blackstone, who follows on this point the opinion of Dalton, it was then agreed that corporal punishment was intended; 4 Comm. 65.

[19] This point was raised in the House of Commons during the debate on the Committee's proposals; see below, p. 435.

[20] *A History of the English Poor Law* (ed. by H. G. Willink, 1898), Vol. 1, pp. 238–239.

[21] Barrington, *op. cit.*, pp. 489–490, quotes the criminal codes of Sweden, Denmark and France, which all punished this offence by death.

if the mother—when giving birth—called for help or confessed that she was about to have a child, it was held that the case was outside the law since no concealment could be proved, and it therefore rested with the prosecutor to prove that the child had been born alive and had been murdered. Similarly the case was taken out of the Act if it was shown that prior to her delivery the mother had in her possession any child-bed linen or other similar articles. When the child had been born before its time and from circumstances attending its birth it could be proved that it had had no hair or nails, these facts were declared to constitute presumptive evidence that it had been born dead, and again the law was not put into operation. Further, according to the practice followed in many cases before the presumption that the child whose death had been concealed had been killed was admitted, some sort of presumptive evidence that it had been born alive was required. Finally in the case of *Jane Peat*, Heath, J., declared that there can be no concealment by the mother within the statute if any person be present, *though privy to the guilt*, and such a case stands therefore as at Common Law.[22] Commenting upon the decisions given in cases tried under this statute East observes that this 'very severe law, has been always construed most favourably for the unfortunate object of accusation'.[23] Even more exact was Eden when he wrote that 'the modern exposition of this statute is a good instance, that *cruel laws have a natural tendency to their own dissolution in the abhorrence of mankind*', and that the 'humane deviations from the harsh injunction of the statute have merely amounted to a tacit abrogation of it'.[24]

Arguments against and in favour of repeal

When the Committee's proposal to revise this statute came up for discussion in the House of Commons, opinion was divided.[25] In defence of the Act it was said that it had been enacted by

[22] See on these constructions, Hale, 2 P.C. 288–289; Blackstone, 4 Comm. 198; Eden, *Principles of Penal Law* (2nd ed. 1771), note t, pp. 15–16; East, 1 P.C. 228–229.

[23] East, *ibid.*, p. 228.

[24] Eden, *ibid.*, pp. 15 and 16. 21 Jac. 1, c. 27, was nevertheless prolonged by 16 Car. 1, c. 4.

[25] *Parl. Hist.* (1771–1774), Vol. 17, cols. 451–453.

a highly esteemed Parliament, that it had been considered many times before being passed as a temporary measure, and had been made permanent only after three further amendments. It was very difficult to establish the proof of the crime and one of the aims of the statute was to make this easier. Moreover, since the practice of destroying children is detrimental to the population and to the country, the Legislature was justified in making every possible provision against it. Similar provisions were in force in other countries, particularly in Denmark, Sweden and France. Thus according to this section of the Commons the advantages of the Act greatly outweighed its disadvantages, particularly since the courts seldom or never put it rigorously into force, but used a discreet latitude.

Among those who urged the repeal of what they felt to be an unwise, inconsistent and unjust law were Burke, Fox, Harbord and Sir William Meredith. Their main arguments were (1) that 21 Jac. 1, c. 27, appointed a severe penalty for a deed largely encouraged by earlier statutes by which women who had bastard children were liable to be punished by flagellation and imprisonment. Nothing—it was argued—could be more unjust or inconsistent with the principles of all law than first to force a woman through modesty to concealment, and then to hang her for that concealment. (2) It was infinitely better that ten guilty persons should escape rather than one innocent person suffer, whereas this law asserted that ten innocent persons should be hanged so that one guilty person should not escape. (3) The concealment of the birth of a bastard might proceed from the best motives, from real modesty and virtue. (4) The admitted non-use of this statute by the courts was yet another argument in favour of its repeal, for 'nothing could more strongly prove the absurdity and inexpediency of the law than the impossibility of putting it in execution, under which the judges found themselves'. (5) It was submitted finally that such despotic countries as Denmark and France should not be regarded as models for England. The House divided and the motion urging the repeal of the statute was negatived.[26] 21 Jac. 1,

[26] Two other attempts to repeal this Act were made at about the same time. In both cases the matter was taken up in the Commons by Mr. Lockhart, but

c. 27, continued in force until 1808, when it was replaced by 48 Geo. 3, c. 58, s. 3, which fundamentally altered the legal structure of the offence, in accordance with the general principles of English criminal jurisprudence.[27]

§ 5. PROPOSALS REJECTED BY THE HOUSE OF COMMONS: (2) FORCIBLE ABDUCTION (3 HEN. 7, C. 2; 39 ELIZ. C. 9)[28]

The scope of the Acts

The two statutes concerned with this crime against morality and sex supplemented each other as regards the legal definition of the offence and the responsibility of accessories, aiders and abettors. 3 Hen. 7, c. 2, recited that 'Where Women, as well Maidens, as Widows, and Wives, having Substances, some in Goods moveable, and some in Lands and Tenements, and some being Heirs apparent unto their Ancestors, for the Lucre of such Substances, been oftentimes taken by Mis-doers, contrary to their Will, and after married to such Mis-doers, or to other by their Assent, or defoiled'. The statute then enacted 'That what Person or Persons from henceforth that taketh any Woman so against her Will unlawfully, that is to say, Maid, Widow, or Wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same Woman so taken against her Will, and knowing the same, be Felony; and that such Mis-doers, Takers, and Procurators to the same, and Receitors, knowing the said Offence in Form aforesaid, be . . . judged as principal Felons'.[29] The act thus defined by 3 Hen. 7, c. 2, was made a capital non-clergyable offence by 39 Eliz. c. 9. This statute referred to the definition embodied in the statute of Henry VII and then stipulated 'That all and every such Person and Persons, . . . as shall be convicted or attainted of any Offence . . . made Felony

his 'Bastard Children Act to repeal' Bill, though passed by the Commons, was twice rejected by the Lords; *Journals of the House of Lords* (1770–1773), Vol 23, June 1, 1772, p. 445, and *ibid.*, June 28, 1773, p. 692. *Parliamentary History* does not record any debate on these two Bills in either House.

[27] Below, note 39 at p. 506.

[28] This proposal was No. 8 on the list brought forward by the Committee; see above, p. 429; reference to the two statutes in question has been made also below, p. 632.

[29] The Act was not to extend to any person taking any woman claiming her as his ward or bond-woman.

by the said Act, . . .[30] or who shall be indicted and arraigned of or for any such Offence, and stand mute, or make no direct Answer, or shall challenge peremptorily above . . . twenty, shall in every such Case . . . suffer Pains of Death without any Benefit of Clergy'. Section 2 added that nothing contained in the Act shall 'extend to take away the Benefit of Clergy, but only from such Person and Persons as . . . shall be Principals, or Procurers, or Accessories before such Offence'.

On the question of the legal responsibility of auxiliaries to the offence, the two Acts of 3 Hen. 7, c. 2, and 39 Eliz. c. 9, were to some degree contradictory. The first referred to persons found guilty of procuring and abetting the same (*i.e.*, taking away a woman against her will), and also 'receiving wittingly the same Woman, so taken against her Will, and knowing the same, be Felony'; and declared that not only 'the Takers' but also the 'Procurators to the same, and Receitors' are to be considered as principal felons. The second Act provided by section 2 that it 'shall not extend to take away the benefit of clergy, but only from such person or persons as shall be Principals or Procurers or Accessories before such Offence committed'. The first—and firmly established—conclusion which emerges from these two enactments is that accessories before the fact, like principal perpetrators, were deprived of their clergy. It was, however, doubted whether 39 Eliz. c. 9 also deprived of benefit of clergy persons 'receiving wittingly the Woman so taken against her Will, and knowing the same', who were declared principal felons by 3 Hen. 7, c. 2. Since 39 Eliz. c. 9, s. 2, declared that benefit of clergy was to be taken away from principals or procurers, or accessories before such offence committed, and since 3 Hen. 7, c. 2, declared that persons receiving such women were principal felons, Hale was inclined to think that such 'receitors' were deprived of their clergy, the two Acts being inter-connected. He was, however, not convinced whether this was the right construction.[31] East, on the other hand, maintained that those who receive the woman do not come within the capital law, such persons belonging rather to the category of accessories after the fact who are not deprived of

[30] 3 Hen. 7, c. 2.
[31] 1 P.C. 661.

benefit of clergy by section 2 of 39 Eliz. c. 9.[32] While this remained a moot point, it was generally agreed that persons who receive the *offender* were entitled to benefit of clergy,[33] as were those who, though privy to the marriage, were neither parties nor consenters to the forcible taking away of the woman.[34]

Abduction of heiresses was frequent in more remote times and Pike includes it among the crimes 'which lie on the border-land between those which veneration for the past ranges in the class of the chivalrously venial and those which in modern times are considered unchivalrously mean'.[35] Until 3 Hen. 7, c. 2, was passed no adequate provision for the punishment of this offence had existed.[36]

Their interpretation by the courts

Though it may appear that the above-mentioned statutes clearly defined the offence, in practice delicate issues had arisen and were determined by judicial interpretation. The basic elements of the offence are that the woman must be taken against her will[37] by force or fraud and must be married or defiled. The important point which arose was whether a case could be within the statute if a woman carried away against her will had later consented to the marriage or to sexual intercourse. This was decided in the affirmative. Summing up the evidence in the case of *Haagen Swendsen*, Holt, C.J., said: 'You are to know, that if she be taken away by force, and afterwards married, though by her consent, yet is he guilty of felony: for it is the taking away by force that makes

[32] 1 P.C. 453, § 2.

[33] At Common Law they were accessories after the fact; Hawkins, 1 P.C. 311, Sect. 9.

[34] *Fulwood's Case* (1637), Cro.Car. 488, 489.

[35] *History of Crime* (1873), Vol. 1, p. 260. Pike quotes a case which appeared in the records of criminal proceedings in the year before the Black Death and which, as he writes, 'throws some light upon the treatment of heiresses who were frequently carried off by violence . . .'.

[36] As it was put by the Solicitor-General in the case of *Haagen Swendsen*, 'it was formerly reckoned a less crime to steal a fortune of £10,000 than to steal 12d. of her money or goods; but in the third year of the reign of King Henry 7, to cure this defect in the law, an act of parliament was made, whereby the taking away a woman, having goods or lands, or being an heir apparent, contrary to her will, and afterwards marrying her, is made a felony, and upon this law the present indictment is grounded'; (1702), 14 St.Tr. 559, 561.

[37] Coke, 3 Inst. 61; Blackstone, 4 Comm. 208.

the crime, if there be a marriage, though by her consent'.[38] Or as Hawkins puts it, 'the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power'.[39]

On the other hand it would seem that the offence was not legally constituted if neither marriage nor defilement had ensued. The Act contained no specific provision to this effect but according to Coke it had to be interpreted on this point in conjunction with the preamble. The Act referred to a person 'so' taking any woman etc.,[40] and in *Baker's and Hall's Case* it was determined that 'this word (*so*) relates to the quality and event of the taking mentioned in the preamble, *scil.* "to be married or defiled"; for if she be not married or defiled, it is not such a taking (*so*), *id est*, so married, or so defiled; and it is not reasonable that (*so*) shall have relation to the taking, which is more remote, and not to the marriage or the defiling, which is nearer, *quod fuit concessum, etc.*; . . .'.[41]

It was not necessary to allege in the indictment that the taking away had been effected with intent to marry or defile the woman.[42] The law was also made applicable when the woman taken away against her will had been married or defiled not by the person who had carried her away but by another, with his consent.[43] When the taking away and the marriage (or defilement) had taken place in different counties, it was decided that if a woman were forcibly taken away in one county but afterwards went voluntarily into another and was there married with her own consent, the fact could not be

[38] 14 St.Tr. 595. See also *Brown's Case* (1673), 3 Keb. 193.

[39] 1 P.C. 311, Sect. 8. In the case of *Swanson, Baynton, Hartley and Spurr* the court determined that 'though perhaps she consented to the marriage, yet the said fact was a crime within the statute; for here was a forcible taking away, and her subsequent consent, while under the restraint, could not be looked upon but an effect of the continuing force . . .'; (1702), 7 Mod. 102.

[40] For the preamble and the body of the law, see above, pp. 436–437.

[41] (1612), 12 Co.Rep. 100; see also 12 Co.Rep. 20. Similarly Hale, 1 P.C. 660, and Blackstone, 4 Comm. 208. But in the case of *Fulwood* (1637), Cro.Car. 489, one of the judges expressed a contrary view.

[42] The case of *Fulwood* (1637), Cro.Car. 488. But Hale observes that it is safer to mention that intention in the indictment; 1 P.C. 660.

[43] This was explicitly provided by 3 Hen. 7, c. 2.

indicted because the offence was not legally constituted in either county. But if when the woman found herself in the second county there was a continuation of force on the part of the person who carried her away, he might be indicted, even if the woman had consented to the marriage or defilement.[44] For obvious reasons it was held that the evidence of a woman married in such circumstances should be admitted though she was *de facto*, but not *de iure*, the wife of the offender.[45]

The crucial circumstance on which the application of the statute depended was that the woman carried away against her will had to have substance of goods or lands, or be an heiress apparent.[46] This was not explicitly stated in the enacting part of the statute but could be inferred from it in conjunction with the preamble. This interpretation, which was unanimously accepted by the courts, raised doubts as to the social and moral justification of the Act. Before passing to this issue, however, it is necessary to indicate the main postulates on which this interpretation rested.

The matter was raised and fully discussed in the case of *Baker and Hall*[47] and in *Bruton* v. *Morris and Others*.[48] In the first case it was determined by Coke and all the judges that 'whereas it is provided, that what person soever who takes a woman so against her will, etc. although that the body of the Act extend to taking only, yet in respect to this word (*so*) it hath relation to the preamble (to such a person as is described in the preamble, *scil.* having substance) it was agreed by all, that if the wife hath nothing, nor is heir apparent, it is out of the statute, for the statute would not have been so curious in describing the person, and all in vain'. In *Bruton* v. *Morris and Others*, Bruton's twelve-year-old daughter was taken away from her parents' house, and carried by means of force and threats into another county by Morris, who there married her. During the trial it appeared that Bruton also

[44] Hale, 1 P.C. 660; East, 1 P.C. 453, Sect. 3. In this second alternative the establishment of the continuation of force was, however, essential. See on this the interesting case of *Lockhart Gordon and Loudon Gordon* (1804); Russell, *On Crimes* (1819), Vol. 1, pp. 821–827.

[45] *John Brown's Case* (1673), 1 Vent. 244.

[46] Coke, 3 Inst. 61; Hale, 1 P.C. 660; Blackstone, 4 Comm. 208.

[47] (1612), 12 Co.Rep. 100.

[48] (1615), Hobart 182.

had a son and that the daughter was neither an heiress apparent to her father, nor had lands or goods. The court decided that the case was not within the law on the ground that 'the preamble of the statute[49] could not be thought to be idle, but meant to restrain the purview to the particular cases of the preamble in the enumeration of the women, and their estates and conditions; . . .'. This construction—it was held—faithfully expresses the meaning of the law 'as being like to be the common case; for men will not commonly steal women that are nothing worth', and shows that the word *so* which figures in the body of the law 'did implicitly bind up the preamble in the purview, for else the word (*so*) were idle, and might be spared, if it did not include the motive and end of the action, which is a part of every action, as being the cause of it, which in this case are lucre and luxuriousness'. It was considered further that the question of whether the marriage or defilement was necessary for the completion of the offence, because 'the motive of lucre is more incorporate into the act of taking, as being a precedent and an efficient cause of it, than the marrying or deflowring, which is an accident following after the act, and perhaps was not proposed, when he took her away', should be similarly resolved.

This exposition, which was consistently followed by the courts, left outside the Act the forcible marriage or defilement of women who had no substance, thereby inevitably lessening the social and ethical value of the statute. 'Of forcible Marriage, etc. it is observable', writes Dagge, 'that by confining the offence to women of estate only, moral principles are made to yield to political considerations; and the security of property is deemed more essential than the preservation of female chastity. . . . This act we find makes the property of the woman the measure of the crime. . . . If the law had been made general, their security would have been included, and the principles of morality would not have been violated by the distinction'.[50]

[49] 3 Hen. 7, c. 2.

[50] *Considerations on Criminal Law* (1772), pp. 378 and 379. Dagge suggests also that cases when the forcible taking away was followed by defilement and those when it was followed by marriage should have been treated differently; *ibid.*, pp. 379–380.

Debate in the House of Commons: Fox in favour of repeal, Burke against it

The Committee responsible for putting forward the proposed revisions, unanimous as they were in supporting the repeal of 21 Jac. 1, c. 27 concerning the murder of bastard children by their mothers, were yet divided as regards the repeal of 39 Eliz. c. 9. The House of Commons' debate on this subject is only briefly recorded but it does throw some interesting light on the line of approach of both supporters and opponents of the proposal. The recommendation was ultimately rejected despite the support given to it by Fox, Phipps and Harbord. They pointed to the difficulty of determining whether a woman had been carried away with or without her consent, and contended both that the punishment provided for rape was an adequate safeguard against this sort of violence and that the Act, as it was worded, made the principal and accessory equally guilty, which was not just. In rejecting the motion for repeal, the House seemed to follow Burke and Ongley, who held that no crime could be more atrocious than a rape of this sort, its consequences being even worse than those of murder, since they insuperably connected the aggrieved woman with the person she abhorred.[51]

§ 6. THE 'PENAL LAWS BILL'

Apart from the two proposals examined in the foregoing paragraphs, which were negatived, the remaining six of the eight embodied in the Committee's list[52] were adopted without a division. Thus the House of Commons proposed the revision of six capital statutes. The proposals would seem to have been very favourably received by the House, and were either not discussed at all or only briefly commented upon. The repeal of 7 Hen. 7, c. 1, for instance, was agreed on the ground that it had been rendered useless by the annual Mutiny Acts. Likewise, the proposal to abrogate the two statutes concerning Egyptians[53] also met with no opposition, Mr. Harbord observing that neither was founded on the principles of common justice, since it was not the name but

[51] *Parl. Hist.* (1771–1774), Vol. 17, cols. 450–451.
[52] Above, pp. 428–429.
[53] 1 & 2 Ph. & M. c. 4; 5 Eliz. c. 20.

the conduct of a man that rendered him a criminal. If the people called Egyptians were guilty of any breach of the law, the same regular procedure lay open for punishing them as for punishing other delinquents.[54] Of the remaining three statutes which were to be abrogated, 35 Eliz. c. 1 was one of the many Elizabethan statutes passed in the supposed interest of the protestant religion. By section 2 it provided that any person who obstinately refuses to come to church, persuades others to impugn the Queen's authority in ecclesiastical causes or is present at unlawful conventicles for religion, and who refuses to conform himself to the laws of the realm, must leave the country. By section 3, a person refusing to

[54] One member of the House, Mr. Ongley, defended these Acts on the ground that in a certain part of Kent there was a body of Egyptians who were frequently accused of committing offences but could not be punished because 'the obscure and mystical language, which prevailed among them, made it frequently impossible to procure evidence, or arraign them more than if they were dumb'; *Parl. Hist.* (1771–1774), Vol. 17, col. 449.

1 & 2 Ph. & M. c. 4, appointed the death penalty without benefit of clergy for gypsies brought into the country and who remained there for a month. But it also contained a more liberal provision (sect. 7) which excluded from the Act those who 'shall leave that naughty, idle and ungodly Life and Company, and be placed in the Service of some honest and able Inhabitant or Inhabitants within this Realm, or that shall honestly exercise himself in some lawful Work or Occupation'. This Act was made permanent by 5 Eliz. c. 20, which extended the extreme penalty to those who are found in the company of gypsies. But again, by s. 5, it was provided that the Act should not apply to those who were born in the country; they were not compelled to depart. It would appear that gypsies came over to England for the first time in 1512 and in the reign of Queen Elizabeth they numbered about 10,000. They were regarded as a 'classe dangereuse'. 22 Hen. 8, c. 10, described them as 'an outlandish People calling themselves *Egyptians*, using no Craft nor Feat of Merchandise, (who) have come into this Realm, and gone from Shire to Shire, and Place to Place, in great Company; and used great, subtil, and crafty means to deceive the People, bearing them in Hand, that they by Palmestry could tell Mens and Womens Fortunes, and so many Times by Craft and Subtilty, have deceived the People of their Money, and also have committed many heinous Felonies and Robberies'. Burnet states in his *History of the Reformation* that on June 22, 1549, 'there was privy search made through all Sussex for all vagabonds, Gypsies, conspirators, prophesisers, players, and such like'. The above-mentioned laws were passed with a view to repressing the anti-social and criminal activities of the gypsies and to preventing their further immigration; see on this John Hoyland, *A Historical Survey of the Customs, Habits, etc., Present State of the Gypsies, etc.* (1816), p. 79 *et seq.*, and Walter Simson, *A History of the Gypsies, etc.* (1865), p. 90 *et seq.* Another author, Samuel Roberts, considers that in modern times the danger of the gypsies was greatly exaggerated: 'If we examine the character and conduct of the Gypsies, as they exist this day in England, they will be found to be much less objectionable than is generally imagined; the same observation, I believe, will apply, in a great measure, to those in all other countries. They appear to me to be a people "more sinned against than sinning"'; *The Gypsies* (1842), p. 82.

depart or returning without licence was declared to be a felon and was to suffer death without benefit of clergy. 9 Anne, c. 16, was passed following the stabbing of the Rt. Hon. Robert Harley by Anthony de Guiscard (a French papist) who at that time (1710) had been under examination before the Privy Council.[55] The Act appointed the death penalty without benefit of clergy for unlawfully attempting to kill, or unlawfully assaulting and striking or wounding, 'any Person, being one of the most honourable Privy Council of her Majesty, her Heirs, or Successors, when in the Execution of his Office of a Privy Counsellor in Council, or in any Committee of Council'. Finally 9 Geo. 2, c. 29, was one of the many Acts passed to ensure the protection of bridges. It declared it a capital, non-clergyable offence wilfully to destroy or damage the bridge over the river Thames in the city of Westminster.[56]

The framing of the Bill implementing the adopted resolutions was entrusted to a Committee [57] composed of Sir William Meredith,[58] Sir Charles Bunbury,[59] Mr. Herbert, Charles Fox, Sir George Savile,[60] Serjeant Glyn [61] and Captain Phipps.[62]

[55] The same Act indemnified all those who then being present gave wounds to Anthony de Guiscard, of which he died.

[56] On other similar statutes see below, p. 621.

[57] *Journals of the House of Commons* (1770–1772), Vol. 33, April 14, 1772, p. 695.

[58] On Sir William Meredith see above, note 6 at pp. 427–428 and below, pp. 474–475.

[59] Thomas Charles Bunbury was known as 'a notable patron of the turf'; A. S. Turberville, *English Men and Manners in the Eighteenth Century* (1926), p. 80. According to G. F. Russel Barker, he is said to have possessed the finest-bred stud in the kingdom, and owned the winner of the Derby in 1780, 1801 and 1813; Horace Walpole, *Memoirs of the Reign of King George III* (1894), Vol. 1, p. 85, note 1. He was a Member of Parliament for the county of Suffolk 1761–1784 and 1790–1812. He married Lady Sarah Lennox and died in 1821, aged eighty. Sir Charles Bunbury was very much interested in prison reform and the system of transportation, and took an active part in several debates on these matters in the House of Commons. Together with Eden, Howard and Blackstone, he was a member of the Committee which framed 19 Geo. 3, c. 74 —one of the most important laws in the history of the prison system. More will be said about Sir Charles Bunbury's work in this field in a subsequent volume of this *History*.

[60] Sir George Savile (1726–1784) 'was a staunch whig of unimpeachable character and large fortune. He devoted the whole of his time to public affairs, and was greatly respected by his contemporaries for his unbending integrity and his unostentatious benevolence'; *D.N.B.*, XVII, 855. 'He had a head', writes Horace Walpole, 'as acutely argumentative as if it had been made by a German logician for a model'; but, 'though his reason was sharp, his soul

[61], [62] For notes see p. 445.

This measure, entitled *An Act to repeal several Acts of Parliament, so far as the same inflict Capital Punishments for certain Offences* and better known by the shorter title of the *Penal Laws Bill*, was brought before the House of Lords on May 21, 1772.[63] The *Parliamentary History* does not record the debate which took place on that occasion, but according to Sir Samuel Romilly the Bill 'was lost in the Lords by the prorogation of Parliament, though the first authorities in that House agreed that five out of six of the Acts reported ought to be repealed'.[64]

It has been mentioned already that some fifty years later Sir James Mackintosh referred to the Committee of 1750[65] in his great speech in the House of Commons. On the same occasion Mackintosh also referred to the *Penal Laws Bill* of 1772, and remarked that 'it met with no hostility from the great ornaments of the House of Lords of that day, Lord

was candid, having none of the acrimony or vengeance of party; thence he was of greater credit than service to that in which he listed'; *Memoirs of the Reign of George III* (1894), Vol. 1, p. 279. He was in favour of religious emancipation; during the Gordon riots his house in Leicester Fields was plundered and burned because he was responsible for the Roman Catholic Relief Act of 1778. A few days before Burke introduced his great project of economic reform, Savile presented a petition on the same subject. Burke held him in the highest esteem.

[61] 'Mr. Serjeant Glyn has just left me',—wrote Lord Chatham to Dr. Calcraft—'I find him a most ingenious, social, pleasing man, and the spirit of the Constitution itself'. In 1763 Glyn was made a Serjeant-at-Law, in 1764 Recorder of Exeter, and in 1772 Recorder of London. He made his reputation as Wilkes' advocate. He was very sincere and consistent in his political convictions, and one day when the King asked Wilkes about his old friend Serjeant Glyn the former replied: 'My *friend*, Sir!—he is no friend of mine; he was a Wilkite, Sir, *which I never was*'. Glyn took part in the trial of 1764 which had followed the republication of the 'North Briton' in volumes; he was also John Almon's advocate. His brilliant defence secured the acquittal of Miss Butterfield, accused of poisoning William Scawen. In 1770, as a Member for Middlesex, he moved for a committee to inquire into the administration of justice in cases relating to the press, and to settle the power of juries. He was a leading member of the 'Society of the Bill of Rights' which, in 1770, addressed a letter to the American Colonies inciting them to rebellion. Glyn was much respected for his great abilities of pleading and his knowledge of law as well as for his speeches in Parliament; see H. W. Woolrych, *Lives of Eminent Serjeants-at-Law* (1869), Vol. 2, pp. 572–604, and *D.N.B.*, VIII, 12–13.

[62] Afterwards Lord Mulgrave. He had a brilliant naval career. As a politician he identified himself with the 'King's friends'; Sir George O. Trevelyan, *History of Charles James Fox* (1880), p. 334.

[63] *Journals of the House of Lords* (1770–1773), Vol. 33, p. 434.

[64] *The Speeches of Sir Samuel Romilly in the House of Commons* (1820), Vol. 1, p. 50.

[65] *Parl. Deb.* (1819), Vol. 39, cols. 780–781; also above, p. 423.

Camden and Lord Mansfield; but it was successfully opposed by others, whom I will not name, and whose names will be unknown to posterity '.[66]

§ 7. THE MOTION OF 1787 FOR THE APPOINTMENT OF A COMMISSION OF INQUIRY OPPOSED BY PITT

A further unsuccessful attempt at the reform of criminal law was made in 1787.[67]

Mr. Minchin, seconded by Mr. Sloper, moved ' that leave be given to bring in a Bill, to appoint certain persons therein named, to examine into the state of all the Penal Laws now in force in this Kingdom, and report their opinion thereon to this House '.[68] It should be noted that Minchin did not ask for the appointment of a Parliamentary Committee but envisaged ' a commission in the manner of a commission of public accounts, to consist of professional men . . . to make the necessary inquiry, from whence the principles of the sort of reform most fit to be adopted could arise '. Minchin's chief justification for the proposed motion was the striking lack of proportion between the gravity of offences and the punishments then appointed for them. He grouped all offences into three classes: (1) High and petty treason, and murder for which—he thought—the death penalty ought to be retained. (2) Certain aggravated offences against property such as burglaries, highway robberies and coining; this class of offences being less homogeneous, he considered that punishments too should be varied, especially in view of the great diversity of burglaries and robberies.[69] (3) What he called

[66] *Ibid.*, cols. 781–782.

[67] During the five years from 1783–1787, 717 persons were sentenced to death, of whom 348 were executed, in London and Middlesex only; see on this above, table, at p. 147. William Hunt relates that ' in 1783, at two consecutive executions, twenty persons were hanged together. Ninety-six were hanged at Old Bailey in ten months in 1785, and at the Lent assizes of that year there were twenty-one capital sentences at Kingston, twelve at Lincoln and sixteen at Gloucester, and in each town nine persons were hanged '; *The History of England, 1760–1801* (Vol. 10 of the ' Political History of England ', 1905), p. 266.

[68] *Parl. Hist.* (1786–88), Vol. 26, cols. 1056–1059.

[69] He criticised the singular severity of the coinage laws, saying that if a coining instrument were found in the custody of any man the *onus probandi* of his innocence lay upon him; failing to establish it, he was liable to be punished

subordinate crimes, such as larceny and simple felonies, which he found had especially disproportionate punishments. Minchin thus based his proposed revision of criminal law on a new classification of offences according to their gravity. Some thirty years later a similar method of approach to this problem was adopted by Sir James Mackintosh.[70] Minchin also drew the attention of the House to the fact that while some years earlier there had been 160 capital offences, 'since that period the number had increased very considerably, as every session of Parliament added a variety'.

Pitt, who replied for the Government, strongly deprecated the proposal. His answer to Minchin's speech is important, both because of the weight he carried in the councils of the State, and because his arguments were taken up and consistently repeated by all future opponents of reform. Pitt said[71]: 'That as the subject of the motion was perfectly new, as it embraced such an extensive system, and went to such very important consequences, he hoped the hon. gentleman would not persist in pushing it forward this session; . . . it would be extremely dangerous to take any step which might have the smallest tendency to discrediting the present existing system, before proper data and principles should be established whereon to found another. Such principles ought to be again and again considered before they should be adopted, and ought to be fully weighed and settled by those learned and able men who filled the highest stations in the Law department'.[72]

Mr. Minchin withdrew his motion, but before doing so pointed out that he had never intended the proposed commission to make final conclusions, but only to frame broad principles for reform for reference to the judges, with whom the ultimate decision would rest. He also declared that he had not brought the subject forward as a Party matter, nor

with death. To have in possession any instrument for coining was declared high treason by 8 & 9 Will. 3, c. 26. On this Act see below, p. 653. Paley was in favour of it; *Principles of Moral and Political Philosophy* (ed. of 1817), p. 426.

[70] *Parl. Deb.* (1819), Vol. 39, cols. 790 *et seq.*

[71] *Parl. Hist.* (1786–1788), Vol. 26, cols. 1058–1059.

[72] Pitt's views on this subject must have undergone a change; see above, pp. 342–343.

had he asked any of his friends to come down to support him.[73]

Thus no progress was made during the thirty-seven years since the question of the reform of criminal law was first considered in 1750. It was still generally believed that the death penalty, even if not carried out, should be upheld for a very considerable number of offences, and it was considered dangerous to expunge or amend even the obsolete capital statutes, some of which had not been acted upon for more than a century. The sustained work of, and the rich information accumulated by two Committees of Inquiry, who counted among their members some most enlightened and cautious men, brought no practical result, while the setting up of a third body was successfully resisted. But not only was no capital statute amended or abrogated and a number of new ones enacted, but the whole approach to these problems became regressive. In 1750 the question of the death penalty was viewed jointly with other comprehensive measures aiming at the better prevention of crime and the more effective punishment of criminals. In 1770 the scope of the Committee's inquiry was already much more circumscribed, while in 1787 the subject was authoritatively pronounced to be unripe for investigation and the mere proposal to initiate an inquiry was stifled. Pitt's view that any recommendation affecting the existing system of punishment 'ought to be fully weighed', and even 'settled', by the judges held little promise for an early revision of capital statutes,[74] for the majority of the judges were then against any such reform. It also raised the delicate constitutional issue of the relation between the Legislature and the judiciary and their respective competence to shape new laws.[75]

[73] Some years later Sir Samuel Romilly accused the government of the day of viewing his suggested penal reforms as a Party matter. In his *Memoirs* he mentions that he believed Members of the House of Lords were on one occasion solicited to vote against his Bill, and that, on another, Treasury letters were sent out requiring the attendance of country Members; see also note 35 at p. 505.

[74] It has been noted, however, that they administered those stringent laws in a most merciful manner; see above, Chap. 3, p. 83 *et seq.*

[75] In 1786, during a debate on Wilberforce's Bill concerning the disposal of the bodies of convicts after execution (see on this below, p. 476 *et seq.*), Lord Loughborough, then Lord Chancellor, said that no Bill bearing upon the criminal law should be brought forward without first being submitted to the judges, for, as he put it, 'the judges were the description of men most likely to discover any defects in the execution of the criminal justice of the country, if any such defects there were; and in that case it might be presumed they

It would be wrong, however, to assume that the Members of Parliament unanimously approved of the existing system of criminal justice. Voices of discontent were often raised and strictures passed by men of high standing and authority, whose efforts indeed achieved some practical effect. The legislative history of a number of Bills brought in during the last seventeen years of the eighteenth century throws an interesting light on a growing opposition in Parliament to excessively severe punishments.

were as competent to suggest a remedy as any other order of men who constituted a part of the mass of society'. In another passage of his speech he contended '. . . that the judges were the persons with whom alterations of the conduct of criminal justice ought to originate'. During the same debate Lord Sydney expressed his full agreement on this point with the Lord Chancellor and stated '. . . that all Bills affecting the criminal justice of the country ought to receive the approbation of the judges previous to their being proposed to Parliament'; *Parl. History* (1786–1788), Vol. 26, cols. 196, 199 and 201.

On this subject see also the letter which Lord Ellenborough wrote in 1807 to Sir Samuel Romilly and Romilly's comment upon it, below, pp. 509–511.

CHAPTER 14

GROWTH OF PUBLIC UNEASINESS: THE CASE OF DR. DODD

§ 1. THE FACTS OF THE CASE

'THE early Hanoverian period', writes Lecky, 'has, indeed, probably contributed as much as any other portion of English history to the romance of crime'.[1] The intense interest which throughout the eighteenth century the public took in the life of great criminals [2] reached its climax in the case of Dr. William Dodd.[3] Though Dr. Dodd's offence was more

[1] *History of England in the Eighteenth Century* (repr. of 1904), Vol. 2, p. 112.

[2] On August 2, 1750, Horace Walpole wrote to Horace Mann: 'I have been in town for a day or two, and heard no conversation but about M'Lean, a fashionable highwayman, who is just taken, and who robbed me among others; . . . His history is very particular, for he confesses everything, and is so little of a hero, that he cries and begs, . . . M'Lean had a lodging in St. James's Street, over against White's, and another at Chelsea; Plunket (his companion) one in Jermyn Street; and their faces are as known about St. James's Street as any gentleman's who lives in that quarter, and who perhaps goes upon the road too'. A few days later he wrote to the same correspondent: 'My friend M'Lean is still in fashion: have not I reason to call him my friend? He says, if the pistol had shot me, he had another for himself. Can I do less than to say I will be hanged if he is?'; *The Letters* (ed. by P. Toynbee, 1903), Vol. 3, pp. 5–6 and 13. And on another occasion he wrote, again to Horace Mann: 'M'Lean is condemned, and will hang. I am honourably mentioned in a Grub ballad for not having contributed to his sentence. There are as many prints and pamphlets about him as about the earthquake'; *ibid.*, p. 18.

Jack Sheppard, who died on the gallows before he was twenty-three years old, captivated public interest not by his numerous offences, but because he was a most successful prison-breaker. He was caught several times and each time he succeeded in escaping from captivity. He was the greatest prison-breaker ever known in the criminal annals of this country and it is this extraordinary feature which made his case a *cause célèbre*. Sheppard maintained that his dexterity was a sufficient reason for being pardoned by the King. When about to be hanged he was very much pitied by the prodigious crowd assembled at Tyburn. Sir James Thornhill painted his portrait. A pantomime was played at the Royal Theatre of Drury Lane called *Harlequin Sheppard* and a drama was published entitled *The Prison Breaker*. A great number of pamphlets about him also appeared during this period; *The Newgate Calendar* (1933), pp. 110–126.

[3] The *D.N.B.*, V, 1060, describes him as 'Dodd, William, forger'. The lively sketch about him is by Leslie Stephen. The author of a learned article in *The Times Literary Supplement* (Dec. 7, 1922), considers that 'the verdict is just', for 'if Dodd had not forged a bond he would not have gained admittance to the national museum'.

prosaic than the exploits of a Jonathan Wild, his case stands out in the history of the administration of criminal law in this period as perhaps the first to stir the public conscience, and to force it to question whether the absolute capital punishment was socially and morally justifiable for all the offences for which it was then appointed. Although Dodd's guilt was proved beyond doubt, and the legality of the verdict was not questioned, great pressure was exercised to prevent the carrying out of the sentence. The case thus marks a definite stage in the crystallisation of public opinion on the subjects of capital punishment and the royal prerogative of mercy.

Biographical background

Dodd was born on May 29, 1729, the son of William Dodd, a vicar of Browne in Lincolnshire. He was entered as a sizar at Clowe Hall, Cambridge, and after having published some poems, went to London. A few years later he married Mary Perkins whose reputation, according to Walpole, was somewhat doubtful. At first he sought to make a literary career, but on the advice of some of his friends he decided to enter the Church. In 1751 Dodd was ordained deacon and became curate at West Ham, Essex; afterwards he was appointed to a lectureship at West Ham and at St. James's, Garlickhythe. He quickly acquired the reputation of a popular preacher and took a leading part in sponsoring philanthropic enterprises. He was mainly responsible for the establishment of Magdalen House 'for redeeming Young Women who had swerved from the Path of Virtue'; of the 'Society for the Relief of Poor Debtors'; and of the 'Humane Society for the Recovery of Persons apparently Drowned'. He acted as a chaplain to Magdalen House and became fashionable in high and influential circles of the period.[4] Horace Walpole relates that he preached 'very eloquently and touchingly' in the 'French style', and that the 'lost sheep sobbed and cried from their souls'.[5] He became an editor of the *Christian's Magazine*

[4] On the good work he did for these establishments and his success as a preacher see Mrs. Papendiek, *Journals* (ed. by Mrs. V. D. Broughton, 1887), Vol. 1, pp. 80–81.

[5] *The Letters* (ed. by P. Toynbee, 1903), Vol. 4, pp. 347–348. Dr. A. Carlyle, who was present at one such sermon, thus comments upon it: 'The fellow (Dr. Dodd) was handsome, and delivered his discourse remarkably well for a

and in 1768 was appointed a chaplain to the King, as well as to Bishop Samuel Squire who at the same time gave him a prebend at Brecon and recommended him for the post of tutor to Philip Stanhope, Lord Chesterfield's heir. In 1766 he attained the degree of LL.D. He took a house in Southampton Row and another in the country to receive pupils of good families. The money his wife received through a legacy and a lottery ticket Dodd invested in a chapel in Pimlico called Charlotte Chapel, where he attracted a fashionable congregation.[6] He was a prolific writer though the value of his works was slight.[7]

In 1772, when travelling to London, he was stopped near a turn-pike by a mounted highwayman who shot at him through the window, but did no damage except breaking a pane. Some time later the robber was apprehended and brought to trial. Dodd appeared in the witness-box and on his evidence the prisoner was found guilty and sentenced to death. A month later he was executed.[8] The readiness with which Dodd brought about the conviction of this offender is somewhat surprising. In those days, even persons who had

reader. When he had finished, there were unceasing whispers of applause, which I could not help contradicting aloud, and condemning the whole institution, as well as the exhibition of the preacher, as *contra bonos mores*, and a disgrace to a Christian city'; *Autobiography* (ed. by J. Hill Burton, 1910), pp. 528–529.

[6] He established wide social connections. Thus, for instance, John Wilke notes in his Diary of Dinner Engagements (Jan. 24, 1777): '. . . Dined at Rev. Dr. Dodd's with the Doctor, Mrs. and Miss, Mr. Wraxall, De Lolme, etc.'; see W. P. Treloar, *Wilkes and the City* (1917), p. 287.

[7] 'Dr. Dodd', observes J. Nichols, 'possessed considerable abilities, with little judgment and much vanity. As a preacher, however, I can testify, from having frequently heard him with delight, that he was deservedly popular'; *Literary Anecdotes of the Eighteenth Century* (1812), Vol. 2, p. 381.

Some of Dodd's essays were widely known; see, for instance, Goethe's reference to Dodd's 'Beauties of Shakespeare' in 'Dichtung und Wahrheit', III Teil, 11 Buch; *Sämtliche Werke* (Propyläen Ausgabe, München), Vol. 25, p. 158. For the list of all his writings comprising fifty-five items see *D.N.B.*, V, 1062. On some other essays the authorship of which is not firmly established see 'Occasional Papers by William Dodd', *The Times Literary Supplement* (Dec. 7, 1922).

[8] This case is related in detail by P. Burke in *The Romance of the Forum* (no date), pp. 153–156. According to Burke, Dodd declared at the trial 'that it was with great reluctance he came into a court of justice on such an occasion, which he said he would not have done if the robbery had not been attended with circumstances of an aggravating kind; but that the firing of the pistol was a crime of so horrid a nature, that his regard to the safety of others had induced him to commence a prosecution so abhorrent to the feelings of his mind'; *ibid.*, *p. 155.*

suffered seriously from depredations were reluctant to put the law into effect and thus be party to an execution, while Dodd himself had strongly advocated a revision of the criminal law in a sermon written some time later entitled *The Frequency of Capital Punishments inconsistent with Justice.*[9] In his views on this subject Dodd was influenced by Beccaria and Eden, both of whom he quotes frequently.

To attain the position to which he aspired, Dodd had to maintain a high standard of living which he could ill afford. In his *Account of Himself* he wrote: '. . . my greatest evil was expence. To supply it, I fell into the dreadful and ruinous mode of raising money by annuities. The annuities devoured me '.[10]

The details of the crime

The event which made Dr. Dodd's case a famous one took place on February 1, 1777. He told Lewis Robertson, a broker, that the Earl of Chesterfield, his former pupil,[11] urgently needed four thousand three hundred pounds, but for reasons of discretion did not wish to act personally in the matter. He presented Robertson with a bond, not filled up or signed, and asked him to find a person who would advance the requisite sum to the young nobleman. Having absolute confidence in Dodd, Robertson applied to the bankers Fletcher & Peach who agreed to lend the money. Robertson then returned the bond to Dodd who produced it the next day

[9] Published in 1772. It was intended to be preached in the Royal Chapel at St. James's.

[10] Dr. William Dodd, *Thoughts in Prison* (1815), Appendix, p. 205. Already as the editor of the *Christian's Magazine*, Dodd was constantly in urgent need of money; see on this a number of Dodd's letters reproduced by James Prior in his *Life of Oliver Goldsmith* (1837), Vol. 1, p. 410–414. Sir John Hawkins writes: 'A brother of his (Dr. Dodd's) wife rented some land of me, and of him I learned from time to time many particulars respecting his character and manner of living, which latter, as he represented it, was ever such as his visible income would no way account for'; *The Life of Samuel Johnson* (1787), p. 435. In 1774 Mrs. Dodd wrote an anonymous letter to Lady Apsley, wife of the Lord Chancellor, offering £3,000 and an annuity of £500 for a promise of the living of St. George's, Hanover Square, vacated by the promotion of Dr. Moss to the see of Bath and Wells. The letter was identified and Dodd, who wrote an unconvincing explanation to the papers, was struck off the list of King's chaplains. On the details of this affair see *Notes and Queries* (Jan.–June, 1858), 2nd Ser., Vol. 5, p. 8. See also Campbell, *Lives of the Lord Chancellors* (4th ed., 1857), Vol. 7, p. 145. He went abroad for a short time, but on his return to England succeeded in regaining his position.

[11] See above, p. 452.

seemingly executed, and witnessed by himself. Thinking, however, that the bankers would object to one witness only, Robertson put his own name under it as well.[12] He then obtained the money which he paid to Dodd. Some suspicion was aroused, however, and the bond was presented to Lord Chesterfield who disowned it. The broker Robertson was taken in custody, while Lord Chesterfield's solicitor accompanied by other officers sought out Dodd. The solicitor told him that he could save his life by the immediate return of the money, at which Dodd refunded six £500 notes, drew on his banker for £700, and made out a judgment on his goods for another £400; the broker returned £100.[13] Dodd was convinced that this restitution would save him from further proceedings, but this was not to be. When taken before the Mayor and charged,[14] he declared that he had been temporarily in difficulties but had not intended actually to defraud Lord Chesterfield. He also declared that the broker Robertson bore no responsibility whatever in the matter.[15]

[12] According to P. Fitzgerald, *A Famous Forgery, being the Story of 'The Unfortunate' Doctor Dodd* (1865), p. 99, in order to dispel any further doubts Dr. Dodd also produced a letter from Lord Chesterfield.

[13] At a certain moment Dr. Dodd was alone in his study; the bond was on the table and a fire was burning in the grate. He could have saved himself by throwing the bond in the fire, a course then not unfrequently taken, sometimes even by prosecutors. That Dodd did not seize the opportunity which thus offered itself was later invoked in his favour by those who attempted to save his life. A. Knapp and W. Baldwin state that the restitution was done 'by the doctor in full reliance on the honour of the parties that the bond shall be returned to him cancelled; but, notwithstanding this restitution, he was taken before the lord mayor and charged . . .', and they add: 'This was, at least, hard treatment: a conviction obtained through such means greatly diminishes its value to the public'; *The Newgate Calendar* (1828), Vol. 3, p. 54, and note, *ibid.*

[14] On this stage see the *Scots Magazine* (Febr., 1777), Vol. 39, pp. 105–106. Fate was more fortunate to Abbé Prévost, the author of *Manon Lescaut*. When in England in 1733 he forged a promissory note. He was arrested and committed to the Gatehouse Prison by Thomas De Veil, Justice of the Peace. A few days later he was re-examined by the same magistrate and discharged. The case is not clear, but it seems that he had tried to defraud a man of his acquaintance, who decided not to prosecute. See on this interesting case M. E. I. Robertson's introduction to her translation of Abbé Prévost's *Adventures of a Man of Quality* (1930), pp. 20–21.

[15] It has been noted at p. 100, note 68, that though not many capital statutes were, during that period, fully put into effect, those relating to forgery were most strictly enforced. Dodd committed 'a crime which, he must have known, can never afford even a hope for the royal mercy in this commercial country'; W. Cooke, *Memoirs of Samuel Foote* (1805), Vol. 1, p. 195. In a pamphlet published after Dodd's execution Robert Goadby, a well-known author and

§ 2. THE REACTION OF PUBLIC OPINION

First wave of sympathy

Owing to Dodd's social standing, his fashionable life, his great popularity and the circumstances of his offence, the case at once became the sensation of the day.[16] When Dodd was brought before the Mayor, ballads were sung in the streets and printed, headed by a drawing representing a figure with three heads, half of whose body was dressed like a clergyman, the other half like a beau.[17] No attempt indeed was made to prove Dodd's innocence and it was generally regretted that

publisher, argues that Dodd fully deserved the punishment he had received, forgery being a most dangerous crime the progress of which had to be checked; J. Nichols, *Literary Anecdotes, etc.* (1812), Vol. 3, p. 724. Dodd's fate was later invoked as a warning; thus the Rev. Henry Venn wrote to his son: 'I hope, my dear son, you feel how utterly insufficient you are in yourself to stand before the trial you are called to, in the way of your intended profession. Remember Dr. Dodd! . . .'; *The Life of the late Rev. Henry Venn* (ed. by the Rev. Henry Venn, 4th ed. 1836), p. 255.

[16] '. . . all the materials of melodrama were present, and every man and woman in London was ready with pity or abuse'; *The Times Literary Supplement* (Dec. 7, 1922). Samuel Curwen, an American Loyalist who lived in England from 1775 to 1784, notes in his Journal on Feb. 13, 1777: 'A reverend, known by the name of the *Maccaroni Doctor*, is in Poultry Compter for forgery, and has confessed to the sum of £4,200 sterling; his real name Dodd; he figures in the *tête à têtes* in the magazines, and unless defamed, is a worthless character, though noted for some serious publications in the common routine. He has two chapels and the Magdalen under his care'; *Journal and Letters* (1842), p. 98. Magazines and newspapers were full of intimate anecdotes relating to his life, showing his character in an unfavourable light; see on this H. Bleackley, *Trial of Henry Fauntleroy* (1924), pp. 186–188. For some contemporary pictures see for instance the *Town and Country Magazine* (1773), Vol. 5, pp. 681–683; *ibid.* (1775), Vol. 7, p. 290; *ibid.* (1779), Vol. 11, pp. 681–685.

[17] One of these ballads ran as follows:

'Who'd think that the shepherd should lead us astray,
When thumping the cushion and loudly would sway,
And tell us so gravely we all must fear God,
But the Devil I fear will have good Doctor Dodd . . .

But for trial, alas! the good Doctor is sent,
For forgery a halter must be the event;
For a time there we'll leave him to feast on salt cod—
May all rogues have their due, so I wish Doctor Dodd.'

And another popular song was:

'Come let us all pray for protection
To our gracious Heavenly God,
Lest we have cause for deep reflection,
Like the unhappy Doctor Dodd;
Who though so great, so fine a preacher,
And once a chaplain, as they tell,
This reverend and learned teacher,
How alas, alas! he fell . . .

[*continued over*

a clergyman should have been involved in a crime of this nature.[18] But the first shock of indignation soon gave way to a wave of sympathy with the 'unfortunate Dr. Dodd', as he was henceforth called.[19] It was generally recognised that this was not the case of a professional criminal and that although Dodd's sincerity could be doubted, he was none the less a useful member of the community. That he had confessed his guilt and had made immediate and full restitution were circumstances which began to press heavily on the public conscience. The opinion thus grew that this was not a case in which the infliction of capital punishment was justified, and that something must be wrong with the law which provided no alternative penalty to be made use of in special circumstances.[20]

The attitude of Dr. Johnson

Dodd's case became even more notorious when Dr. Johnson became his zealous defender.[21] Johnson hardly knew Dodd, whom he had only met once, many years before Dodd had

> His yearly income, we are informed,
> Was five or six hundred so round,
> And if he could not live upon it,
> How must a curate with forty pound?
> And pride and luxury bringing ruin,
> And to the greatest misery,
> Now this was Doctor Dodd's undoing,
> And set him upon forgery.'

[18] Horace Walpole calls him in one of his letters 'that impudent hypocrite'; *Letters* (ed. by P. Toynbee, 1904), Vol. 10, p. 74.

[19] 'Never, perhaps', writes H. Angelo, 'did the history of civilisation afford so general an instance of public feeling in behalf of the fate of an unfortunate individual, as in the case of Dr. Dodd . . . There is, moreover, sometimes, a sort of fashion in feeling, when sorrow, as it were, becomes a national epidemic. The conversation in every circle was of "poor Dr. Dodd"'; *Reminiscences* (1828), Vol. 1, pp. 455 and 456. 'The exertions now made to save Dr. Dodd were perhaps beyond all example in any country'; *Celebrated Trials* (1825), Vol. 4, p. 525.

[20] Dr. Dodd was indicted under 2 Geo. 2, c. 25 (1729).

[21] Richard Cumberland, who at the request of Lady Frances Bourgoyne wrote the defence for Robert Perreau when under trial for forgery (see on this case below, note 43, at p. 462), relates that 'when poor Dodd fell under the like misfortune, he applied to me in the first instance for the like good offices, but as soon as I understood that application had been made to Dr. Johnson, and that he was about to be taken under his shield, I did what every other friend of the unhappy man would have done, consigned him to the stronger advocate, convinced that if the powers of Johnson could not move mercy to reach his lamentable case, there was no further hope in man, his penitence alone could save him'; *Memoirs* (1807), Vol. 1, p. 404.

committed the forgery.[22] He had a low opinion of Dodd's character,[23] nor did he esteem his writings.[24]

In the hope that Dr. Johnson might help him in his distress, Dodd appealed to him through the Countess of

[22] Croker quotes an interesting letter written by Dodd in 1750 to his friend the Rev. Parkhurst, the lexicographer, in which he mentions this meeting and makes the following remarks about Dr. Johnson: 'I spent yesterday afternoon with Johnson the celebrated author of *The Rambler*, who is of all others the oddest and most peculiar fellow I ever saw. He is six feet high, has a violent convulsion in his head, and his eyes are distorted. He speaks roughly and loud, listens to no man's opinions, thoroughly pertinacious of his own. Good sense flows from him in all he utters, and he seems possessed of a prodigious fund of knowledge, which he is not at all reserved in communicating; but in a manner so obstinate, ungenteel, and boorish, as renders it disagreeable and dissatisfactory. In short, it is impossible for words to describe him. He seems often inattentive to what passes in company, and then looks like a person possessed by some superior spirit. I have been reflecting on him ever since I saw him. He is a man of most universal and surprising genius, but in himself particular beyond expression'; Boswell, *Life of Samuel Johnson* (ed. by J. W. Croker, 1859), Vol. 7, pp. 121–122, note (1).

[23] 'His moral character'—wrote Johnson to Boswell in 1777—'is very bad: I hope all is not true that is charged upon him. Of his behaviour in prison an account will be published'; *ibid.*, Vol. 6, pp. 254–255. Dr. Newton, Bishop of Bristol, is said to have observed that Dodd deserved pity, and when asked why, he replied: 'Because he is to be hanged for the least crime he ever committed'; Horace Walpole, *Journal of the Reign of King George the Third* (ed. by Dr. Doran, 1859), Vol. 2, p. 124.

[24] When Boswell read out to Johnson a passage from Dodd's poem *Thoughts in Prison* and asked him his opinion of it, Johnson replied: 'Pretty well, if you are previously disposed to like them'; *Life of Johnson* (ed. by Croker, 1859), Vol. 7, p. 107. He also had some doubts regarding Dodd's sincerity. After Boswell had read out to Johnson another passage with which he was better pleased, he took the book into his own hands, and having looked at the prayer at the end of it, said: 'What *evidence* is there that this was composed the night before he suffered? *I* do not believe it'. He then read aloud a passage in which Dodd prayed for the King, etc., and said: 'Sir, do you think that a man, the night before he is to be hanged, cares for the succession of the royal family? Though, he *may* have composed this prayer then. A man who has been canting all his life, may cant to the last'; *ibid.* He considered, however, that Dodd was a successful preacher and wrote in his *Occasional Papers*: 'Of his public ministry the means of judging were sufficiently attainable. He must be allowed to preach well, whose sermons strike his audience with forcible conviction'; *ibid.*, Vol. 6, p. 286.

At a certain time Dodd was anxious to become a member of Dr. Johnson's club, but according to Sir John Hawkins 'Dodd's wish to be received into our society was conveyed to us only by a whisper, and that being the case, all opposition to his admission became unnecessary'; *The Life of Samuel Johnson* (1787), p. 435. In 1765 Dodd endeavoured to become a preacher to Lincoln's Inn and G. Harris reproduces a rather undignified letter which Dodd had written to Yorke (afterwards Lord Chancellor Hardwicke), a member of that society, praying for his support; *The Life of Lord Chancellor Hardwicke* (1847), Vol. 3, pp. 430–431. For Horace Walpole's opinion on Dodd see below, note 42 at p. 462.

Harrington,[25] who sent a message to Johnson to this effect.[26] In view of Johnson's poor opinion of Dodd, the readiness with which he consented to help him may seem somewhat surprising. It may be explained partly by his great kindness and sympathy with human beings in distress,[27] and partly by the fact that Dodd's case confirmed Johnson in his conviction that the criminal law was excessively and unnecessarily severe as well as irrationally uniform.[28] He was fully aware that as the law then stood, Dodd had to be hanged; and he objected to a system providing no alternative to the death penalty which was—he firmly believed—too severe a punishment for Dodd's offence.[29]

[25] She was the eldest daughter of Charles Fitzroy, Duke of Grafton, and wife of William, second Earl of Harrington.

[26] The Countess's message was taken to Johnson by Dodd's friend Allen—the printer—who later related how Johnson was very much agitated and said 'I will do what I can'; Boswell, *op. cit.*, Vol. 6, p. 277.

[27] When Dodd's application first reached him he was at Streatham Church, which he immediately left to write an answer to the letter he had received. When relating this incident afterwards he added: 'I hope I shall be pardoned, if once I deserted the service of God for that of man'; 'Anecdotes and Sayings of Johnson', *ibid.*, Vol. 9, p. 131. Johnson censured the clergy very severely for not interposing on Dodd's behalf and said 'that their inactivity arose from a paltry fear of being reproached with partiality towards one of their own order'; *ibid.*, Vol. 6, p. 287, note (1).

[28] On Dr. Johnson's views regarding the revision of criminal law, see above, pp. 336–339.

[29] According to Sir John Hawkins, Johnson said that had he been an adviser to the King, he would have told him that, in pardoning Dodd, his justice would have been called in question. Hawkins thus comments on this: 'I cannot forbear remarking an inconsistency in the opinion of Johnson respecting the case of Dodd. He assisted in the solicitations for his pardon, yet, in his private judgment, he thought him unworthy of it'; *The Life of Samuel Johnson* (1787), p. 530.

It seems, however, that Dr. Johnson's approach was not inconsistent: (1) Johnson held that punishments ought to be in harmony with the gravity of the offences, and he criticised English criminal law for being generally too severe and for appointing the same punishment for offences of widely differing gravity; on these views see above, p. 37 and pp. 336–339. (2) He believed that, considering the peculiar circumstances of the case, transportation would be an adequate penalty for Dodd's offence. (3) At the same time Johnson was emphatic that justice ought to be equally awarded to all. The following passage occurs in a sermon written for Dodd by Dr. Johnson and which Dodd preached to convicts in Newgate, when he was himself under sentence of death: 'One of the principal parts of national felicity arises from a wise and impartial administration of justice. Every man reposes upon the tribunals of his country the stability of possession, and the serenity of life. He therefore who unjustly exposes the courts of judicature to suspicion, either of partiality or error, not only does an injury to those who dispense the laws, but diminishes the public confidence in the laws themselves and shakes the foundation of public tranquillity'; 'The Convict's Address to his Unhappy

Dodd stood his trial on February 2, before Willes, J., Perryn, J., and Gould, J. Mansfield and Davenport appeared for the Crown, and Cowper, Buller (who afterwards became judges themselves) and Howarth for the prisoner.[30] Dodd's offence was so unmistakably proven that it was hardly possible to advance anything really substantial in his defence. Dr. Johnson wrote a speech for Dodd which, though eloquent and deeply moving, carried little weight from the legal point of view.[31] After being away for ten minutes only, the jury returned the verdict of guilty. It recommended Dodd to mercy,[32] but when he received the death sentence on May 26, the Recorder, Serjeant Glyn, intimated to him that he should not count on being pardoned.

Public agitation for mercy

It was at this stage, however, that the pressure of public opinion in favour of commutation of the death sentence passed on Dodd reached its height. How deep and widespread this feeling was, may be gathered from a description of the public agitation given by a foreigner then travelling in England[33]:

Brethren' (delivered in the chapel of Newgate on Friday, June 6, 1777), p. 20; appended to the Rev. John Villette's *A Genuine Account of the Behaviour and Dying Words of William Dodd, LL.D.* (1777). On Johnson's authorship of this sermon see Boswell, *Life of Johnson* (ed. by Croker, 1859), Vol. 6, p. 309. It is thus apparent that although Johnson was against Dodd's execution, he fully understood the delicate position of the Crown in deciding whether to grant a pardon, particularly since many offenders had suffered death for the same or similar offences.

[30] For the trial see: C. Pelham, *The Chronicles of Crime* (1886), Vol. 1, pp. 274–288; *Select Criminal Trials at Justice-Hall in the Old Bailey* (1803), Vol. 1, pp. 1–31; *Annual Register* (1777), Vol. 20, Appendix to the Chronicle, pp. 232–240; and G. T. Crook, *The Complete Newgate Calendar* (1926), Vol. 4, pp. 114–119.

[31] Boswell, *op. cit.*, Vol. 6, p. 277. The Act under which Dodd was tried required the existence of an 'intention to defraud' and Johnson attempted to reduce Dodd's guilt by submitting that he (Dodd) did not intend 'finally to defraud'. Johnson was not the only one to entertain this view; according to *Celebrated Trials* (1825), Vol. 4, p. 526, 'a more violent stretch of law never characterised any jurisprudence: no capital crime was committed with an intention to defraud; and to assert that such intention existed is a manifest absurdity'.

[32] The judge advised them to apply to the Recorder as he could not second their application. For their petition delivered to the King by Samuel Elliot, the foreman, see the *Scots Magazine* (July 1777), Vol. 39, pp. 385–386.

[33] D'Archenholz (formerly a Captain in the Service of the King of Prussia), *A Picture of England* (translated from the French, 1790), pp. 145–146. On D'Archenholz see below, Appendix 3, pp. 701 and note 14, *ibid.*

'The judges, the jury, the counsel, the spectators, all the world'—he writes—'was bathed in tears . . . This unfortunate man [Dr. Dodd] always flattered himself with the hope of a pardon, and his numerous friends interested themselves for this purpose with the same warmth as if the safety of the nation depended on his life. The Jury who tried him recommended him to the mercy of the sovereign; whole corporations, the city of London itself presented a petition in his favour; the newspapers were every day filled with the good actions he had performed, and quoted the most interesting passages in his sermons. His writings were collected and reprinted; the poets sung his praises, and in fine every thing was practised to exert the sympathy of the nation for a criminal so much beloved. Having succeeded, his partisans drew up a petition to the King, and never before was such a one seen in England. It was carried by a porter who bent under the load, for it took up twenty-nine yards of parchment, and was signed by twenty-three thousand housekeepers'.[34]

The petition of the Corporation of London,[35] another one presented to the Queen by Earl Percy on behalf of Mrs. Dodd, yet another from Dodd himself to the King, and Dodd's letters to Lord Chancellor Bathurst and to Lord Mansfield, were all drafted by Dr. Johnson.[36] Numerous pamphlets were printed in Dodd's defence and the prosecutors in the case were abused and threatened in letters addressed personally to them. The behaviour of Lord Chesterfield was also much commented upon. He was strongly criticised for not having tried to stop

[34] It was called 'The Petition of the Gentry, Merchants, and Traders of London'. For the text of this petition see *Papers written by Dr. Johnson and Dr. Dodd in* 1777 (with an Introduction and Notes by R. W. Chapman, 1926), pp. 9–11. H. Angelo writes referring to it: 'If I mistake not, more than one hundred thousand signatures were obtained, among which were a large proportion, the sign manual, of persons of rank, wealth, and talent; such a list was never collected, perhaps, in behalf of any individual offender against the laws from the earliest period of society'; *Reminiscences* (1828), Vol. 1, p. 459.

[35] When during the discussion on this subject in the Court of Common Council one of the Aldermen questioned the wisdom of the course they were taking, another pointed out significantly that there could be no impropriety in the matter since the forgery laws were made sanguinary for the benefit of the commercial world. Hence they, as representing the City of London, the very heart of commerce, might fairly ask for lenity; P. Fitzgerald, *A Famous Forgery* (1865), pp. 143–144.

[36] Boswell, *op. cit.*, Vol. 6, pp. 278–279.

the proceedings and became known as a nobleman who 'hung a parson'.[37]

Dodd behaved in prison with great dignity and led a life of austerity.[38] He spent some time trying to improve Rossell's *Prisoners' Director*, wrote a poem *Thoughts in Prison*,[39] was receiving many letters,[40] and was constantly visited by his numerous friends and sympathisers. He was convinced that the King would ultimately commute his sentence to one of transportation; so much so that on the day when the order for execution arrived, he asked William Woodfall (of the *Morning Chronicle*) to visit him and to discuss the chances of a comedy he had written being produced on the stage. When Woodfall tried to draw Dodd's attention to

[37] A. Knapp and W. Baldwin say that Dodd's resentment against his pupil was to some extent 'justifiable' and that Chesterfield's 'situation as an evidence was truly pitiable'; *The Newgate Calendar* (1828), Vol. 3, p. 62. J. H. Jesse, the editor of George Selwyn's letters, writes that 'Lord Chesterfield has been accused of a cold and relentless disposition in having deserted his old tutor in his extremity'; but adds that he 'heard it related by a person who lived at the period, that at a preliminary examination of the unfortunate divine, Lord Chesterfield, on some pretence, placed the forged document in Dodd's hands, with the kind intention that he should take the opportunity of destroying it; but that the latter wanted either courage or presence of mind enough to avail himself of the occasion'; *George Selwyn and his Contemporaries* (1844), Vol. 3, p. 195; on this incident see also above, note 13, at p. 454. In one of her letters, Mrs. Elizabeth Montagu relates that 'Lord Chesterfield has behaved with great kindness to the doctor's brother, who is a worthy man, and to Mrs. Dodd's nephew . . .'; Doran, *A Lady of the Last Century* (1873), p. 222.

[38] Rev. John Villette, Ordinary of Newgate, *A Genuine Account of the Behaviour and Dying Words of William Dodd, LL.D.* (1777), *passim.*

[39] 'Have you Dr. Dodd's thoughts in prison?'—asked Countess Cowper in one of her letters to Mrs Port,—'I think you would like them'; Mrs. Delany, *The Autobiography and Correspondence* (ed. by Lady Llanover, 1862), 2nd Ser., Vol. 2, p. 508. In an interesting article 'Books Written in Prison' Dodd's poem is described as 'the spasmodic, hysterical, and insincere utterance of a weak man under affliction'; *All the Year Round* (1871), N.S., Vol. 7, p. 33. In 1777, *Thoughts in Prison* was translated into French.

In this poem Dodd described *inter alia* the horror he felt from the constant rattling of chains. A. Griffiths relates that prisoners often clanked their irons for amusement; *The Chronicles of Newgate* (1884), Vol. 1, note at p. 431. Dodd's case evoked great interest abroad and was related in many foreign newspapers. Certain German publications reported that Dodd together with his wife were lying in Newgate in chains. F. A. Wendeborn who was then in England and visited Dodd denies these reports. He records that Dodd was detained in a comfortable room at Newgate and that when he visited him he was sitting near the fire-place and his wife was sitting next to him near a table; *Der Zustand des Staats, etc., in Grossbritannien* (1785), Vol. 2, note ** at pp. 20–21.

[40] A letter written to Dodd by Lady Huntingdon is reproduced in *The Life and Times of Selina Countess of Huntingdon* (1844), Vol. 2, pp. 427–428.

his almost hopeless position, he said with great emphasis: 'Oh, they will not hang me'.[41] He also preached a most eloquent and moving sermon to his fellow convicts in Newgate.[42]

The intervention of Dr. Johnson

The final decision respecting Dodd's fate hung for a long time in the balance. The King is reputed to have said: 'If I pardon Dodd, I shall have murdered the Perreaus'.[43] Lord Mansfield was from the beginning opposed to the commutation of Dodd's sentence and said so when the King asked his

[41] John Taylor, *Records of My Life* (1832), Vol. 2, pp. 250–251. It appears that Dodd's comedy was neither published nor acted; *Notes and Queries* (July–December, 1853), Vol. 8, p. 245.

[42] The sermon is appended to Villette's *Behaviour and Dying Words of William Dodd*, note 20 at pp. 458–459. It was presented to the public as Dodd's work though it had been written for him by Dr. Johnson; Dodd abstained from giving even the slightest intimation of this fact. According to Boswell, Johnson disapproved of Dodd's leaving the world persuaded that *The Convict's Address* was of his own writing; *Life of Johnson* (ed. by Croker, 1859), Vol. 6, p. 308. Horace Walpole wrote about Dr. Dodd that 'he was undoubtedly a bad man, who employed religion to promote his ambition,—humanity to establish a character and, it is to be hoped, to indulge his good-natured sensations,—and any means to gratify his passions or vanity, and to extricate himself out of their distressing consequences'; *Journal of the Reign of King George the Third* (1859), Vol. 2, pp. 121–122.

[43] Some writers state that it was Lord Thurlow who said: 'If Dr. Dodd be saved, the Perreaus have been murdered'; Angelo, *Reminiscences* (1828), Vol. 1, p. 471; see also below, note 44 at p. 463.

Robert and Daniel Perreau were twin brothers, both of great social respectability, who had been accused of a series of forgeries committed over a period of time. Though both were ultimately found guilty, it has never been established beyond all doubt whether Robert Perreau had taken part in these fraudulent activities or whether he had been a victim of his attachment to his brother and had lost his life through telling a lie. The part played by Margaret Caroline Rudd who lived with Daniel Perreau also remains very obscure. For these reasons, and because of the hitherto unimpeachable character of Robert Perreau who was highly praised by such witnesses as Lady Lyttleton, Sir John Moore, General Rebow and Captain Burgoyne, the trial evoked great interest. Seventy-eight bankers and merchants of London signed a petition to the King in favour of a pardon for Robert Perreau, and newspapers were full of articles implying that both men fell victim to a vicious woman. But all these endeavours failed and the Perreaus were hanged. Thirty thousand people attended the execution which took place on January 17, 1776. On this interesting trial see *The Newgate Calendar* (1933), pp. 861–877. The author observes: 'There was great guilt somewhere, but where it lay the public will determine'. It is interesting to note that similar doubts were entertained by the *Gentleman's Magazine* (1775), Vol. 45, pp. 278–284. See also the *Annual Register* (1775), Vol. 18, App. to the Chronicle, pp. 222–223.

The case of Mrs. Rudd was very interesting both because of her close connection with Daniel Perreau and because it gave rise to a discussion whether, having been considered an accomplice who, however, later gave evidence on behalf of the Crown, she was entitled to indemnity and should

advice.[44] Dr. Johnson, on the other hand, persevered in his attempts to save Dodd. Through a friend he endeavoured to obtain a faithful account of the attitude of the Court, so as to be able to estimate the chances of a respite. He helped Dodd to draft a letter to the King and himself sent another on his behalf to Jenkinson (afterwards Earl of Liverpool) who was then Secretary of War, soliciting his aid. In this letter Johnson significantly remarked: 'The supreme power has, in all ages, paid some attention to the voice of the people; and that voice does not least deserve to be heard when it calls out for mercy. There is now a very general desire that Dodd's life should be spared. More is not wished; and, perhaps, this is not too much to be granted'.[45] But all was of no avail and

not be prosecuted for her own guilt so disclosed. When Mrs. Robert Perreau was giving evidence against Mrs. Rudd, she was asked whether she hoped that the conviction of Mrs. Rudd would lead to the pardoning of her husband; she answered: 'If Mrs. Rudd is found guilty, I suppose it will. I hope it may be the means of procuring Mr. Perreau's pardon'. It was submitted to the court that this statement showed that Mrs. Perreau was not a competent witness. See on Mrs. Rudd's trial *Select Criminal Trials at Justice-Hall in the Old Bailey* (1803), Vol. 1, Appendix, pp. 1–11. The Perreaus left some papers with the Ordinary of Newgate which were afterwards published and in which they attempted to prove their innocence.

[44] 'The Privy Council, however', writes J. H. Jesse, '(guided, it is said, by Lord Mansfield, who deprecated any commutation of punishment as a most dangerous precedent), recommended that the sentence should be carried into execution. George the Third, it is reported, no sooner heard the opinion pronounced by Lord Mansfield, than he took up the pen, and signed the death-warrant. He is also stated to have observed in private, that, had he pardoned Dodd, he should have considered himself morally guilty of the murder of the two Perreaus who had recently been executed for the same offence'; *George Selwyn and his Contemporaries* (1844), Vol. 3, p. 195. Sir William Wraxall confirms these circumstances—communicated to him by Lord Sackville—and adds that if pardon 'could have been extended to him without producing, by the precedent, incalculable injury to society, his Majesty would undoubtedly have exercised in this case the prerogative of mercy. He felt the strongest impulse to save Dodd, not only on account of the numerous and powerful applications made in his favour, but as a clergyman who had been one of his own chaplains. The Earl of Mansfield, however, prevented so pernicious an act of grace'; *Memoirs* (ed. by Henry B. Wheatley, 1884), Vol. 4, p. 249. According to Campbell, *Chief Justices of England* (3rd ed., 1874), Vol. 3, p. 320, 'the fate of Dr. Dodd was afterwards ascribed to the pointed answer which he (Lord Mansfield) gave when the King asked whether, on account of the convict being a clergyman, his life might not be spared,—"If Dr. Dodd does not suffer the sentence of the law, the Perreaus have been murdered"'.

[45] Lord Liverpool neither replied to nor acknowledged the receipt of Johnson's letter. Croker remarks that at that time Liverpool 'was obnoxious to popular odium for an unfounded imputation of being the channel of a secret influence over the King. To request, therefore, *his* influence with the King on a matter so wholly foreign to his duties and station, was a kind of verification of the

Dodd's execution was fixed for June 27, 1777. D'Archenholz remarks that the King acted with consistency in a most delicate situation,—for having refused to pardon Dodd he took the same decision a few years later in the case of Ryland, the celebrated engraver whom he patronised.[46]

The last attempts to save the prisoner

Dodd resigned himself to the inevitable[47] and behaved with great dignity. According to Villette, when on the appointed

slander, at which Lord Liverpool might have felt offended'; Boswell, *op. cit.*, Vol. 6, pp. 283 and 284.

In that letter Johnson also stated that as far as he knew Dodd would be 'the first clergyman of our church who has suffered public execution for immorality'. This statement seems to be well founded. When in January, 1728 the Rev. Kinnersly and William Hales were found guilty of forgery, Kinnersly was sentenced to stand twice in pillory, to pay a fine of £200, to be imprisoned for two years and to give security for good behaviour for a further three years. He 'mounted the pillory in his canonical habit. Before his head was fixed in a proper position, he threw several printed papers among the crowd: several constables and others, with long staves, were hired to prevent the mob from their usual diversion in such cases; so that he and his partner in iniquity suffered very little from their hands'; *Celebrated Trials* (1825), Vol. 3, p. 431. Soon afterwards he died in Newgate of a fever. A few years after Dr. Dodd's execution, the Rev. James Hackman was hanged for murder (committed on April 9, 1779). His case too evoked great public interest. Hackman's offence was a *crime passionel*; the lady he had killed was the well-known Miss Ray (in some annals her name is spelled *Reay*) who for many years had been the mistress of John Montagu, fourth Earl Sandwich by whom she had had several children. Hackman shot her in a fit of jealousy while she was leaving Covent Garden Theatre, because she had made it clear that she would never marry him. He then attempted to kill himself with another pistol. Miss Ray was thirty-four years old. The fact that Hackman had two pistols gave rise to an amusing exchange of views between Johnson and Beauclerk; see Boswell's *Life of Johnson* (1859), Vol. 7, pp. 257–258. Apparently James Boswell accompanied Hackman on his way to Tyburn. For the contemporary evidence relating to this case see J. H. Jesse, *George Selwyn and His Contemporaries* (1844), Vol. 4, pp. 59–65 and pp. 78–84; see also *D.N.B.*, VIII, 865. Hackman was present at Dodd's execution; A. Griffiths, *The Chronicles of Newgate* (1884), Vol. 2, p. 16.

[46] William Wynne Ryland was appointed by the King as his engraver with a salary of £200 a year, to which the Queen added another £100 as an expression of her admiration for his talents. He also set up a business of his own and soon became a man of considerable fortune. He was sentenced to death and executed for forgery; G. T. Crook, *The Complete Newgate Calendar* (1926), Vol. 4, pp. 156–158.

[47] In his *Journal* (1827), Vol. 4, p. 99, John Wesley notes (May 25, 1777): 'I saw Dr. Dodd for the last time. He was in exactly such a temper as I wished. He never, at any time, expressed the least murmuring or resentment at any one; but entirely and calmly gave himself up to the will of God. Such a prisoner I scarce ever saw before, much less such a condemned malefactor. I should think none could converse with him without acknowledging that God is with him'. Wesley had visited Dodd on several previous occasions and had always gained the same impression; *ibid.*, pp. 90 and 95.

day Dodd was taken out of Newgate 'the spectators and prisoners wept and bemoaned him; and he, in return, prayed God to bless them'.[48] He was driven to Tyburn in his own carriage,[49] and was executed on June 27, in the presence of a prodigious crowd.[50] He retained his courage to the last.[51]

Some years before Dr. Dodd committed his offence, John Wesley had been in correspondence with him on certain religious subjects. These letters are quoted by Rev. L. Tyerman in *The Life and Times of the Rev. John Wesley, M.A.* (1870), Vol. 2, pp. 232–233; see also *ibid.*, pp. 597–598.

Although Dodd accepted the verdict as impartial, and proclaimed his unchanged veneration for the King, he felt that his offence ought not to be punished by death; see Appendix to his *Thoughts in Prison* (1815), p. 206. Villette notes that Dodd 'had sometimes expressed his thoughts about our penal laws, that they were too sanguinary; that they were against, not only the laws of God, but of nature; and that his own case was hard, that he should die for an act, which he always declared to be wrong, and by which he never intended to injure any one individual; and that as the public had forgiven him, he thought he might have been pardoned'; Villette, *Behaviour and Dying Words of William Dodd* (1777), p. 14.

[48] 'The day of execution at length arrived', relates Angelo, 'and never did so general a sympathy prevail, as on this occasion, throughout the country. In London every visage expressed sadness; it appeared, indeed, a day of universal calamity; yet, strange to say, peoples of all conditions flocked to town to see the melancholy procession, or rather mournful cavalcade, move onward, from some spot between Newgate and Tyburn . . . On the evening preceding the day of execution, I remember my mother being so deeply affected with the approaching fate of Dr. Dodd, that she left the dinner-table, and every one present was sensibly touched with sorrow at his impending fate'; *Reminiscences* (1828), Vol. 1, pp. 459 and 460. A. Knapp and W. Baldwin relate that 'it is impossible to give an idea of the immense crowds of people that thronged the streets from Newgate to Tyburn'; *The Newgate Calendar* (1828), Vol. 3, p. 58. Another writer, H. Bleackley, notes: 'There had been enormous crowds at the executions of Jack Sheppard and Jonathan Wild, Lord Ferrers and the brothers Perreau, but the crowd that assembled when Dr. Dodd was taken to Tyburn was the greatest that had ever been known'; *The Hangmen of England* (1929), p. 120.

[49] D'Archenholz, *A Picture of England* (1790), p. 184. On this privilege, which was granted to some offenders, see above, pp. 170–171. During his journey Dodd asked Villette to read to him the fifty-first Psalm and he prayed for the King and the people.

[50] On June 29, 1777, Horace Walpole wrote to the Countess of Upper Ossory: 'Are you not glad, Madam, there is an end of talking of poor Dr. Dodd? I felt excessively for him, without a good opinion, for between the law and his friends, he suffered a thousand deaths'; *Letters* (ed. by P. Toynbee, 1904), Vol. 10, p. 69. According to Fitzgerald, 'all along that three miles (the distance between Newgate and Tyburn) the whole of London was out in the streets, waiting and expectant. The authorities were scared by the popular feeling, and two thousand men were kept drawn up in Hyde Park, ready for an emergency. Every window was open up to the roof, and eager faces filled every window, looking out. There was a fever of expectation and a roar of voices . . . But the strongest effect is described to have been, when, with a decorous respect, ten thousand hats were swept from ten thousand heads; . . . (At Tyburn) from eight o'clock it had been crowded. All the house-tops that

[51] For note, see p. 466.

The desire to save Dodd was so persistent that even in the very last days several schemes were devised to prevent the execution. Thus an unsuccessful attempt was made to bribe the gaoler of Newgate with the sum of a thousand pounds collected for the purpose, and, a few days later a man with five hundred pounds was seen about the prison attempting to bribe some minor officials. Another scheme was suggested by a certain Mrs. Wright who was known for making good models in wax. She was to model Dodd's head and bring it to the prison where a figure resembling Dodd was to be dressed up, while Dodd himself was to be smuggled out. Apparently one of the main reasons why Dodd objected to this project was that he did not want to impair the position of the governor of Newgate who had shown him much kindness. But attempts to save him were not abandoned. The hangman was bribed into agreeing to adjust the rope in such a way as not to press too much on the throat, while Dodd was advised not to stir or struggle. A heavy weight was apparently sewn up in his clothes, to which a small cord was

commanded a view were covered. The windows were filled. The trees—and there were many trees then in Tyburnia—were literally loaded with human beings'; *A Famous Forgery*, pp. 172–173 and 175. Charles Fox and the Abbé Raynal watched this execution from the top of an unfinished house nearby. Horace Walpole relates that 'two thousand men were ordered to be reviewed in Hyde Park during the execution, which, however, though attended by an unequalled concourse of people, passed with the utmost tranquillity'; *Journal of the Reign of King George the Third* (ed. by Dr. Doran, 1859), Vol. 2, p. 126. It is stated in the *Notes and Queries* (July–December, 1860), 2nd Ser., Vol. 10, p. 198, that 'when the hangman was going to put the halter round the doctor's neck, the latter removed his wig, showing his bald shaved head; and a shower of rain coming on at the same time, some one on the platform hastily put up an umbrella, and held it over the head of the man who had but a minute to live, as if in fear that he might catch cold'.

51 But Johnson disbelieved that Dodd had not been frightened by death. Boswell notes that when he said, '"Dr. Dodd seemed to be willing to die, and full of hopes of happiness"; "Sir", said Johnson, "Dr. Dodd would have given both his hands and both his legs to have lived. The better a man is, the more afraid he is of death, having a clearer view of infinite purity"'; *op. cit.*, Vol. 6, p. 293.

Dr. Johnson had written for Dodd a *Last Solemn Declaration* which was to be read out by Dodd or by Villette at Tyburn before the execution, but the project was later abandoned. It is interesting to note the changes made by Dodd in Johnson's draft. He inserted, for instance, the sentence 'I never knew or attended to the calls of frugality, or the needful minuteness of painful economy'; in the next passage he changed Johnson's words: 'my life for some *few unhappy* years past has been *hypocritical*', into '. . . has been *dreadfully erroneous*'. Johnson's remark on the margin was 'with this (that it was hypocritical) he said he could not charge himself'; *ibid.*, pp. 293 and 279.

attached in order to keep the pressure off his neck. Immediately after the execution his friends carried the body to a nearby house where a hot bath was prepared and a known surgeon was waiting. He tried to bring Dodd back to life but in vain. According to a note which appeared in 1790 in the *Gentleman's Magazine*, 'if the excessive curiosity of the crowd had not occasioned great delay, the attempt would have been successful'.[52] Dodd was buried in Cowley, Middlesex,[53] but his case was remembered long after his death. Rumours were circulating that he had been saved and had gone abroad, and an Aberdeen paper published a letter from Provence to the effect that Dodd was living there happily 'and beyond the reach of his enemies'.[54]

In the second half of the nineteenth century the case was made the subject of a melodrama and according to Fitzgerald, 'Dr. Dodd had a long run'.

§ 3. THE IMPLICATIONS OF THE CASE

It is a well-known fact that in England public reaction to certain criminal trials has always had a profound influence on subsequent changes in the administration and system of criminal justice. Dr. Dodd's case undoubtedly belongs to this category. There was nothing in his crime which normally would be likely to evoke public interest. Trials for many

[52] On these attempts see: Philip Thicknesse, *Memoirs and Anecdotes* (1788), Vol. 1, pp. 227–228; D'Archenholz, *A Picture of England* (1790), p. 148; *Gentleman's Magazine* (1790), Vol. 60 (Part 2), p. 1077; *Notes and Queries* (January–June, 1858), 2nd Ser., Vol. 5, pp. 221–222.

[53] Dr. Dodd's wife, who had been his faithful companion to the last, lost her reason after his execution and spent the remaining years of her life in misery. She died in 1784. The aspersion thrown on her by Walpole does not seem well founded; *Notes and Queries* (July–December, 1877), 5th Ser., Vol. 8, pp. 12–13.

[54] A correspondent in the *Notes and Queries* (July–December, 1903), 9th Ser., Vol. 12, pp. 197–198, relates, that in the earlier years of the nineteenth century it was commonly believed that by some means or other Dodd had escaped. On revival after execution, see above, pp. 194–195.

Johnson related in 1783 that a friend of his asked for a motto for a lady who wished to have Dr. Dodd's picture in a bracelet. 'I said, I could think of no better than *Currat Lex*. I was very willing to have him pardoned, that is, to have the sentence changed to transportation; but, when he was once hanged, I did not wish he should be made a saint'; Boswell, *Life of Johnson* (1859), Vol. 8, p. 199.

similar capital offences—committed before and after—passed unnoticed, as did numerous other capital cases which—from their circumstances—might have been thought worthy of public attention and sympathy. Thus—to give one instance only—on the very day when Dodd was executed, another offender was also put to death. He was young and had been sentenced to death for robbing a stage-coach passenger of only two half-guineas and seven shillings; yet nothing was done to save him.[55]

It is obvious that Dodd's case became a *cause célèbre* primarily because of his personality and not because of his crime. At first there had been no more behind the attempts to obtain pardon for him than sympathy and pity for a man of social standing who, owing to one fatal slip, had found his way to Newgate, but ultimately his case helped to direct public attention to certain fundamental defects of the criminal law. From the jurors who found him guilty of the offence for which he had been indicted, down to his fellow-prisoners, everyone felt that wrong was being done under the cloak of justice.[56] For as Dr. Johnson admirably expressed it in a letter which he wrote to Dodd one day before the execution: 'Be comforted: your crime, morally or religiously considered, has no very deep dye of turpitude. It corrupted no man's

[55] Similarly, public opinion was very little moved when Peter M'Cloud, a boy of not yet sixteen, was executed on May 27, 1771 for housebreaking. His father having died when he was a child, he had been left to the care of his mother, a woman of doubtful character known to have encouraged lads to steal. He began his criminal career by joining a gang of six other boys who were mainly active in picking pockets, principally to steal handkerchiefs and for those depredations he was many times tried at the Old Bailey. Some time later he attempted, with two accomplices, to break into a house but was caught in the attempt. He stood his trial at the Old Bailey, was capitally convicted and sentenced to death. He died with great courage and perfect calm; G. T. Crook, *The Complete Newgate Calendar* (1926), Vol. 4, pp. 68–70.

[56] J. Taylor, who was one of the spectators who came to see Dr. Dodd on his way to Tyburn, notes that 'a deep sense of pity seemed to be the universal feeling. I was young and adventurous, or I should not have trusted myself in so vast a multitude; sympathy had repressed every tendency towards disorder, even in so varied and numerous a mass of people'; *Records of My Life* (1832), Vol. 2, note at p. 252 Public agitation in favour of Dodd was undoubtedly a symptom of the growth of humanitarianism, always largely responsible for promoting reforms of the penal system. 'We live in an age in which humanity is the fashion', were the words with which Sir John Hawkins, in his *Life of Samuel Johnson* (1787), p. 521, began his narrative of Dodd's case.

principles: it attacked no man's life. It involved only a temporary and reparable injury'.[57]

There can be little doubt that had he been sentenced to transportation for fourteen years, such a verdict would have been supported by public opinion and the case of the 'unfortunate Dr. Dodd' would not have arisen. Thus on July 20, 1777, Mrs. Elizabeth Carter wrote to Mrs. Montagu[58]: 'Did you ever observe within your memory such a madness of petitioning as in a late unhappy case? We seem to be getting into the character of the Athenians, and instead of acting upon general principles, to be moved only, as Lord Bacon expresses it, " by the spur of the occasion ". Instead of all this exertion for one particular individual (Dr. Dodd), it is much to be wished there might be some representation made in a proper manner to the legislature, to change the law, which is found so very insufficient to prevent the evil, that is perpetually increasing. Imprisonment, labour, and restitution, so far as it could be made, would, I believe, by its being a constant object, be more efficacious than hanging . . .'.[59] Similar views were expressed in contemporary newspapers and periodicals. A particularly striking instance is provided by a

[57] Boswell, *Life of Johnson* (1859), Vol. 6, p. 285. It is perhaps interesting to note that although Johnson was in close contact with Dodd by correspondence since the latter's committal, he never went to see him personally. This last letter had been written in reply to one by Dodd in which, in the face of his approaching death, he had expressed in moving terms his deep gratitude to Johnson for all he had done for him.

[58] *Letters to Mrs. Montagu* (1817), Vol. 3, pp. 26–27.

[59] See also Sir William Meredith's speech in the House of Commons, *Parl. Hist.* (1777–1778), Vol. 19, col. 240; ' . . . So fatally are we deviated from the benignity of our ancient laws, that there is now under sentence of death an unfortunate clergyman (Dr. Dodd) who made satisfaction for the injury he attempted; the satisfaction was accepted; and yet the acceptance of the satisfaction and the prosecution bear the same date. There does not occur to my thoughts a proposition more abhorrent from nature, and from reason, than that in a matter of property, when restitution is made, blood should still be required'.

Boswell's opinion on this matter is also worth recording. He was neither an extremist, nor an over-zealous philanthropist, and yet he wrote to Johnson: 'If for ten righteous men the Almighty would have spared Sodom, shall not a thousand acts of goodness done by Dr. Dodd counterbalance one crime? Such an instance would do more to encourage goodness, than his execution would do to deter from vice'; *Life of Johnson* (1859), Vol. 6, p. 253.

See further M. Dawes, *An Essay on Crimes and Punishments* (1782), note on p. 111, where he writes that Dodd was condemned and executed 'to the disgrace of his prosecutor . . . and the rigour of our criminal law'.

letter dated July 4, 1777, which appeared in the *Scots Magazine*[60]: 'A late melancholy execution for forgery has turned the minds of many persons to the laws which doom men in this country to an equal punishment for very unequal crimes.—No man can take this matter into a moment's serious consideration, without regretting the sanguinary principle which confounds all ideas of vice, by decreeing to the same fate the starving highwayman and the cruel murderer; . . . I do not blame the denial of royal mercy,—but before fresh instances call for it, I would strongly recommend to our race of law-politicians . . . to take this branch of law into consideration. The hard labour on the Thames . . . is one novelty in our criminal law, I believe a very salutary one. Condemn to long periods of that punishment the men whose lives are at present forfeited for crimes short of murder'.[61]

Another important implication of the case was that the royal prerogative of mercy could not be relied upon as the best means of correcting the deficiencies of law. Since Dodd's guilt was beyond doubt, and since the law knew only one punishment for his crime—death, it was obvious that his life could be saved in no other way except by royal pardon. It is known that George III was particularly anxious to reaffirm the power of the Crown and viewed with the uttermost suspicion what was then often described by the vague term of popular clamour. This was also the attitude of his most intimate advisers. The very notoriety which Dodd's case had acquired and the strength of public opinion on this matter thus reduced his chances of being pardoned. Horace Walpole, for instance, writes: 'An incident, that seemed favourable, weighed down the vigorous scale. The Common Council of London had presented a petition for mercy, to the King. Lord

[60] (September, 1777), Vol. 39, p. 470.

[61] In the previous issue of the same periodical (July, 1777, p. 344) there appeared a short account of the work and treatment of convicts employed on the Thames. An article on the same subject also appeared in the *London Magazine* (May, 1777), Vol. 46, pp. 264–265. The author strongly supported the view that this secondary punishment constituted an excellent substitute for the death penalty for many offences and was capable of fulfilling 'the design of punishments' which is 'the reformation of the offenders, or by making them an example, to deter others, and restrain them from the like practices'.

Mansfield, who hated the popular party as much as he loved severity, was not likely to be moved by such intercessors'.[62]

The issues involved in this remarkable case were forcefully summed up by Dr. Johnson in his *Observations on the Propriety of Pardoning Dr. Dodd* which he sent to the newspapers shortly before Dodd's execution.[63]

> 'This day will be conveyed to the Secretary of State a Petition in favour of Dr. Dodd, signed by twenty-three thousand hands. On this occasion it is natural to consider—
>
> That in all communities penal laws have been relaxed, as particular reasons have emerged.
>
> That a life eminently useful, or single action eminently good, or even the power of being useful to the publick, have been sufficient to protect the life of a delinquent.
>
> That no Arbiter of life and death has ever been censured for granting the life of a criminal to *honest* and powerful solicitation.
>
> That the man for whom a Nation petitions, must be presumed to have merit uncommon in kind or in degree, for however the mode of collecting subscriptions, or the right judgment exercised by the subscribers, may be open to dispute, it is at last plain that something is done for this man, that was never done for any other, and Government, which must proceed upon general views, may rationally conclude, that this man is something better than other offenders have been, or has done something more than others have done.
>
> That though the people cannot judge of the administration of justice so well as their governours, yet their voice has always been regarded.
>
> That this is a case in which the petitioners determine against their own interest, and those for whose protection the law was made entreat its relaxation, and our Governours cannot be charged with the consequences which the people bring upon themselves.
>
> That as this is a case without example, it will probably be without consequences, and many ages will elapse, before such a crime is again committed by such a man.

[62] *Journal of the Reign of King George the Third* (ed. by Dr. Doran, 1859), Vol. 2, p. 125.

[63] For a facsimile reproduction of these observations see *Papers written by Dr. Johnson and Dr. Dodd in 1777* (with an Introduction and Notes by R. W. Chapman, 1926), pp. 24–26.

That though life be spared, Justice may be satisfied with ruin, imprisonment, exile, infamy, and penury.

That if the people now commit an errour, their errour is on the part of mercy, and that perhaps history cannot show a time in which the life of a Criminal guilty of nothing *above* fraud, was refused to the cry of *nations*, to the joint supplication of three and twenty thousands.'

CHAPTER 15

FIRST SIGNS OF OPPOSITION IN PARLIAMENT TO A FURTHER INCREASE IN THE SEVERITY OF PUNISHMENT

§ 1. THE BILL TO MAKE ARSON IN DOCKYARDS A CAPITAL FELONY (1777)

The significance of the debate

WHEN on May 18, 1777, Mr. Combe brought in a Bill to make wilfully and maliciously setting fire to ships a capital non-clergyable offence, he was largely actuated by the recent great fires at Portsmouth and Bristol.[1] His *Bill for the better Securing Dock Yards* aimed at 'better securing and preserving the Dock-Yards, Magazines, Ships, Vessels, Stores, Warehouses, Goods, and Merchandises, being the Property of private Persons within the Kingdom of *Great Britain*'. In an amendment to the Bill, Sir Charles Bunbury proposed that instead of capital punishment, seven years' hard labour on the Thames should be imposed. The creation of new capital offences was at that time almost a commonplace occurrence. The significance of the debate on this Bill[2] lies therefore not in that yet another offence was to be made capital, but in that despite the gravity of the offence the Bill met with strong opposition, and that an amendment was submitted proposing an alternative punishment. The opposition was led by Sir Charles Bunbury who was known for his interest in penal

[1] Three attempts were made by a half-lunatic criminal known as John the Painter. A detailed account of these extraordinary crimes is to be found in the *Annual Register* (1777), Vol. 20 (History of Europe), pp. 28–31. John Painter's skilfully organised arsons remained undetected for a considerable time and were exploited by the political parties of the period. The Tories ascribed them to American and Republican machinations, while some of their opponents declared that they were malicious acts or inventions of the Tories, staged for the purpose of discrediting their adversaries. See on this Lord Mahon, *History of England from the Peace of Utrecht* (1851), Vol. 6, p. 216.

[2] *Parl. Hist.* (1777–1778), Vol. 19, cols. 234–241.

matters, but who had only just begun to take an active part in the movement for the reform of criminal law.[3]

Salient points of Sir William Meredith's speech

During the debate Sir William Meredith delivered a short but forcible speech in which the postulates and aims of criminal law reformers were for the first time coherently formulated in the House of Commons.[4] The main arguments were indicated rather than developed. But although Meredith accurately assessed some of the wider implications of the problems involved, his speech was not free either from bias or exaggerations. While speaking on the relatively narrow subject of the particular Bill, Meredith did not restrict himself to the immediate issue, but critically examined the principles underlying legislation in criminal law generally. His remarks related to what he himself called ' our whole system of criminal law ', and to ' our habits of thinking and reasoning upon it '— a most remarkable approach at a time when research into the principles and objects of criminal law was but seldom undertaken.

His main observations may be summed up as follows: cruel laws do not prevent the commission of crimes, ' for it is not the mode, but the certainty of punishment, that creates terror. What men know they must endure, they fear; what they think they can escape, they despise '. Each new capital law leads to the enactment of a number of other capital laws. One argument is always sufficient: ' If you hang for one fault, why not for another? If for stealing a sheep, why not for a cow or a horse? '.[5] Referring to the attempt made a few years earlier by Sir Charles Bunbury to bring about the repeal

[3] On Bunbury see above, note 59 at p. 444. He was particularly interested in the prison system and transportation.

[4] *Parl. Hist.* (1777–1778), Vol. 19, cols. 235–241.

[5] Later this point was taken up and forcefully developed by Lord Grenville; below, pp. 522–523.

Sir William Meredith also deprecated the practice of including new capital offences within certain classes to which they should not belong. As an instance he quoted coining, which ' under the name of treason found an easy passage ', and mentioned the case of a girl of fourteen then lying in Newgate under sentence of being burnt alive for that offence. She had been found guilty of having hidden some white-washed farthings at her master's suggestion, and had been declared to be an accomplice with her master in the treason. He had been hanged a few days before and she would have been burnt alive on the

of certain antiquated capital statutes,[6] Meredith further contended that the House of Lords had rejected the Bill mainly on the ground that it was a dangerous innovation, tending to subvert the established legal system. In actual fact—he thought—'the very reverse is truth. These hanging laws are themselves innovations. No less than three and thirty of them were passed during the last reign.[7] I believe, I myself was the first person who checked the progress of them'. As regards the Bill under consideration, Meredith was against it. Summing up his reasons for proposing to punish this offence by hard labour, he stated that as the end of all punishment is example, he preferred hard labour to death for 'so much example is gained in him who is reserved for labour, more than in him who is put to death, as there are hours in the life of the one, beyond the short moment of the other's death'.[8]

Notwithstanding Meredith's speech, Sir Charles Bunbury's motion that the offence should be made clergyable was rejected by 39 votes to 10. But although the Bill was read twice,[9]

same day 'had it not been for the humane but casual interference of Lord Weymouth'.

Another misuse of capital statutes mentioned by Meredith was their application to offences for which, when enacted, they were not intended. As an instance he quoted the Shoplifting Act, which he held was originally meant to prevent robberies of banks, silversmiths and other shops where there were goods of great value, but which in time had become applicable to the lifting of anything off a counter with intent to steal. As an illustration he quoted the following case: 'Under this Act one Mary Jones was executed, . . . it was at the time when Press-warrants were issued, on the alarm about Falkland Islands. The woman's husband was pressed, their goods seized for some debt of his, and she, with two small children, turned into the streets a-begging. It is a circumstance not to be forgotten, that she was very young (under 19) and most remarkably handsome. She went to a linen-draper's shop, took some coarse linen off the counter, and slipped it under her cloak; the shopman saw her, and she laid it down; for this she was hanged. Her defence was (I have the trial in my pocket) "that she had lived in credit and wanted for nothing, till a press-gang came and stole her husband from her; but since then, she had no bed to lie on; nothing to give her children to eat; and they were almost naked; and perhaps she might have done something wrong, for she hardly knew what she did". The parish officers testified to the truth of this story; but it seems there had been a good deal of shop-lifting about Ludgate: an example was thought necessary; and this woman was hanged for the comfort and satisfaction of some shopkeepers in Ludgate-Street'.

[6] Above, pp. 427–430 and 442–446.

[7] See on this above, pp. 4–5.

[8] The same argument was advanced by Beccaria when he suggested that capital punishment should be replaced by penal servitude for life; above, p. 285

[9] *Journals of the House of Commons* (1776–1778), Vol. 36, pp. 267, 286.

it was subsequently dropped.[10] This was a significant development about which, however, *Parliamentary History* provides no additional information.

As will be seen later, Meredith's three postulates were invariably reiterated by all who in later years urged the reform of criminal law. Although they had at their disposal much richer information, only a few were able to state their cases with equal lucidity and conciseness. But Meredith was not a man who carried much weight,[11] which may perhaps account for the meagre acknowledgment his contribution to the movement for reform has received. Another reason may be that he objected to all severe punishments, however great the crime. Hardly a reference to his speech was ever made by Sir Samuel Romilly, Sir James Mackintosh or Sir Thomas Fowell Buxton —a singular omission in view of their extensive knowledge of the subject. Meredith's speech was published in pamphlet form in 1831 and widely read; six editions were issued, one of 60,000 copies.[12]

§ 2. THE BILL FOR REGULATING THE DISPOSAL AFTER EXECUTION OF THE BODIES OF CRIMINALS EXECUTED FOR CERTAIN OFFENCES, AND FOR CHANGING THE SENTENCE PRONOUNCED UPON FEMALE CONVICTS IN CERTAIN CASES OF HIGH AND PETTY TREASON (1786)

The history of this Bill brought in by Wilberforce[13] is of many-sided interest. Only on this occasion did Wilberforce take an active part in sponsoring a penal measure,[14] although in later years he consistently supported Romilly and his successors in their efforts to revise criminal laws. His interest

[10] *Parl. Hist.* (1777–1778), Vol. 19, col. 241.

[11] On Meredith, see above, note 6 at pp. 427–428.

[12] *D.N.B.*, XIII, 272. It was published by the 'Society for the Diffusion of Knowledge on the Subject of Capital Punishment' in a series of pamphlets entitled 'Punishment of Death: A series of short articles to appear occasionally in Numbers designed for general circulation'; see Pamphlet No. 1: *Speech of the Right Hon. Sir. William Meredith, Bart. in the House of Commons, May* 13, 1777 *in Committee on a Bill creating a new Capital Felony* (1831); see also above, note 22 at p. 350.

[13] *Life of William Wilberforce* (ed. by his sons, 1838), Vol. 1, p. 114; see also *Journals of the House of Commons* (1786), Vol. 41, p. 815. The other sponsors were Duncombe and Michael Angelo Taylor.

[14] One reason for this may have been his preoccupation with the movement for the abolition of slavery.

in the problem of punishment had been aroused by Romilly's pamphlet *Executive Justice*.[15] But the Bill of 1786 indicates that at that time his views on this subject were as yet immature. The two proposals embodied in the Bill were to a certain extent contradictory. The proposal to discontinue the burning to death of women found guilty of high or petty treason was progressive and humanitarian, but the same cannot be said of the second clause of the Bill, relating to dissection.[16] It will be remembered that dissection of the bodies of executed criminals had been imposed by 25 Geo. 2, c. 37, for murder only.[17] If adopted, Wilberforce's Bill would have extended this additional punishment to rape, arson, burglary and robbery, thus putting these offences on the same level as murder.

The Bill, with some amendments, was adopted by the House of Commons[18] but was thrown out by the House of Lords,[19] mainly owing to the opposition of Lord Loughborough who was then Lord Chancellor.[20] In respect to the proposed change in the method of executing women found guilty of high

[15] See Sir Reginald Coupland, *Wilberforce* (1923), p. 54 where he states that Wilberforce 'had made friends with Samuel Romilly and had been much impressed by the pamphlet which heralded his great crusade against the barbarities of the English penal law'.

[16] Coupland refers to the first provision only, but the manuscript of the Bill preserved in the Records' Office, Houses of Parliament, contains both the above-mentioned clauses.

[17] On this statute see above, pp. 206–209.

[18] *Journals of the House of Commons* (1786), Vol. 41, pp. 815, 926, 930, 942, 945, 949, and *Journals of the House of Lords* (1783–1787), Vol. 37, p. 562. According to Wilberforce, the Bill, though introduced by him, was drawn up by the Solicitor-General (Sir Archibald Macdonald) and corrected by the Attorney-General (Sir Richard Pepper Arden, afterwards Lord Alvanley). It was then put into the hands of 'one of the most active judges', who undertook to communicate upon the subject with the rest of the bench at a general meeting. Wilberforce relates that though he disliked the alterations, he submitted to them on the grounds of policy; *Life of William Wilberforce* (ed. by his sons, 1838), Vol. 1, p. 115.

[19] *Parl. Hist.* (1786–1788), Vol. 26, H.L. July 5, 1786, cols. 195–202.

[20] Alexander Wedderburn, first Baron Loughborough and afterwards first Earl of Rosslyn, was born in 1733 and died in 1805. In 1779 he succeeded Thurlow as Attorney-General. In 1780 he was appointed Chief Justice of the Court of Common Pleas and held this office for the twelve succeeding years. In 1793 he attained the supreme ambition of his life by becoming Lord Chancellor of England. He was greatly interested in penal matters and in 1793 published a tract entitled *Observations on the state of the English prisons, and the means of improving them*. W. C. Townsend rightly praises the constructive and progressive aspects of this tract; *The Lives of Twelve Eminent Judges* (1846), Vol. 1, pp. 225–227.

or petty treason, Lord Loughborough was against 'the alteration, because although the punishment, as a spectacle, is rather attended with circumstances of horror, likely to make a more strong impression on the beholders than mere hanging, the effect was much the same, as in fact, no greater degree of personal pain was sustained, the criminal being always strangled before the flames were suffered to approach the body'.[21] But while this argument of Lord Loughborough's was definitely regressive,[22] in his opposition to the extension of dissection he was actuated by considerations of which no reformer would have disapproved. The clause of 25 Geo. 2, c. 37, imposing dissection of the bodies of executed murderers had, he said, a strong deterrent value.[23] 'Was it wise, therefore, to destroy this salutary effect, by making the deprivation of the rights of burial a common and an ordinary consequence of every conviction of almost every capital offence?'[24] The imposition of the same punishment for such different crimes as murder and burglary would—he further contended—increase the number of burglaries attended with murder, 'the criminals knowing that the commission of the crime was to receive no greater punishment than the other'.[25] None of the Members of the House of Lords supported the Bill, whereas Lord Sydney,[26] when speaking against it, urged the Lord

[21] *Parl. Hist.* (1786–1788), Vol. 26, col. 199.

[22] '. . . Such sentiments', writes Lord Campbell, 'reflect discredit on the times rather than the individual. When Loughborough was Chancellor, our penal code, having reached its utmost degree of atrocity, was generally defended and approved. All that can be said against him personally is, that on such subjects he was not in advance of his age'; *Lives of the Lord Chancellors* (4th ed. 1857), Vol. 8, p. 208. Elsewhere Campbell states that Loughborough was very considerate when trying capital cases; *ibid.*, pp. 54–55 and 208. This opinion was confirmed by Romilly and Samuel Parr. On the abolition of burning of women convicted of treason see above, pp. 212–213.

[23] 'That addition (dissection) had been found of essential advantage to the community; criminals hardened in vice, and practised in villany, had stood with a firm countenance during trial, and had even heard sentence of death passed on them without emotion; but when the judge informed them, that their bodies were to be deprived of sepulture, and that they were to undergo a public dissection, their countenance changed, they grew suddenly pale, trembled, and exhibited a visible appearance of the extremest horror'; *Parl. Hist.* (1786–1788), Vol. 26, col. 197. For other views concerning the efficacity of this measure see above, pp. 192 and 208.

[24] *Op. cit.*

[25] *Ibid.*, col. 198. On similar views expressed by Montesquieu and Bentham see above, note 14 at p. 271 and pp. 376–377.

[26] *Ibid.*, col. 201. Thomas Townshend, first Viscount Sydney, was at one time Pitt's Secretary for the Home Department; he is largely remembered for having established a new settlement for transported convicts.

Chancellor to take steps to revise the branch of criminal law relating to burglary in order ' to discriminate the various and distinct crimes classed under the general head of burglary, and to apportion distinct punishments '.

Many years passed before any such reform was undertaken.[27] In the meantime, yet another attempt was made to impose the additional punishment of dissection for certain particularly aggravated kinds of robbery and burglary. The motion for leave to bring in a Bill to this effect met with strong opposition and was ultimately negatived.[28] Serjeant Adair,[29] who was one of those who objected to the extension of 25 Geo. 2, c. 37, declared that there were glaring inequalities ' in the classes and definitions of crimes, by which the severest penalties were attached to species of offences infinitely less obnoxious than others which were punished in a much slighter manner; ' and that ' the complexion of our criminal laws was already too sanguinary '. In his opposition to the Bill, Adair was supported by Charles James Fox as well as by the Attorney-General (John Scott, afterwards Lord Eldon).[30]

§ 3. PROTECTION OF STOCKING FRAMES: 28 GEO. 3, C. 55 (1788)

The scope of the Bill

28 Geo. 3, c. 55, is one of the many eighteenth century statutes passed to curb acts of violence arising from social unrest. The struggle between wage-earners and employers in the eighteenth and early ninteenth centuries often assumed violent forms and frequently resulted in the destruction of machinery.[31] Its

[27] See below, p. 605 and Appendix 5, p. 734.

[28] *Parl. Hist.* (1795–1797), Vol. 32, ' Motion for Anatomising the Bodies of Felons executed for Burglary or Highway Robbery ', H.C., March 11, 1796, cols. 918–922.

[29] On Serjeant Adair see below, note 66 at pp. 488–489.

[30] Lord Colchester notes that the motion was negatived ' as tending to confound the distinction of crimes, as that sentence hitherto belonged only to murder '; *The Diary and Correspondence* (ed. by his son Charles, Lord Colchester, 1861), Vol. 1, p. 41.

[31] ' Die fabrikmässige Grossindustrie rief plötzlichere und schmerzlichere Veränderungen der gewohnten Weise von Produktion und Erwerb hervor, als es seinerzeit der allmälige Sieg der Hausindustrie hat. Es handelte sich zugleich um höchst concrete und griefbare Erscheinungen, gegen welche sich die Leidenschaft derjenigen wenden konnte, welche bei dem Process zunächst

main objects were the enforcement of a limit to the number of apprentices [32] and of a fixed rate of wages.[33] The Legislature responded to these disturbances [34] by enacting very severe penal laws. Thus 12 Geo. 1, c. 34 (1725), entitled 'An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages' punished the offence of assaulting a master weaver or any other person concerned in the manufacture with transportation for seven years; the same penalty was appointed for causing disturbances and for knowingly sending a letter threatening these persons with 'any Hurt or Harm'.[35] By another section of the Act, breaking into, or entering by force, any house or shop either by day or by night with intent to cut (or destroy) any woollen goods on the loom, or any tools employed in the making of such goods, as well as destroying or burning any racks on which woollen goods are hung were made capital, non-clergyable offences. 4 Geo. 3, c. 37, appointed the same penalty for breaking into a shop, house, cellar, etc. with intent to steal or destroy any linen yarn, linen cloth, etc. or any tools used for the manufacture of such articles, and for maliciously cutting any of these goods when exposed to bleach or dry.[36] For the same offences committed

verloren, nämlich um Maschinen und grosse einförmige Fabrikgebäude mit ihren rauchenden Schloten'; Adolf Held, *Zwei Bücher zur Sozialen Geschichte Englands* (Leipzig, 1881), p. 604.

[32] The employment by masters of a great many apprentices taken from among the workhouse children was, as Professor Mantoux puts it, 'a circumstance which reduced *pro tanto* the employment and wages of adult workers'; *The Industrial Revolution in the Eighteenth Century* (1937), p. 82.

[33] 'The industries that were making the new wealth, were not supporting their workpeople. If a traveller had moved among the employers, and been shown the brimming life of mills, mines, canals and docks, he would have said that England as an industrial nation was making an advance unprecedented in the history of trade. If he had moved among the working classes, learned what wages they were receiving, how they lived, he would have concluded that the industries in which they were employed were either stagnant or declining'; J. L. Hammond and B. Hammond, *The Town Labourer* (1941), p. 96.

[34] For some interesting information on the disturbances caused by framework-knitters, see W. Felkin's *History of the Machine-wrought Hosiery and Lace Manufacture* (1867), pp. 115–117 and pp. 228–229. See also S. and B. Webb, *The History of Trade Unionism* (1902), pp. 44–46, and Mantoux, *op. cit.*, pp. 82–83.

[35] Section 6; the threats of burning down their houses, destroying their trees or maiming their cattle were also mentioned.

[36] 4 Geo. 3, c. 37, was entitled 'An Act for the better establishing a Manufactory of Cambricks and Lawns, or Goods of the Kind usually known under those

in respect to woollen and silk manufactures the death penalty was appointed by 6 Geo. 3, c. 28. In relation to these three statutes 22 Geo. 3, c. 40, was to a large extent a consolidating measure.[37] It expressly repealed 12 Geo. 1, c. 34, s. 7, and 6 Geo. 3, c. 28, s. 15, but since it did not mention 4 Geo. 3, c. 37, s. 16, it was held that this last-named Act remained in force.[38]

The Bill was introduced by D. P. Coke on May 5, 1788.[39] Its threefold aim was (a) to alter the law relating to workmen who fail to return borrowed frames; (b) to increase the punishment for selling a frame belonging to another; and (c) to increase the punishment for breaking into the house of another with intent to destroy his frames. In respect to (a), Coke held that the law as it then stood was unsatisfactory, for the rightful owner could only recover his frames by an action of trover. He proposed that a person retaining a frame for more than six days after it had been claimed by the rightful owner, should be liable to a fine of twenty or forty shillings to be levied by a justice of the peace who, in the case of non-payment, was to be empowered to commit the party to gaol for from one to three months. His proposal in respect to (b) was much more drastic, for he suggested that a person selling or appropriating a frame belonging to another should be deemed guilty of felony and be liable to transportation. As regards (c), Coke insisted that the new law should declare breaking into the house of another with intent to cut or destroy his frames a capital, non-clergyable offence.

Denominations, now carrying on at *Winchelsea*, in the County of *Sussex*; and for improving, regulating and extending the Manufacture of Cambricks and Lawns, or Goods of the Kind usually known under those Denominations, in that Part of *Great Britain* called *England* '. The capital provision was contained in s. 16. The inclusion of such a proviso in an Act bearing this clumsy title is an instance of the highly defective manner in which penal laws were then drafted; more will be said on this matter in a subsequent volume of this *History*.

[37] For this Act see below, p. 656. It was extended to Scotland by 29 Geo. 3, c. 46.

[38] According to Hale, a second statute enacting an offence to be a felony does not repeal a former one which had enacted the same, though with some slight formal differences; 1 P.C. 705. East indorses this statement, but with the reservation that ' the two provisions may well stand together without clashing or inconsistency '; 2 P.C. 1079, § 23.

[39] *Parl. Hist.* (1788–1789), Vol. 27, cols. 391–394, and cols. 394–395.

Conflicting views on the Bill

It is significant that the Bill was opposed even by the official spokesman of the Government, the Attorney-General.[40] Respecting point (b) he agreed that the action of trover was not an adequate remedy and quoted the taking away of furniture from ready-furnished lodgings as a case in which a breach of trust was declared a felony.[41] Nevertheless he objected to Coke's proposal because 'he saw no reason for going at once to absolute transportation, which was certainly the next punishment to death itself'. The Attorney-General had nothing to say on the proposal to introduce capital punishment for breaking-in (point (c)). This part of the Bill was none the less criticised on several grounds. One Member, for instance, objected to making the act of going into the house of another with intent to cut and destroy his frame a capital felony, for 'he thought it impossible for any man to pronounce the intent of another'. He doubted also whether 'the multiplication of sanguinary laws was not at once a disgrace to the country, and an evil', and asked for more information as to whether similar existing laws 'had ensured their end, and produced any effect'.[42]

Coke's reply is most interesting and throws light on the origin of numerous capital laws then being passed. He stated that he 'was not speaking his own sentiments, but those of other people; the manufacturers of Nottingham imagining, that if breaking into a manufacturer's house by night,[43] with intent to cut or destroy any frame, or work in a frame was made a capital felony, that offence would never again be committed. They had therefore instructed him to propose such an alteration in the law, and to remind the House, that

[40] Sir Richard Pepper Arden (afterwards Lord Alvanley); made Solicitor-General in 1782; became Attorney-General and Chief Justice of Chester in 1784 and in 1788 succeeded Lord Kenyon as Master of the Rolls. In 1801 he became Chief Justice of the Common Pleas. Was on intimate terms with Pitt, who strongly supported him in his judicial career against the opposition of Lord Thurlow.

[41] 3 W. & M. c. 9.

[42] *Op. cit.*, col. 392. Grenville similarly urged the House 'to set its face against any extension of capital punishments, unless in very particular cases; for it was evident that if the Legislature permitted such an extension, in ever so strong an instance, it was directly made a precedent'; *ibid.*, cols. 394–395.

[43] The laws relating to this subject and summarised above, pp. 480–481, made no such distinction. It is also interesting to note that when Coke brought forward his Bill, he did not confine it to a breaking effected by night.

there was an Act of Parliament in existence, which made it a capital felony, to commit a similar offence in any woollen or silk manufacturer's house in Spitalfields; and as the frames of Nottingham stocking manufacturers were of twice the value of the frames used in the woollen or silk manufactories of Spitalfields,[44] they hoped the House would have no objections to extend to them the advantages of a similar law: of this at least they were certain, that if such an extension was denied them, the statute in favour of the Spitalfields manufacturers ought to be repealed '.[45]

Like many other promoters of absolute capital statutes, Coke was against the differentiation of punishments in accordance with the gravity of the offence. When attacked for suggesting the same penalty for breaking with intent to destroy frames and for breaking accompanied by the actual destruction of such frames, he replied that the crime was not the less because the offender had not been able to commit it altogether; ' the intent was his crime, and for that he should suffer '. He mentioned that no apprehension should be felt regarding the difficulty of ascertaining the true intent of the offender; this was a matter for juries who ' were too honest to bring in a verdict of so fatal a nature, without having first had sufficient proof adduced to convince them that the verdict was merited '. His final statement reveals how closely he adhered to the penal doctrine of Paley. ' The present Bill '—he says—' held out a capital punishment *in terrorem*, in order to deter men from committing such offences; he wished not that any person should be hanged under the authority of the Bill.' [46]

The capital clause abandoned

Before Coke's Bill became law (28 Geo. 3, c. 55) it had been extensively modified and made much more lenient. While Coke suggested that a person failing to return frames to their owner six days after they had been claimed should be punished by a fine of 20s. or 40s., section 1 of the new Act prolonged the

[44] Elsewhere in his speech Coke stated that there were about 3,000 knitting-frames used in the manufacture of stockings.

[45] *Op. cit.*, col. 394; compare Lord Russell's remark regarding the extent to which the immediate economic interests of particular groups were responsible for the multiplication of capital statutes; above, note 34 at p. 39.

[46] *Ibid.*, cols. 392–393; on Paley see above, pp. 248–257.

notification to fourteen days and appointed a fine of 20s. only. For the offence of unlawfully selling frames, which Coke proposed to punish by transportation, the Act appointed solitary confinement for from three to twelve months.[47] Coke's proposal to appoint capital punishment for breaking into a house and destroying (or intending to destroy) the frames was also abandoned, transportation for not less than seven and not more than fourteen years being adopted instead. Thus not only was the death penalty not adopted, but a discretionary power was given to the courts to adjust the length of transportation according to the individual circumstances of the case. 28 Geo. 3, c. 55, stands in striking contrast to other Acts relating to similar offences, all of which were capital.[48]

§ 4. THE PROPOSAL OF 1789 TO AMEND 6 GEO. 3, C. 36 (1766) RELATING TO THE CULTIVATION OF TREES AND OTHER PLANTS

The debate of 1789[49] is noteworthy inasmuch as it revealed the growing opposition to any further increase in the severity of criminal law, whether or not the relevant statute carried the death penalty.

Confused state of the law on this subject

Under 6 Geo. 3, c. 36, the taking away and destroying of trees, etc., at night was a felony. But, according to Mainwaring, who introduced the Bill, if any person came into a garden during the day, or during the early morning or evening twilight, he might break trees and pull up plants, roots or shrubs with virtual impunity, for in such cases only an action of trespass could be instituted. Another inconvenience was the extreme difficulty of establishing what was the dead of night. His intention was therefore to make this offence

[47] At the same time Coke's proposals were broadened on this point, for in s. 3 the Act provided the same penalty for knowingly receiving or purchasing any such unlawfully sold frames, machines or engines.

[48] See for these statutes below, p. 656. This departure was particularly remarkable in view of the fact that 12 Geo. 1, c. 34—one of the earlier Acts—specifically referred to framework knitters.

[49] *Parl. Hist.* (1789–1791), Vol. 28, May 20, 1789, cols. 140–145; see also the second debate on the same subject, *ibid.*, May 28, 1789, cols. 145–147.

punishable by imprisonment or transportation at the discretion of the court.

Actually the law on this subject was as follows: By 6 Geo. 3, c. 36, to break, destroy or carry away in the night-time any roots, shrubs or plants to the value of 5s. was declared a felony punishable by transportation for seven years. But 6 Geo. 3, c. 48, s. 3, passed in the same session and dealing with the same acts, provided that the first offence should be punished by a fine not exceeding 40s., the second by a fine not exceeding £5, and the third be deemed a felony and be punished by transportation for seven years. The Act did not specify whether to be within its scope the offence had to be committed at night or during the day. Obviously the two laws were somewhat inconsistent. In the case of *Hitchcock and Howe*, tried in 1788,[50] it was determined that the first of these Acts had not been repealed by the second, but that they were to be considered as one Act passed in the same session. They declared that it was a mere accident in what order the chapters in the Statute Book were arranged. In this case, if the chapters were transposed it would be a felony under 6 Geo. 3, c. 36, if the property was both taken or destroyed at night and was of the value of 5s.; but in all other cases the offence would have to be prosecuted under 6 Geo. 3, c. 48. Buller, J., stated that had the two statutes been made in different sessions, the later one would have had to be considered as virtually repealing the former.[51] It was also held that under 6 Geo. 3, c. 36, the court had the power to pass any sentence that could be inflicted for a simple felony.

The spirit of the debate

While explaining why he thought the amendment of the relevant law necessary, Mainwaring said that 'he was aware of the proper aversion of the House, to the extension and increase of the penal statutes. Their number, undoubtedly, was already too great'. But, he believed, 'there were cases which might be stated, that were too glaringly injurious not

[50] East 2 P.C. 588–589.

[51] Serious doubts also arose as to the connection between these two Acts and one of the provisions of the Waltham Black Act; see on this above, pp. 61–66.

to demand some remedy '.[52] Sir Joseph Mawbey, who strongly supported Mainwaring, was also most anxious to point out 'that the proposed bill was not an extension of capital offences; had that been the case, he would have opposed it '.[53] It was significant for the mood of the House that the arguments of those who opposed and those who sponsored the proposed measure were similar in spirit. Sheridan, for instance, observed when speaking against the proposal, 'that there were so many of those statutes, and in several cases they were carried to so extreme a degree of rigour and severity, that they proved a disgrace to the laws and to the country '.[54] In Windham's opinion every penal law was in itself an evil, justifiable only inasmuch as it served to prevent a greater evil. The aid of the law ought never to be called in till men had done as much as they could for their own protection. 'The fences about the grounds of nurserymen were very slight, and therefore the nurserymen chose to fence themselves by statutes . . . The question to be considered was, what amount of penal laws does the security of human life require '.[55] Finally Burke, who took part in the second debate, pointed to certain fundamental defects of the criminal laws: 'That considering the whole system of the penal laws in this country as radically defective, as he always had opposed, so should he still continue to resist their intended multiplication. Instead of applying a remedy to the source of the evil, whenever inconvenience was felt in any particular instance, recourse was had to the legislature for a new law for that particular case. . . . Against all offences which admitted of it, a civil was preferable to a criminal remedy, because the danger done could be appreciated by a jury, and not only punishment inflicted on the offender, but reparation made to the injured person. . . . He recommended a revision of the whole criminal law, which in its present state he thought abominable '.[56]

[52] *Parl. Hist.*, (1789–1791), Vol. 28, col. 141.

[53] *Ibid.*, col. 143.

[54] *Speeches* (ed. by a Constitutional Friend, 1842), Vol. 1, p. 475.

[55] *Parl. Hist.* (1789–1791), Vol. 28, cols. 144–145. But Windham later strongly opposed Sir Samuel Romilly's efforts to revise the criminal laws; see above, p. 258 and below, p. 509.

[56] *Ibid.*, cols. 146–147; on Burke's views on penal matters, see above, pp. 339–341.

§ 5. SEDUCING SOLDIERS TO DESERT OR MUTINY: 37 GEO. 3, C. 70 (1797)

Bill presented by Pitt

The immediate reason for bringing in this Bill was the mutiny of 1797 on board a number of ships at the Nore[57]; the Bill was brought in by Pitt on the day on which the House of Commons was debating the King's message respecting the mutiny.[58] In support of his motion Pitt said first, that the disturbances at the Nore were a manifestation of a well-organised and premeditated plan to provoke a widespread sedition[59]; and secondly, that the law designed to deal with the offence was inadequate owing to the fact that 'the statute laws of this country were not the result of a systematic code; they had grown up to what they were by an accumulation of provisions made to suit offences as they occurred'.

The offences which were to be dealt with by the new law were in Pitt's own words 'so complex in their nature, that it was impossible to define them'.[60] He suggested that they should be described as[61]: 'maliciously and advisedly to commit any act of mutiny or treason, or to make or endeavour to make any mutinous or traitorous assemblies, or to commit any mutinous or traitorous acts whatever'. When the Bill implementing this very wide proposal was ultimately framed[62] it comprised a number of distinct offences, the four main ones being (a) to endeavour to seduce a person serving in His

[57] *Parl. Hist.* (1797–1798), Vol. 33, cols. 797–806. 'The King's Message', *ibid.*, cols. 796–797, contained the following passage: '. . . His Majesty cannot doubt that his parliament will adopt, with readiness and decision, every measure which can tend, at this important conjuncture, to provide for the public security. And his majesty particularly recommends it to the consideration of parliament, to make more effectual provision for the prevention and punishment of all traitorous attempts to excite Sedition and Mutiny in his majesty's naval service . . .' The mutiny at the Nore was preceded by a mutiny of the fleet at Portsmouth. For a detailed narrative of these events see the *Annual Register* (1797), Vol. 39 (History of Europe), pp. 207–222. See also Pike, *History of Crime* (1876), Vol. 2, pp. 387–389.

[58] *Parl. Hist.* (1797–1798), Vol. 33, cols. 806–813.

[59] According to some contemporary and modern views these disturbances could have been prevented had the Government shown more foresight. See Lord Holland's *Memoirs of the Whig Party* (ed. by Henry Edward Lord Holland, 1852), Vol. 1, p. 95; and J. Holland Rose, *William Pitt and the Great War* (1911), pp. 312 *et seq.*

[60] Parl. Hist. (1797–1798), Vol. 38, col. 808.

[61] *Ibid.*, col. 813.

[62] For the Act see below, p. 618 and note 34, *ibid.*

Majesty's forces by sea or land from his duty and allegiance; (b) to endeavour to incite such a person to an act of mutiny; (c) to endeavour to incite him to make, or endeavour to make, a mutinous assembly; and (d) to endeavour to incite him to commit any traitorous or mutinous act.[63] According to Abbot, who represented the Crown in *Fuller's Case*, the word *endeavour* 'clearly implies an act done, and holds a middle place between the compassing and the actual perpetration; it describes the attempt to carry the operation of the mind into effect'.[64] He notes also that 'the Legislature appear to have studiously selected the word "endeavour", as being of the largest and most general import; and they have not mentioned any particular modes of attempt, or circumstances accompanying the attempt, as necessary to constitute the crime'.[65] The preamble indicated that 'the publication of written or printed papers', or 'malicious and advised speaking' shall constitute the offence.

Divergence of views on the subject of punishment

The crucial question which emerged in the course of the debate was how this wide range of criminal activities was to be punished. In the approach to this problem four tendencies can be discerned. Pitt himself at first represented the moderate tendency. He thought that persons guilty of such acts 'were the worst traitors to society, and deserved the most exemplary punishment'. But since the precise nature and extent of their offences could not be determined, he considered capital punishment inappropriate and suggested that they should be declared aggravated misdemeanours to be punished—at the discretion of the courts—either by a fine and imprisonment, or by transportation. The House of Commons, he hoped, would not consider that he proposed too much or too little.

In the ensuing debate Pitt's proposal was criticised by Serjeant Adair who represented the extreme tendency.[66] The

[63] *R.* v. *Fuller* (1797), 2 Leach 790.
[64] *Ibid.*, 796.
[65] *Ibid.*, 795.
[66] James Adair was educated at Peterhouse, Cambridge. He later became a fellow of his college and was called to the bar by Lincoln's Inn. He gained a political reputation by siding with Wilkes in the latter's quarrel with Horne

penalties suggested by Pitt appeared to him inadequate to the offence, which was equal to the most aggravated form of treason. He objected also to making it a misdemeanor and declared that 'however unwilling he might be to multiply the penalties of death—and he believed, according to our criminal code, that penalty was too often inflicted—yet for the offence now described, not only death should be incurred, but death in more than usual horror; for scarcely any punishment could be too severe for such a crime'. But he warned the House against making the measure a permanent law. Pitt doubted whether by making the law more severe its execution would thereby be made more effective.

While Adair contended that if framed in accordance with Pitt's suggestion the Act would be too lenient, certain other Members objected that it would be too severe, particularly the clause which was to empower the courts to inflict transportation. This view was shared by Hobhouse, who implored the House 'to consider well before they adopt measures of extraordinary harshness'.[67]

A compromise solution was proposed by Spencer Perceval who thought the offence should be made a felony, but not

Tooke. Between 1775 and 1780 he was sitting in Parliament as a Whig M.P., but he was a very moderate Whig. Very hostile to the French Revolution, he resigned from a famous Whig club and severed his close political connection with Fox when the latter declared his sympathy with it. Together with Sir John Scott (afterwards Lord Eldon) he took part in the prosecution of Thomas Hardy and Horne Tooke. Afterwards he appeared with Erskine for the defence of William Stone and showed himself an able advocate. When England was threatened with invasion, Adair, though very advanced in age, joined a force of London volunteers. According to Chalmers his 'eloquence was vigorous and impressive, but his voice was harsh, and his manners uncourteous'. Adair attained the position of Serjeant-at-Law and Recorder of London and that of Chief Justice of Chester; see H. W. Woolrych, *Lives of Eminent Serjeants-at-Law* (1869), Vol. 2, pp. 660–675.

[67] Benjamin Hobhouse was born in 1757 in Bristol, the son of a merchant. He went to Brasenose College, Oxford, and was afterwards called to the bar by the Society of the Middle Temple. He was first elected to Parliament in 1797 and was later an M.P. from 1806 to 1818. In 1803 he became a Secretary to the Board of Control under Addington. Made baronet in 1812, he was a Fellow of the Royal Society and of the Society of Antiquaries. Among his writings some relate to important legal topics. See *A Treatise on Heresy as cognisable by the Spiritual Courts, and An Examination of the Statute of William III for Suppressing Blasphemy and Profaneness* (1792); and *An Inquiry into what constitutes the Crime of compassing and imagining the King's Death* (1795). Lord Broughton, a statesman and politician, was his son; *D.N.B.* IX, 940. When in Parliament, Hobhouse continued to take an active interest in the reform of criminal law.

without benefit of clergy. He proposed that the courts should be empowered to select one of three alternative penalties: imprisonment, transportation or death. This was an equitable and just suggestion, particularly since on the one hand the offence was admittedly very serious, while on the other the statute was to be framed so broadly as to include a great number of widely differing acts.

Before the debate was concluded, however, the extreme tendency prevailed. Pitt changed his original opinion and declared that since an act of mutiny and an endeavour to make any mutinous assembly were punished with death, 'it could not, certainly, be thought too severe to make those persons who were guilty of seduction, those who were the movers and instigators of sedition and mutiny, liable to the same punishment'. Despite its final result, the debate on this Bill was symptomatic of the growing opposition to any further increase in the severity of criminal law. The suggestion not to make the law permanent was in accordance with these feelings; Pitt himself brought in a clause, which was adopted, limiting the duration of 37 Geo. 3, c. 70, to one month after the commencement of the next session of Parliament.[68]

[68] Pitt simultaneously introduced another Bill purporting to declare it a capital felony to hold any intercourse with ships in mutiny, after a certain proclamation had been issued and read in the dockyard. In addition the Solicitor-General proposed that benefit of clergy should be withdrawn from offenders guilty of this crime. This extreme suggestion was supported by Pitt, for as he said, 'the man who had been guilty of acts of such aggravated rebellion and treason ought to be completely separated from that country whose cause they had abandoned. If they valued the communication and intercourse with a father, a brother, or a wife, before they could enjoy the sweets of those endearing relations, they must reconcile themselves to their offended country'.

The Bill was opposed by a number of Members on political and psychological grounds, while Mr. Nicholls objected to it because it 'blended the acts of communication and intercourse with the acts of aiding and abetting treason'. It would seem that even intercourse with a person guilty of high treason was only a misdemeanor, provided it was not accompanied by overt acts of aiding and abetting. Nicholls suggested that (a) a less severe penalty should be appointed for mere communication with the ship from shore made without any motive of sedition; and (b) a felonious communication should be declared a misdemeanor and punished as such, while the court should be vested with the discretionary power to inflict transportation in aggravated cases. These moderate proposals failed to meet with the approval of the House of Commons. As the Attorney-General (Sir John Mitford, later Lord Redesdale) put it, 'the principle of the bill was not new; for England such as it is, existed upon it'. The Bill was then passed without any modification and became 37 Geo. 3, c. 71. Like 37 Geo. 3, c. 70, it was a temporary measure only; *Parl. Hist.* (1797–1798), Vol. 33, cols. 813–820.

37 Geo. 3, c. 70, prolonged for seven years

Though originally enacted as a temporary measure, 37 Geo. 3, c. 70, continued to be prolonged for brief periods[69] until in 1800 a motion was brought by Abbot to extend it for seven years.[70] He contended that there were too many temporary Acts (he put their number at 150), that the statute in question embodied a permanent policy and that it had proved most useful. Personally he was inclined to think that it should be made perpetual, but since the Irish Legislature had extended a similar measure until 1807, he wished the British Legislature to give to it the same degree of permanency. Lord Hawkesbury[71] supported the proposal, for as he put it 'the best laws had been made on the spur of the occasion'. The measure—he argued—was inspired by mercy, since by the appointment of the death penalty for seduction more lives were likely to be saved than lost, and prevention of crime was always better than the punishment of it. Another Member said that the very existence of the House might be due to that Act and proposed its prolongation not till 1807 but till 1870.

Opposing the proposal Hobhouse recalled that he had been against the Act even when it was first put into force. He defended temporary laws because they gave the Legislature an opportunity of reviewing at frequent intervals 'the policy of its own acts'. The second opponent of the proposal, Tierney, insisted that since the mutiny on board the fleet which brought the Act into existence had subsided, no valid reason could be adduced to justify its continuance.[72] Despite this opposition,

[69] Continued by 38 Geo. 3, c. 6; 39 Geo. 3, c. 4; 39 & 40 Geo. 3, c. 9; and 39 & 40 Geo. 3, c. 16.

[70] *Parl. Hist.* (1800–1801), Vol. 35, cols. 764–769.

[71] Charles Jenkinson, first Earl of Liverpool.

[72] George Tierney (1761–1830), educated at Eton and Peterhouse, Cambridge, was the son of a rich London merchant who later went to Gibraltar to act as a prize agent there and then settled in Paris. For many years Tierney led the opposition against Pitt. The Whigs never forgave him for continuing to attend the House of Commons after Fox and his followers had decided in 1798 not to do so. He held a number of minor posts in the administration, first under Addington and later in the coalition government led by Canning. But he is best remembered for his work on the opposition benches. According to Justice Hamilton, *D.N.B.* XIX, 866, 'had Tierney been the contemporary of men less brilliant than Pitt, Burke, Fox, and Sheridan, his reputation as a debator would have stood very high . . . for years he fought the uphill battle of hopeless opposition, and fought it admirably, when his more famous contemporaries retired from it. Yet because of the social obscurity of his origin the Whigs would neither trust nor reward him . . .' In Tierney the cause of penal reform found a zealous and adroit defender.

however, Abbot's motion was adopted and the Bill went to the House of Lords. As has been pointed out elsewhere,[73] it was then common for the promoters of an emergency law to suggest a time limit for its duration in order to forestall the opposition. The usual procedure then was to prolong it from time to time, again for limited periods only, until the particular form of criminal activity which had been its immediate cause had subsided. This would be attributed to the beneficiary influence of the law, which they therefore claimed should now be made permanent. When that stage had been reached the chances of the opposition were usually slight, public opinion having had time to accustom itself to a statute which although harsh, could be claimed to have been proved useful by experience.[74]

Bill opposed by Lord Holland

The subsequent history of the Bill is interesting inasmuch as it marks the occasion on which Lord Holland made his first major speech in Parliament on the subject of criminal law.[75] The only previous comprehensive speech on this subject was that of Sir William Meredith, delivered in 1777.[76] Meredith advocated the setting up of an inquiry into the ' whole system of criminal law ', and called for a radical change in ' our habits of thinking and reasoning upon it '. Lord Holland's statement was inspired by similar considerations. Lucid in its construction and of great eloquence, it was an earnest and vigorous appeal to Parliament to change its outlook on penal

[73] See above, p. 17.

[74] On emergency laws see above, pp. 15–19.

[75] *Parl. Hist.* (1800–1801), Vol. 35, cols. 769–774. At the time of this speech Lord Holland was only twenty-seven years old. A year earlier, in 1799 he had spoken against forfeiture of inheritance upon attainder for treason and together with Lord Ponsonby entered a protest on the ' Journals of the House of Lords '; *Parl. Hist.* (1798–1800), Vol. 34, cols. 1085–1089 and 1091–1092. By 7 Ann. c. 21, s. 10 and 17 Geo. 2, c. 39 this additional penalty was to be imposed only during the life of the Pretender and his sons. On May 9, 1799, however, Charles Abbot brought in a Bill to repeal these limitative clauses. Although opposed by Hobhouse, Sir Francis Burdett and some other Members of the House of Commons, the Bill was adopted by a great majority. In the House of Lords, it was strongly supported by the Lord Chancellor (Lord Loughborough, afterwards Earl Rosslyn), and became law (39 & 40 Geo. 3, c. 93); *ibid.*, May 9, 1799, cols. 1067–1074, and June 25, cols. 1074–1085; and H.L., July 4, cols. 1085–1091. This subject is also noted in connection with Bills introduced in 1813–1814 by Sir Samuel Romilly, below, pp. 518–519.

[76] Above, pp. 474–475.

matters. His approach to the subject bears a strong affinity to that of Eden and Romilly. Denouncing the severity of criminal laws he urged their revision, pointing out also a number of grave limitations of emergency laws.[77] Apart from these general arguments, he opposed the Bill because it proposed to punish with death even a mere utterance of words. He objected to the imposition of so severe a punishment for so indefinite a crime. This vagueness—he submitted—would render the law liable both to abuse and to evasion. Moreover, in accordance with the rules of evidence then in force, the Act would deprive a person tried under it of the privilege of counsel to plead in his defence.

Though the sponsors of the Bill advanced no material arguments, and hardly any of its supporters rose to reply to Holland's speech,[78] the Bill was none the less adopted without substantial modification and became 41 Geo. 3, c. 29 (1800). But in spite of this initial setback Lord Holland continued to support all attempts at the reform of criminal law. He remained in close contact with Sir Samuel Romilly[79] and for many years spared no effort to break the hostility of the House of Lords. Unlike Romilly, however, he lived to see the fruits of his labours, the criminal law having already been extensively revised by the time he retired from public life.[80]

[77] On this see above, p. 16.

[78] Lord Grenville supported the measure. In his opinion the question before the House was not 'whether there were or were not in our penal code too many capital punishments (perhaps he, for one, might be inclined to think there were), but whether this offence ought to be punished with death and whether such a punishment was likely to operate as a preventive of crime'. According to Grenville the offence was almost as serious as the greatest crime that could be committed against society, *i.e.*, treason. The Act was in his view at all times necessary for the security of the State; *Parl. Hist.* (1800–1801), Vol. 35, col. 774.

[79] See for instance below, note 5 at p. 523.

[80] On Lord Holland (1773–1840), see Macaulay's eloquent essay in *Works* (ed. by Lady Trevelyan, 1866), Vol. 6, pp. 533–542. 'Those who most dissent from his opinion', writes Macaulay, *ibid.*, p. 538—'must acknowledge that a public life more consistent is not to be found in our annals. Every part of it is in perfect harmony with every other part; and the whole is in perfect harmony with the great principles of toleration and civil freedom'.

PART V

THE GROWTH OF THE MOVEMENT FOR THE REFORM OF CRIMINAL LAW

Chapter 16

SIR SAMUEL ROMILLY'S CAMPAIGN FOR REFORM

§ 1. THE REPEAL OF 8 ELIZ. C. 4 IMPOSING CAPITAL PUNISHMENT FOR STEALING FROM THE PERSON

Reasons for selecting this statute

AFTER many years of preliminary studies,[1] it was during a holiday at Cowes in the summer of 1807 that Romilly decided to take up in Parliament the subject of the reform of criminal law. It was then that he prepared his first speech and drafted the two Bills he intended to introduce.[2] The course he then contemplated taking was very different from the one he ultimately adopted. At that stage his intention was to alleviate the severity of criminal law by greatly increasing the value of stolen property in all statutes which appointed capital punishment for theft.[3] He had no doubt that this 'ought long ago to have been done'.[4] At the same time he was convinced that a far more drastic reform was needed.[5]

Ten months later, in January, 1808, under the advice of his friend George Wilson, Romilly abandoned the idea of bringing before Parliament even this moderate proposal. Wilson considered that without first consulting the judges, Romilly could not hope to carry the matter through and might well prejudice any future attempts at reform. 'I cannot think', writes Romilly in his *Memoirs*, 'of consulting the judges; I have not the least hope that they would approve

[1] See above, pp. 313–322.

[2] One of the Bills related to the compensation to be accorded to persons wrongfully accused.

[3] Similar suggestions had often been made before; see for instance the remarks of Sir Henry Spelman above, pp. 264–265.

[4] *Memoirs of the Life of Sir Samuel Romilly* (ed. by his sons, 1840), Vol. 2, p. 230.

[5] '. . . what I have in contemplation to do . . . compared with what should be done, is very little'; *ibid.*

of the measure'.[6] Some months later, however, another of his friends, Scarlett (afterwards Lord Abinger) advised him to introduce a Bill to repeal all statutes imposing capital punishment for larceny. Sceptical of the chances of carrying through such a sweeping measure, yet determined to attempt to introduce at least a small reform, Romilly decided on a middle course: 'I determined to attempt the repeal of them (statutes) one by one; and to begin with the most odious of them, the Act of Queen Elizabeth, which makes it a capital offence to steal privately from the person of another'.[7]

Subsequent events proved that Romilly's caution had been well justified and that he had rightly assessed the strength of the opposition with which his proposals would have to contend. He had also acted wisely in selecting 8 Eliz. c. 4 (1565) as the first statute to be repealed.[8] The offence of picking pockets—always frequent—had been continually increasing and early in the nineteenth century had reached very considerable proportions.[9] Despite this the statute of Elizabeth had at an early stage become largely inoperative. Its scope had been considerably restricted owing to defective drafting,[10] as it had by a series of judicial decisions,[11] while the disproportionately severe punishment which it imposed discouraged prosecutions.[12] In the few cases in which the death sentence had been pronounced, it was later commuted. Romilly himself acknowledged that he knew of only one offender actually executed under this Act. Even Paley, who was so strongly opposed to any revision of criminal law, explicitly mentioned 8 Eliz. c. 4 as deserving of repeal.[13]

Romilly's Bill was adopted by the House of Commons and

[6] *Ibid.*, pp. 235–236.

[7] *Ibid.*, p. 239.

[8] For this statute see below, Appendix 1, pp. 636–637.

[9] It was mainly committed by organised gangs of professional thieves often employing children. For some vivid descriptions see notes by foreign observers, below, Appendix 3, pp. 706–707.

[10] The Act required that the theft be committed 'privily without his (the person's) knowledge'. Consequently, whenever it was ascertained that the victim had actually *seen* the taking of his or her purse or watch, the capital charge could not be put into effect and the offence had to be reduced to simple larceny.

[11] For the judicial exposition of this statute see below, Appendix 2, pp. 660–666.

[12] Highly characteristic of the public feeling on this subject was the common practice of dragging such offenders to the nearest fountain or water pump and after giving them a cold shower setting them free.

[13] See above, p. 256.

passed the House of Lords without opposition or comment.[14] Apart from imposing a less severe penalty, the new Act embodied a much improved definition of the offence.[15] Two noteworthy circumstances connected with this first stage of Romilly's activities are the nature and extent of concessions which he was forced to make, and the conflicting views on the supposed effect the repeal of the death penalty for stealing from the person had on the incidence of the offence.

The concessions which Romilly was forced to make

Romilly's Bill was preceded by the following preamble: 'And whereas the extreme severity of penal laws hath not been found effectual for the prevention of crimes, but on the contrary, by increasing the difficulty of convicting offenders, in some cases gives them impunity, and in most cases renders their punishment extremely uncertain: And whereas, the Act hereinbefore recited hath, by the great diminution of the value of money, become much more severe than was originally intended; . . .'.[16] This preamble, embodying as it did a broad statement of principles, was unacceptable to the majority of the House of Commons. Not without foundation they contended that it implied disapproval of a large section of existing laws and if adopted would form a basis for further reforms.[17]

The second, no less symptomatic concession which Romilly was forced to make, concerned the penalty which was to replace capital punishment. His suggestion that picking pockets should be made simple larceny punishable by transportation for seven years was opposed mainly on the ground that transportation for so limited a period of time had no

[14] 48 Geo. 3, c. 129. For the debates on the Bill see *Parl. Deb.* (1808), Vol. 11, H. C., May 18, 'Criminal Law', cols. 395–404, and June 15, cols. 877–886. Romilly's speech when introducing the Bill is also included in his *Speeches* (1820), Vol. 1, pp. 38–47.

[15] On the suggestion of Sir Thomas Plumer, who was then Solicitor-General, and with the support of Sir Samuel Romilly, the already quoted restrictive provision (see above, note 10) was replaced by the words 'whether privily without his knowledge or not, . . . but without such force or putting in fear as is sufficient to constitute the crime of robbery'. Moreover those 'present, aiding and abetting' were to be punished in the same manner as the principal offenders.

[16] 48 Geo. 3, sess. 1808, 260, *Parl. Papers* (Public Bills, 1808), Vol. 1, p. 557.

[17] *Parl. Deb.* (1808), Vol. 11, cols. 877–880.

deterrent value.[18] Instead, it was decided to impose transportation for life as the maximum punishment, and transportation for not less than seven years or imprisonment (with or without hard labour) for not more than three years as two alternatives to be imposed in less serious cases. Defending his initial proposal Romilly rightly observed that if transportation for seven years was thought to be so ineffectual then it should not be applied at all; yet three times the number of offenders were being transported for seven years than for any longer period.[19] He also thought it an 'extraordinary argument' that disapproval of a certain less severe punishment should warrant the imposition of an inordinately severe one.

But these remarks did not go to the root of the matter. However extraordinary their arguments, the attitude of Romilly's opponents was consistent with their outlook on penal matters. Revealing in this respect is the debate on the protection of oyster-fisheries which took place some three weeks later.[20] A Bill was then brought in to make the theft of oysters from certain places a felony punishable by transportation for seven years. Opposing the Bill, Romilly reminded the House that only three weeks earlier they had denounced transportation for seven years as utterly ineffective. However, his proposal to impose imprisonment for two years was rejected and the Bill passed into law.[21] Thus in the first case transportation for seven years had been declared useless in order to justify the imposition of a more severe punishment, while in the second case it was unhesitatingly adopted, for whatever its merits it was the more severe of the two penalties envisaged. The elimination of offenders from society was held to be the best safeguard against crime. From this point of

[18] Typical in this respect was the view expressed by James Abercromby, afterafterwards Lord Dunfermline, who in 1835 became Speaker of the House of Commons. He said that transportation should always cover 'the natural period of the criminal's existence'; *ibid.*, col. 885. Sir Thomas Plumer, then Solicitor-General, informed Romilly of his consultations with Lord Ellenborough and several other judges, all of whom approved his amendment making transportation for life the maximum penalty under the new Act; Romilly, *Memoirs*, Vol. 2, p. 245.

[19] On this see above, pp. 160–161.

[20] *Parl. Deb.* (1808), Vol. 11, H.C., June 22, Oyster Fishery Bill, cols. 993–995.

[21] 48 Geo. 3, c. 144 (1808); it repealed 31 Geo. 3, c. 51, which had been found inadequate.

view transportation for life was naturally to be preferred to transportation for seven years, and transportation for seven years to imprisonment.

Conflicting views on the effect of the repeal of 8 Eliz. c. 4

Almost immediately after the passing of 48 Geo. 3, c. 129,[22] both prosecutions and convictions for stealing from the person began rapidly to increase. This undisputed fact was very differently interpreted by the reformers and their opponents.

Persons indicted and convicted at the Old Bailey for stealing from the person (1809–1814) [23]

	Persons indicted at the Old Bailey for stealing from the person.	Convicted of the whole charge.	Convicted of simple larceny only.	No Bills found or acquitted.
1809	99	43	1	55
1810	98	40	1	57
1811	151	58	2	91
1812	149	65	3	81
1813	189	93	2	94
1814	191	91	3	97

The increase in the number of persons indicted and convicted of stealing from the person, so strikingly borne out by the above table, was held by Lord Ellenborough and his followers to prove that the abolition of the death penalty impaired public safety.[24] Romilly looked upon it as the vindication of the reformers' claim that the Bill fulfilled its main purpose, which was to enhance the certainty of punishment by relaxing its severity, the increase being not in the

[22] June 30, 1808.

[23] This table, as well as those which follow, have been computed on the basis of the Appendix 2 to the 'Report on Criminal Laws' (1819), 585, *Parl. Papers* (Reports, 1819), Vol. 8, pp. 135–139; Appendix A to the 'Report from the Select Committee on the Police of the Metropolis' (1828), 533, *Parl. Papers* (Reports, 1828), Vol. 6, p. 1 at pp. 271–301; and on the basis of Romilly's evidence before a committee on the police of the metropolis; see 'Report from the Committee on the State of the Police of the Metropolis' (1816), 510, *Parl. Papers* (Reports, 1816), Vol. 5, p. 1 at pp. 248–251. The figures relate to London and Middlesex only but reveal a trend common to the whole country.

[24] See *Parl. Deb.* (1810), Vol. 17, col. 196*. Fully reported in the Appendix to *Parl. Deb.* (1811), Vol. 19, col. lxxxviii. Lord Ellenborough was most categorical that the repeal of the death penalty for the offence in question was the main cause of its subsequent increase: 'From my own knowledge, and the general information of the judges, I am certain that the increase of that class of offenders has become, in this short period, enormous . . . knowing they (offenders) are no longer exposed to the danger of incurring the penalty of death, we have information of their depredations in our public streets, and in the open day'.

incidence of crime itself but in that of prosecutions and convictions for it.

In order to ascertain the true effect of the new Act it is necessary to remember first, that it not only repealed the death penalty but also broadened the definition of the offence thus increasing the number of acts which could be tried under it.[25] Secondly, that it was misleading to examine the figures for the years which followed the repeal of the death penalty only. When examined for a longer period of time covering both the years which preceded and those which followed the repeal, they disclose an upward trend in the incidence of prosecutions and convictions for this offence beginning many years before the passing of the new law. It can thus be reasonably assumed that the undisputed increase after the passing of the law was at least in part due to the influence of other factors. Thirdly, the figures relating to this particular offence should have been compared with those relating to all offences. The table which follows shows that the upward trend was by no means peculiar to stealing from the person only, but that all offences were then on the increase.

Average number of persons committed for trial at the Old Bailey for all offences and for stealing privately in a shop.
(Years: 1806-7; 1809-10; 1813-14.) [26]

	For all offences.	For stealing privately in a shop to the value of five shillings.
1806–1807	958	21
1809–1810	1,228	34
1813–1814	1,445	44

Moreover, the incidence of one particular offence against property—privately stealing in a shop—which continued to carry the death penalty, increased no less sharply than that of stealing from the person, for which capital punishment had been abolished. One more point should be noted. Whereas during the three years immediately preceding the passing of the new Act about half (36) of the 77 persons tried for stealing privately from the person were acquitted, during the three years following its enactment (1809–1811) only about every third person tried was acquitted (88 out of 234). Similarly, while during the first period, only 6 of the 41 committed

[25] On this see above, note 15 at p. 499.
[26] Figures relating to the whole of England and Wales show a similar trend.

offenders were found guilty of the crime of which they had been accused, the remaining 35 having had their charges reduced to simple larceny, in the second period only four verdicts of simple larceny were returned and the original charges upheld in all the remaining 139 cases. This trend fully confirmed the reformers' contention that the relaxation of the severity of criminal law would lead to a more effective enforcement of its provisions.

In conclusion it may be stated that whereas the recorded increase in the incidence of stealing from the person could not be attributed exclusively to a greater readiness to prosecute,[27] there was certainly no foundation whatsoever for the view that this increase proved that more offences were actually being committed now that the death penalty had been abolished. In subsequent years this last interpretation was continually advanced by all opponents of reform, who made it one of their main arguments against Romilly's further attempts to revise the criminal law.[28]

§ 2. ATTEMPT TO REPEAL CERTAIN STATUTES IMPOSING CAPITAL PUNISHMENT FOR LARCENY

The three Bills of 1810

On February 9, 1810, Romilly moved for and obtained leave to bring in three Bills to repeal 10 & 11 Will. 3, c. 23, 12 Anne,

[27] Romilly, and particularly some of his followers, certainly tended to over-emphasise the influence of this factor.

[28] One of the very few among Romilly's opponents who displayed a greater objectivity and caution in assessing the real significance of the recorded increase was Spencer Perceval, then Chancellor of the Exchequer. During a debate in the House of Commons in 1811 he said: 'The hon. and learned gentleman (Sir Samuel Romilly) had said that he thought more prosecutions had been commenced, and that more witnesses had come forward, in consequence of the punishment being slighter than formerly, as many had escaped punishment through the reluctance of individuals to prosecute, when death must follow conviction. Now, it might be that more prosecutions were commenced than formerly against such offenders—not because prosecutors and witnesses came forward more willingly from the consideration he had stated, but because more offences were committed, and committed with greater hardihood, from a knowledge of the penalty incurred being less severe. This might be the cause of the increase of prosecutions while at the same time it rendered conviction more easy. He did not say it was so; he would not decide either one way or the other, but he contended that the hon. and learned gentleman in taking this as a most decisive proof in favour of the efficacy of this measure, had shewn himself not wholly free from prejudice'; *Parl. Deb.* (1811), Vol. 18, Feb. 21, 1811, 'Privately Stealing Bill', cols. 1261–1268 at col. 1264.

St. 1, c. 7, and 24 Geo. 2, c. 45, respectively. The first of these Acts imposed capital punishment for stealing privately in shops to the value of five shillings, the second for stealing to the value of forty shillings in dwelling-houses and the third for stealing to the same amount on board vessels on navigable rivers.[29] The offences covered by these statutes, and especially by the first two, amounted to a considerable proportion of all non-violent offences against property and therefore of all crimes. The repeal of the death penalty for offences so frequently committed would have amounted to a serious breach in the existing system, and the proposal to effect so important a change must be regarded as the first attempt at a drastic reform of criminal law. Romilly's speech on this occasion was one of the most brilliant ever delivered in Parliament on the subject of crime and punishment.[30] It was followed by prolonged and animated debates which ranged over a wide field and touched upon every aspect of the problem.[31] Sir William Grant (Master of the Rolls), Canning and Wilberforce were among Romilly's most ardent supporters. The keynote of Grant's important statement was that criminal law should be brought into harmony with the predominant feelings of the community.[32] Canning argued that the great number of capital statutes which the courts

[29] On these three statutes see below, Appendix 1, pp. 633–634, 635–636 and 637. On the restrictive manner in which they were interpreted by the courts, see below, Appendix 2, pp. 666–674.

[30] For a detailed examination of this speech see above, pp. 322–331, for the wide response it evoked see *ibid.*, pp. 331–336.

[31] See *Parl. Deb.* (1810), Vol. 15, Feb. 9, 'Criminal Law', cols. 366–374; Vol. 16, H.C., May 1, 'Privately Stealing Bill', cols. 762–780; *ibid.*, H.C., May 4, 'Criminal Laws', cols. 833–835 and 944–949. For a fuller record see *Parl. Deb.* (1811), Vol. 19, Appendix, 'Debates in the Year 1810 upon Sir Samuel Romilly's Bills, etc.', cols. i–cxxii.

[32] 'The laws say that the punishment of death shall be inflicted for stealing in a dwelling-house to the amount of forty shillings. The practice says it shall not be inflicted. As they cannot both be right, the question is, which is wrong, and where the remedy is to be applied? Now I think the practice is right. . . . So much of the execution of the law depends upon the public, that their concurrence in the propriety or repugnance to the existence of the law is always an object highly deserving of the consideration of every legislature. But important as it is to the administration of justice in every country, in England it is all in all. . . . This universal confederacy amongst the middling classes of society not to punish those offences by death: this conduct of the higher orders in dispensing with the law, is to me conclusive evidence that in the advanced state of civilisation in this country, the punishment of death is too severe for this crime'; *Parl. Deb.* (1811), Vol. 19, Appendix, cols. lxvi–lxvii.

were called upon to administer inevitably distorted their discretionary power; the revision of these laws would put this power on a firm and well-regulated basis, without in the least restricting its scope.[33] Whereas Wilberforce supported Romilly's proposals on broad humanitarian grounds, invoked in their favour the authority of Pitt and appealed for an effective system of alternative penalties, and particularly for the re-organisation of prisons.[34]

As Romilly had expected, the Bill to amend 12 Anne, St. 1, c. 7, which imposed capital punishment for theft in dwelling-houses to the value of forty shillings, met with very strong opposition and was lost in the Commons by a majority of two, thirty-five voting against, and thirty-three for it.[35] When the result of the vote was made known, Perceval and Ryder pressed the House to decide also on the other two Bills, but since only sixty-seven Members were present at the time the House agreed with Romilly that the debate should be postponed. A few days later, on May 4, the Bill amending 10 & 11 Will. 3, c. 23, which punished stealing privately in a shop to the value of five shillings with death, was read a third time and adopted. The third and last Bill, to amend 24 Geo. 2, c. 45, was again postponed and a few days later Parliament was prorogated. Thus out of three Bills only one was adopted by the House of Commons.

In the course of a subsequent debate on this Bill in the House of Lords on May 30, 1810,[36] issues were raised and views expressed in the light of which it became evident that the Bill would not be adopted. This debate indeed not only sealed the fate of the one Bill then under discussion. It clearly indicated that for many years to come any attempt at the reform of criminal law was doomed to failure.

[33] *Ibid.*, cols. lxxviii–lxxxii.

[34] *Ibid.*, cols. lxxiv–lxxvii.

[35] Commenting upon this vote in his *Memoirs*, Vol. 2, p. 317, Romilly states that twenty-two out of thirty-five Members who voted against his measure held Government offices; among these were three Lords of the Admiralty, two Lords of the Treasury, two Secretaries of the Treasury, the Secretary of the Admiralty, the Secretary of State, the Secretary of War, the Secretary for Ireland, and an Under-Secretary of State.

[36] *Parl. Deb.* (1810), Vol. 17, cols. 196*–200*. For a fuller record see *Parl. Deb.* (1811), Vol. 19, Appendix, cols. lxxxvii–cxxii.

Paley's penal doctrine indorsed by Lord Ellenborough and Lord Eldon

The first fact which emerged from the debate in the House of Lords was that both the Lord Chancellor (Lord Eldon) and the Lord Chief Justice (Lord Ellenborough) were fully in agreement with the doctrine of William Paley which, as has already been stated, constituted the most eloquent and ingenious defence of a criminal law based on capital punishment.[37] His doctrine was the antithesis of all that the school of reformers stood for[38]; between his views on penal matters and those of Romilly and his followers there could be no compromise.[39] Lord Ellenborough's two speeches[40] were in fact a summary of Chapter IX (On Crimes and Punishments) of Paley's *Moral and Political Philosophy*.[41] Both he and Lord Eldon also fully endorsed Paley's main thesis that the most effective means of preventing crime is to appoint capital punishment for a great many offences and to execute it in a few selected cases only.[42]

[37] On Paley's doctrine, see above, pp. 248–257.

[38] See above, Chaps. 10 and 11.

[39] Ellenborough's well-known remark that if the Lords were to pass Romilly's Bill, 'we shall not know where to stand—we shall not know whether we are upon our heads or our feet' well reflects the absolute irreconcilability of these two doctrines.

The only Act which he framed was 43 Geo. 3, c. 58, known as Lord Ellenborough's Act. In so much as it repealed 21 Jac. 1, c. 27 (on this statute see above, pp. 430–434), and re-drafted the definition of the offence of murdering bastard children, 43 Geo. 3, c. 58, marked an advance; but since it also created ten new capital felonies, '. . . the revolting severity of our criminal code was scandalously aggravated'; Campbell, *The Lives of the Chief Justices of England* (3rd. ed., 1874), Vol. 4, p. 292. For a cogent criticism of this statute see the evidence given by Sir W. David Evans before the 'Select Committee on Criminal Laws' (1819), 585, *Parl. Papers* (Reports), Vol. 8, p. 43. For the debate on the Bill see *Parl. Hist.* (1801–1803), Vol. 36, March 28, 1803, cols. 1245–1247.

[40] *Parl. Deb.* (1811), Vol. 19, Appendix, cols. lxxxvii–cxii and cols. cxviii–cxxii. For Lord Eldon's speech see *ibid.*, cols. cix–cxiv.

[41] Dr. Paley dedicated this book to Lord Ellenborough's father, Edmund Law, D.D., Bishop of Carlisle. He was on terms of friendship with both of them.

[42] Lord Eldon's exact words were: 'I am rather of opinion that it is not the circumstances of the severity of the law being put into execution to the fullest extent, so much as the imaginary terrors of it on the mind, that produces the abhorrence of crime'; *Parl. Deb.* (1811), Vol. 19, col. cxii.

The only new argument which Lord Ellenborough adduced was the increase in stealing from the person which followed the abolition of the death penalty for that offence; see above, pp. 501–503. He also insisted that the contemplated reforms were of an abstract and speculative character, ran against long established practice and aimed at revising laws which embodied the wisdom of

It should be noted that at a certain stage of the debate Lord Eldon, though strongly supporting Lord Ellenborough, was prepared to compromise on the Bill. He suggested that the death penalty for stealing privately in a shop should be upheld but, as he put it, instead of 'to the value of five shillings of the money of William 3, to make it ten shillings of the value of his present Majesty'. However, Lord Ellenborough objected even to this amendment stating that the point had not escaped his attention, that he had 'suggested the idea to those most eminent for their knowledge upon these subjects as to the prudence of such an amendment', but that they were against it.[43]

The attitude of the judges

Lord Ellenborough's reference to his consultations with the judges indicates that when speaking against Romilly's Bill he was expressing not only his own views but also those of other judges. To dispel any doubts about it he stated during the debate: 'This, my Lords, is not only my own opinion, but it is that of the learned judges, with whom I have been in the habit of consulting upon the punishment of crimes; for they are unanimously agreed that the expediency of justice and public security requires there should not be a revision of capital punishment in this part of the criminal law: and I can assure your lordships I have correctly represented their sentiments in addressing the observations I have made, to the consideration of this House'.[44] Lord Eldon similarly declared: 'I must take the liberty to say that although the opinions of the twelve judges of England would not decide me against my own judgment, I cannot venture to entertain the idea that it

many generations. It will be remembered that some thirty years earlier Sir William Meredith had indicated that most of the capital statutes were of very recent origin; above, p. 475.

[43] Lord Ellenborough even rejected the moderate improvements suggested by Blackstone; see on this, above, p. 258.

Actually Ellenborough's views were even more extreme than Paley's. For whereas Paley agreed that 8 Eliz. c. 4, should be repealed, Ellenborough told Sir Thomas Plumer in 1808 that he was by no means convinced that a revision of this statute was necessary, and in 1810 referred to Romilly's Bill as '. . . a most dangerous innovation in the criminal law of the country . . .'; on this Bill see above, pp. 497–501.

[44] *Parl. Deb.* (1811), Vol. 19, Appendix, col. xcii.

becomes me to treat with disrespect the knowledge and wisdom of men so deeply conversant with the laws of the land . . .'[45]

Lord Ellenborough said that he was expressing the unanimous opinion of those judges 'with whom I have been in the habit of consulting upon the punishment of crimes', but it is obviously difficult to ascertain whether the advice of all the judges had been sought. Thus in 1812 a statute was passed, 52 Geo. 3, c. 143, which apart from consolidating into one Act a number of earlier statutes imposing the death penalty for revenue offences, also repealed a number of others, all of which imposed capital punishment.[46] This new law originated from a Committee appointed by the House of Lords. During one of its sittings, in which some of the judges were taking part, the Solicitor of the Excise had submitted evidence bearing out the insuperable difficulty of obtaining convictions in capital cases.[47] This deposition had been confirmed by one of the judges present.[48] Obviously the repeal of capital statutes by 52 Geo. 3, c. 143, would not have been possible without the consent of the judges who had been members of the Committee.[49]

None the less it cannot be doubted that the opinions of

[45] *Ibid.*, col. cix.

[46] A list of these statutes was given to the Committee on Criminal Laws of 1819 by T. W. Carr, Solicitor of Excise; see 'Report from Select Committee on Criminal Laws' (1819), 585, *Parl. Papers* (Reports, 1819), Vol. 8, p. 57.

[47] On this and on the effect the abolition of capital punishment for these offences had in stimulating prosecutions and making convictions more certain see the above quoted evidence of the Solicitor of Excise; *op. cit.*, p. 56 and pp. 58–59.

[48] This was made public during the debate in the House of Lords by the Earl of Lauderdale. Neither Lord Ellenborough nor Lord Hawkesbury, whom he asked to confirm his statement, contradicted him. Lord Lauderdale acknowledged that exceptional weight should be attached to Lord Ellenborough's pronouncement, for 'he has come down to the House strengthened by the collective opinion of a body of men for whom your lordships must feel the greatest respect, and for whom the country entertain a veneration and esteem in no degree inferior to the considerations of this House'. None the less he doubted whether Lord Ellenborough was expressing the views of all the judges.

It may well be that the judge to whom Lord Lauderdale referred was Sir Archibald Macdonald. As Solicitor-General in Pitt's Government he had spoken in the House of Commons in favour of the establishment of a police force and a revision of capital laws; see above, pp. 342–343. In 1793 he became Chief Baron of the Exchequer; from the evidence he gave before the Committee of 1819 it is apparent that he favoured a reform of criminal law; see *op. cit.*, p. 48.

[49] According to Lord Lauderdale, 'the whole reasoning in favour of the mitigation of punishment for offences against the excise laws, must apply, with tenfold force for the mitigation of the punishment of death for stealing in a shop to the amount of only five shillings'; *Parl. Deb.* (1811), Vol. 19, col. cix.

Lord Eldon and Lord Ellenborough were shared by a great many, if not all the judges. Windham, who was one of the chief spokesmen of the opposition, had already said during the debate on Romilly's Bill in the House of Commons that he had 'reason to believe that the persons most competent to decide upon the expediency of this measure, I mean the judges themselves, wholly disapprove of the alteration intended by my hon. friend in the criminal law of the land'.[50] Sir Vicary Gibbs, then Attorney-General, referred to the absence of evidence that the projected reforms were considered necessary by the judges, who, in his opinion, 'from their high offices and their opportunities of daily observation, ought, I consider to have been consulted respecting this change'.[51] Finally, the Chancellor of the Exchequer (Spencer Perceval) understood it to be 'the unanimous opinion of the bench that the alteration will be attended with consequences the most injurious'.[52] Romilly's reply that 'he had sent to all judges a statement of his view on the subject' and that 'none of them had signified to him their disapprobation of what he had proposed' obviously could not be taken as indicating their consent.

The judges to be consulted on all Bills relating to criminal law

In 1787 William Pitt and a year earlier Lord Loughborough, then Lord Chancellor, had said that any project aiming at a reform of criminal law should originate from the judges or, if coming from another quarter, should be approved by them before being submitted for the consideration of Parliament.[53] This thesis was now reaffirmed and was strongly opposed by Sir Samuel Romilly both on constitutional grounds and because he knew that he had little chance of obtaining their approval.[54]

The question of whether or not the judges should be consulted prior to a Bill being brought in had arisen in 1807 in connection with a project unconnected with criminal law.

[50] *Ibid.*, col. lxv.
[51] *Ibid.*, col. lxxi.
[52] *Ibid.*, col. lxxxii.
[53] See on this, above, p. 447 and note 75 at pp. 448–449.
[54] See above, pp. 497–498. See also Romilly's *Memoirs*, Vol. 2, p. 246, where he states: '. . . I knew the severity of Lord Ellenborough's disposition, and had therefore avoided consulting him before I brought either Bill in'.

On January 28 of that year Romilly asked for leave to bring in a Bill to make freehold estates assets with which to pay simple contract debts. The project was very well received by the House. Some days earlier Romilly had sent a copy of the Bill to Lord Ellenborough and had received in reply a note which, in addition to Ellenborough's own observations upon this Bill, contained the following passage:—

> 'As so very great a change in the law will be effected by the proposed Bill, if it should pass, I think the judges should have an opportunity of considering it before it is introduced into Parliament. If the Bill commenced in the Lords, as Bills of this nature used formerly to do, it would, I believe, be referred to the judges in the first instance, as a matter of course, to report their opinion thereupon; and, though the proposed Bill originates in the Commons, where no such reference can be made, it would still be expedient to obtain their opinion individually respecting the alteration meant to be effected, and to leave the Bill, in that view, for their consideration a reasonable time before it is brought in. In the hurry of Term I have not yet had time to attend to it as I ought. The general principle of subjecting real estates to the demands of simple contract creditors I much approve.' [55]

Romilly interpreted this passage in the sense that Lord Ellenborough would wish him to withdraw his motion. He replied that he had already gone too far to be able to do so, and added: 'With respect to consulting the judges individually, before a Bill is brought into the House of Commons, if that be necessary, or even proper, it is very obvious that no person in my situation can with propriety propose any alteration of the law; because, to devote the time which would be necessary for such a communication with the judges would be quite incompatible with his unavoidable occupations or, I should rather say, with the discharge of the duties of his situation'. In his *Memoirs* he adds the following further comment [56]:—

> 'It appears to me a most unconstitutional doctrine, that no important alteration can be made in the law, unless the judges are first consulted on it. If they are to be consulted, of course their opinions are to be followed; and consequently,

[55] Romilly, *Memoirs*, Vol. 2, pp. 177–178.
[56] *Ibid.*, pp. 178–179.

> if they, or if only a majority of them, disapprove of any proposed alteration in the law, it must be abandoned. They would have to be considered like the Lords of Articles formerly in Scotland; or like a fourth member of the Legislature, who are to have something like what has been called the initiative in legislation; a power of preventing any proposed measure not only from passing into a law, but even from being debated and brought under the view of Parliament; and this important power too, exercised not ostensibly, and as public men, with all the responsibility which belongs to the discharge of any public duty, but with the indifference and carelessness which necessarily must attend such private communications.' [57]

As has already been observed Romilly did not consult the judges in 1808 when he intended to bring in his first Bill to repeal 8 Eliz. c. 4.[58] He notes, however, that on reflection he thought it proper to 'make him (Lord Ellenborough) some apology for this omission'. He had accordingly written to Lord Ellenborough, who replied as follows:—

> 'My dear Sir, I assure you that, if I had not received the favour of your note, I was not at all likely to have attributed the non-communication of your plan respecting the Criminal Law to any want of that attention and kindness which I have always experienced from you. Perhaps it was as well that you did not previously apprize me of your intentions, as you did not mean to communicate with the other Judges on the subject. . . .' [59]

During the House of Commons' debate of 1810 Spencer Perceval, then Chancellor of the Exchequer, again stated that he would only support projects of reform 'if he had heard any representation of the bad effects of the existing law, made by any of the judges, or by any magistrate engaged in the administration of penal justice'.[60]

[57] Romilly also notes that Lord Redesdale was reputed to have said that he would oppose the Bill in the House of Lords on the grounds that it had not been communicated to the judges before being put before Parliament. In order to prevent this Romilly immediately sent a copy of the Bill to all the judges, without however asking them to express their opinions. In his *Memoirs* he adds: 'I shall probably not hear from any of them upon it; and whether they approve or disapprove of it, I shall bring it into the House'.

[58] See above, pp. 497–498.

[59] Romilly, *Memoirs*, Vol. 2, p. 247. Letter dated May 17, 1808.

[60] *Parl. Deb.* (1811), Vol. 19, Appendix, col. lxxxii. For a direct attempt to influence the course of a debate in the House of Commons see below, pp. 514–516. For the attitude of the Committee of 1819 see below, pp. 545–547.

§ 3. A FURTHER ATTEMPT TO REPEAL CERTAIN STATUTES IMPOSING CAPITAL PUNISHMENT FOR LARCENY

A petition demanding the repeal of two statutes: 18 Geo. 2, c. 27, and 3 Geo. 3, c. 34

In view of these circumstances the defeat in the House of Lords of Romilly's Bill to repeal 10 & 11 Will. 3, c. 23, was a foregone conclusion. It was thrown out by a majority of twenty, the Archbishop of Canterbury and six other dignitaries of the Church voting against it.[61] But serious as this setback had been, it did not deter Romilly from continuing his efforts. Despite the attitude of the House of Lords it was of course still possible that his proposals would be adopted by the House of Commons. The favourable reception of his speech by the public also acted as a stimulus.[62] Thus on February 27 and March 4, 1811, he brought in five Bills. Of these, the first three were the same that had already been debated and lost the previous year; the remaining two aimed at repealing two statutes: one imposing capital punishment for stealing to the amount of ten shillings from bleaching-grounds in England (18 Geo. 2, c. 27)[63]; and the other—to the amount of five shillings from bleaching-grounds in Ireland (3 Geo. 3, c. 34).[64]

When moving for leave to bring in these Bills, Romilly put before the House two remarkable petitions asking for these statutes to be repealed, because owing to their excessive severity they had been found ineffective. The petitions were signed by 150 proprietors of bleaching-grounds in Ireland and a considerable number of calico-printers of England.[65] For the first time a section of the community for the protection of which certain laws had been enacted complained that they were too severe and demanded their repeal on this ground.

[61] On this see above, note 30 at p. 353.

[62] The reaction of leading periodicals of the period may be quoted as an illustration. See on this, above, pp. 331–336.

[63] This statute was one of the few which provided an alternative punishment; see Appendix 1, below, p. 633 and note 11 at pp. 633–634; for its interpretation see Appendix 2, below, pp. 674–675.

[64] See Romilly, *Speeches*, Vol. 1, pp. 315–322, and *ibid.*, pp. 322–327. See also *Parl. Deb.* (1811), Vol. 18, H.C., Feb. 21, 1811, 'Privately Stealing Bill', cols. 1261–1268; and *Parl. Deb.* (1811), Vol. 19, H.C., Feb. 27, 'Capital Punishments', col. 106.

[65] For the full text of this petition see Appendix 4, below, p. 727.

As Sir Samuel Romilly said when presenting the petitions, 'the Petitioners . . . were not stating the opinions of speculative and theoretical reasoners, but the sincere belief and conviction of experienced men representing the injuries which their property had sustained in consequence of the inefficacy of the laws made for their protection'.[66] The Bills passed both Houses,[67] even Lord Ellenborough voting for their adoption 'on account of the petition from those who were to receive the protection of the law'.[68] In the course of the years that followed a number of similar petitions were put before Parliament.[69]

A questionnaire answered by the Recorder and the Common Serjeant of London put before the House of Commons

During the debate in the House of Commons on Romilly's three remaining Bills the opposition to the Bills was led by Colonel Frankland.[70] His very long speech delivered on this occasion [71] was afterwards published in the form of a tract intended as a reply to Romilly's pamphlet *Observations on the Criminal Law*.[72] Today almost completely forgotten, Frankland's speech is a useful guide to current views on criminal law and problems of punishment. He once more re-affirmed all the main tenets of Dr. Paley's penal doctrine [73]

[66] *Speeches*, Vol. 1, p. 323.

[67] The new Acts—51 Geo. 3, c. 41, and 51 Geo. 3, c. 39—replaced capital punishment by transportation for life and also provided two alternative penalties: transportation for not less than seven years and imprisonment with hard labour for not more than seven years.

[68] *Parl. Deb.* (1811), Vol. 20, H.L. May 24, 'Criminal Law Bill', cols. 296–303, at col. 299.

[69] See on this, below, pp. 527 and 592–593.

[70] *Parl. Deb.* (1811), Vol. 19, H.C., March 29, 'Dwelling-House Robbery Bill', cols. 614–661.

[71] *Ibid.*, cols. 615–650.

[72] On Romilly's pamphlet see above, pp. 322–331. The full title of Frankland's tract is: *The Speech of William Frankland, Esq., in the House of Commons, etc., on the second reading of several Bills, brought in by Sir Samuel Romilly, making alterations in the Criminal Laws* (1814). Repetitiveness and exaggerated eloquence blunt the force of his arguments.

[73] He thus said that 'laws operate principally by the silent and invisible working of the terror of their sanctions'; when such laws are in force, an individual who contemplates the commission of a crime 'finds everywhere confusion, uncertainty and obscurity. A kind of darkness seems to envelop him. The terror of the law swells in his imagination. The haze magnifies it. He cannot measure its size or shape. When we know the extent of a danger, how much of our apprehension immediately disappears?"; *Parl. Deb.* (1811), Vol. 19, cols. 626 and 640. On Paley and his penal doctrine see above, pp. 248–259.

adding a number of his own often striking observations,[74] and again arguing that no project of reform in criminal law ought to be considered by the Legislature unless recommended by the judges or by others concerned in the administration of criminal justice.[75] He also put before the House a document which he had obtained from Sir Thomas Plumer, then Solicitor-General.[76] It consisted of a series of questions which the Solicitor-General put to the Recorder of London and to the Common Serjeant, together with their replies.[77] It was a very one-sided piece of evidence. The questions had been framed by a known opponent of the revision of criminal law; those who had answered them were not present during the debate and could not be cross-examined. Nor could any counter-evidence be submitted since neither Romilly nor his supporters had had any knowledge of Frankland's intention to read out this document to the House. Although Frankland stated that he did not quote their opinion 'as authority, to

[74] Criminal laws contribute to the shaping of national character and the customs and moral standards of society and should therefore be changed as little and as seldom as possible; '. . . no alterations have ever produced happiness in the frame of human society, but such which (according to the law of nature in the external world) have been so gradual as scarcely to be perceptible'. The great number of mild punishments by which the death penalty would have to be replaced, '. . . might produce a greater sum of human suffering, and a greater diminution of human happiness, than a small number of severe punishments, without more effectually obtaining the end proposed, which end is the prevention of a species of action materially injurious to the country, and not an infliction upon the agent of so much suffering, as a retribution of so much moral guilt'.

[75] 'Have any of these magistrates, whose absence I lament, transmitted their representations? Has any description of magistrate whatever, subordinate or superior, moved on the occasion? Unless it has been for the purpose of anxiously expressing his dissent to the measures proposed and of deprecating their adoption'; *Parl. Deb.* (1811), Vol. 19, cols. 618–619.

[76] Sir Thomas Plumer had intended himself to communicate to the House of Commons the replies to his questionnaire but was prevented from attending on that day; Romilly, *Memoirs*, Vol. 2, p. 383.

[77] The Common Serjeant was then Knowlys and the Recorder of London Sir John Silvester (sometimes also spelled Sylvester). Sir John Silvester strongly opposed Romilly's proposals. In 1816 he contended that the repeal of the death penalty for privately stealing from the person had led to an increase of this offence; see his evidence before the committee on the state of the police of the metropolis in their 'Report' (1816), 510, *Parl. Papers* (Reports, 1816), Vol. 5, p. 1 at p. 222. But he did not rule out the advisability of restricting the scope of 10 & 11 Will 3, c. 23, by raising the value of property for the theft of which capital punishment could be imposed; see on this his reply to question 5, below, p. 516.

govern or direct the conduct of the House,'[78] the document was bound to carry great weight. It runs as follows[79]:—

QUESTIONS PROPOSED TO THE RECORDER AND TO THE COMMON SERJEANT OF THE CITY OF LONDON, TOGETHER WITH THEIR ANSWERS.

Question I

What has been the effect of the Act of Parliament which took away capital punishment from privately stealing from the person?

The Recorder: The effect of the act of last sessions, in my opinion, has been to increase the number of offenders, and consequently the number of convictions.

The Common Serjeant: I have not observed any beneficial effect as yet, resulting to the public from the repeal of the 8th Elizabeth c. 4, which took away the benefit of clergy from the offence of privately stealing from the person.

Question II

Has it been found by experience that the number of pick-pockets has increased since, or diminished?

The Common Serjeant: The information which I have collected in the course of my official duty has satisfied my mind, that the offence of larceny from the person has very much increased since the repeal of the statute above mentioned, and that the offenders of that description have become more numerous, more united in gangs, and that they carry on their depredations more systematically and with greater boldness.

Question III

Was there, before the act passed, any reluctance in prosecutors to prosecute, for this offence, or in jurors to convict, if the evidence was complete?

The Recorder: I am not aware of the least reluctance in prosecutors to come forward and prosecute, as the law formerly stood, nor did I ever know a jury loth to convict, when the evidence was complete.

The Common Serjeant: The above-mentioned statute applied to any value exceeding one shilling, and in prosecutions where the value of the stolen article was very trifling, I have observed a reluctance in juries to find the prisoners guilty of privately stealing; but in cases, not of that description, I have not found more

[78] *Parl. Deb.* (1811), Vol. 19, col. 642.
[79] *Ibid.*, cols. 643–645.

unwillingness to apply the law to that species of offenders, than to a thief of any other class.

Question IV

What is, at this time, the state of the metropolis in respect to crimes? Which are the most prevalent, and most difficult to be guarded against?

The Recorder: The crimes most prevalent in the city of London and county of Middlesex, and which are most difficult to be guarded against, I take to be stealing to the amount of 40*s.* in a dwelling-house, and stealing to the amount of 5*s.* privately in a shop. But offenders of the first description, viz. for stealing in a dwelling-house, are nearly as numerous as all the other offenders subject to capital punishment.

The Common Serjeant: Offences against the personal security of individuals are not very prevalent larcenies. The larcenies from the person, and from shops and warehouses, are arrived to a very high pitch; but above all larcenies from dwelling-houses, and those particularly through the agency of menial servants.

Question V

Is it advisable or safe to take off the capital punishment from shoplifting, stealing from ships, etc. in canals and navigable rivers etc. and from a dwelling-house, without breaking, and without being a burglary?

The Recorder: I certainly do not think it advisable to take off the capital punishment in the three cases alluded to, viz.: stealing to the amount of 40*s.* in a dwelling-house; the stealing goods to the same amount on a navigable river or canal, and the stealing goods of the value of 5*s.* privately in a shop. But whether any and what alteration should be made as to the amount of the value of the goods stolen, might deserve some consideration.

The Common Serjeant: I am most fully convinced that the repeal of the 10th and 11th Will. 3, and of the 23rd and 24th Geo. 2, c. 45, would be very unadvisable and very unsafe. And, in the present depraved state of the domestic and other servants in the metropolis, I cannot possibly conceive any measure more big with mischief to every private housekeeper, and to every tradesman, than the lessening the severity of the 12th Anne, stat. 1, c. 7.

It will be noted that the questions related not only to the effect of the repeal of 8 Eliz. c. 4 and to the general state of crime but also to the three Bills then under consideration by the House of Commons.

Bills to repeal 10 *&* 11 *Will.* 3, *c.* 23; 24 *Geo.* 2, *c.* 45; *and* 12 *Anne, st.* 1, *c.* 7, *adopted by the House of Commons*

That the cause of the reformers had gained ground in the House of Commons is well illustrated by the fact that suggestions at a compromise were advanced by their opponents: Colonel Frankland for instance, who said in his speech that Romilly's project was 'supported by doctrines avowedly calling in question the whole frame and policy of our criminal jurisprudence', none the less suggested that 12 Anne, st. 1, c. 7, relating to stealing in dwelling-houses, be amended in two ways: (a) by raising the value of stolen property from forty shillings to forty pounds, 'so as to do away with that disposition of juries and witnesses to shut their eyes to the facts respecting the real value of the thing stolen'; and (b) by making it possible for the prosecutor to proceed either for simple or for compound larceny.[80] Richard Ryder, then Secretary of State for the Home Department, opposing the repeal of the shop-lifting Act (10 & 11 Will. 3, c. 23) suggested that the value of goods should be raised and that sentences ought not to be passed upon those whom it was not intended to execute[81]; while Lockhart said that should the House decide to repeal statutes 'which had the sanction of antiquity', it should be done for a limited period of one or two years only.[82] However, Romilly refused to make any concessions and all three Bills—two of which had been rejected a year earlier—were adopted by the House of Commons. Some weeks later they were thrown out by the House of Lords.[83]

§ 4. LIMITED CHANGES INTRODUCED BETWEEN 1812 AND 1814

In 1812[84] Romilly succeeded in bringing about the repeal of 39 Eliz. c. 17, an obsolete statute which made it a capital

[80] *Parl. Deb.* (1811), Vol. 19, cols. 645 and 645–646.
[81] *Ibid.*, H.C., April 8, 'Dwelling-House Robbery Bill', cols. 743–745, at col. 743.
[82] *Ibid.*, col. 744.
[83] *Parl. Deb.* (1811), Vol. 20, H.L., May 24, cols. 296–303. Lord Ellenborough opposed the Bills for, as he put it, 'they went to alter those laws, which a century had proved to be necessary, and which were now to be overturned by speculation and modern philosophy', and Lord Eldon, because he thought it unwise 'to withdraw the salutary influence of the terror'.
[84] *Parl. Deb.* (1812), Vol. 21, H.C., Feb. 7, cols. 701–702.

offence for soldiers or mariners to wander without a pass.[85] His only two other Bills which were ultimately adopted related to corruption of blood and to the system of execution for high treason. The *Attainder of Treason and Felony Bill* ' to take away corruption of blood ' was in the first instance lost in the House of Commons.[86] Romilly's original intention had been to abolish corruption of blood both for high treason and felony; but when he reintroduced his Bill[87] a year later, in 1814, a compromise solution was agreed upon whereby except for high treason, petty treason and murder,[88] the effects of

[85] On this statute see below, Appendix 1, pp. 621–622. Another similar Act—5 Eliz. c. 20—which made it a capital felony for any person to remain for more than a month in the company of Egyptians had been singled out for repeal by the committee of 1770 (see above, pp. 442–443), and repealed thirteen years later by 23 Geo. 3, c. 51 (1783).

[86] See Romilly's *Speeches*, Vol. 1, pp. 434–435; *Parl. Deb.* (1813), Vol. 25, ' Attainder of Treason and Felony Bill ', April 5, cols. 576–587. For an earlier debate connected with this subject see *Parl. Hist.* (1798–1800), Vol. 34, cols. 1067–1074, 1074–1085, 1085–1091.

The opposition was led by Charles Yorke, Frankland and Sir William Garrow (Solicitor-General). According to Romilly, Yorke's action was dictated by ' filial piety towards his father, who, when a very young man, wrote his *Considerations on the Law of Forfeitures* '. During the debate Romilly read out the following passage from a letter dated January 26, 1766, from Yorke to Blackstone: ' As to corruption of blood, it is one thing to explain the grounds of law, and another to wish the law altered in that respect, as being carried too far. I have done the first, but said nothing as to my opinion in the latter respect. The actual forfeiture in treason was the point of my argument; and to show it consistent with the justice, the policy, and principles of free government. Permit me, however, to desire that you will strike out any reference to that very juvenile treatise '; Romilly, *Memoirs*, Vol. 3, p. 99. The third corrected and enlarged edition of Yorke's *Some Considerations on the Law of Forfeiture for High Treason* was published in 1748. Yorke's doctrine had been critically examined by Dagge, *Considerations on Criminal Law* (2nd ed., 1774), Vol. 2, *passim*, and Vol. 3, Appendix, p. 1 *et seq.*; changes in the law had been advocated by Eden, *Principles of Penal Law* (2nd ed., 1771), pp. 46–49, and by Blackstone, 4 Comm. 387–388. Romilly quoted Blackstone extensively in support of his proposal, to which Frankland replied as follows: ' The authority of Sir William Blackstone had been referred to as against the corruption of blood. But it was not fair to look at a few sentences brought in as ornamental flourishes at the end of a lecture, to enliven the students of a college. His opinion was to be collected from the whole bearing and tenor of his work, which was decidedly in favour of the prevailing system '; *Parl. Deb.* (1813), Vol. 25, col. 584.

[87] See *Parl. Deb.* (1813–14), Vol. 27, March 23, 1814, ' Corruption of Blood ', cols. 342–346; *ibid.*, col. 360; *ibid.*, April 25, cols. 527–541. A detailed account of this last and decisive debate was prepared by Basil Montagu and published as a tract by the ' Society for the Diffusion of Knowledge on the Subject of Capital Punishments '. It was later reprinted in the Appendix to *Parliamentary Debates*; see ' Debate in the House of Commons, April 25, on Sir Samuel Romilly's Bill for taking away Corruption of Blood on Attainder of Felony and Treason, etc.'; *Parl. Deb.* (1814), Vol. 28, cols. cxli–clxxvii.

[88] As well as abetting, procuring, or counselling in any of these crimes.

corruption of blood were to operate in respect to the attainted person during his lifetime only.[89] Romilly was on this occasion strongly supported by Mackintosh, who made a notable contribution to the debate.

His *Bill to alter the Punishment of High Treason* had an equally difficult passage. The sentence he originally proposed was that the offender should be hanged and his body be at the King's disposal. The Bill was substantially altered in the committee stage but even in this changed form was found unacceptable by the opposition and was rejected on Colonel Frankland's motion. The Bill was, in Frankland's words, yet another of 'these mischievous attempts to unsettle the public opinion with respect to the enormity of these atrocious offences'; Sir William Garrow (then Attorney-General) said that he would never have voted for the old law if it were now to be enacted, but since it had the sanction of centuries, he was against changing it.[90] 'So that the Bill is lost', notes Romilly in his *Memoirs*, 'and the Ministers have the glory of having preserved the British law, by which it is ordained that the heart and the bowels of a man convicted of treason shall be torn out of his body while he is yet alive.'[91] A year later he reintroduced the Bill and this time achieved a large measure of success, although on the suggestion of Lord Ellenborough and Lord Eldon the House of Lords introduced an amendment whereby it was to be a part of the sentence that the body of the criminal should be cut into quarters. Romilly reluctantly

[89] 54 Geo. 3, c. 145 (1814).—An Act to take away Corruption of Blood save in certain cases.

In the House of Lords, the third reading of the Bill was moved by Lord Erskine; Lord Holland made an attempt to restore the Bill to its original form, *i.e.*, to extend it to high treason, petty treason and murder, as well as to felonies, but his amendments to this effect were negatived; *Parl. Deb.* (1814), Vol. 28, cols. 747–748. For Lord Holland's unsuccessful attempt made eleven years later, see *Parl. Deb.* (1825), N.S., Vol. 13, 'Treason Forfeiture Bill', April 22, cols. 123–124, and May 26, cols. 825–836.

[90] This debate is very inadequately reported in *Parl. Deb.* (1813), Vol. 25, H.C., 'Bill to alter the Punishment of High Treason', cols. 763–764. For a full report see Basil Montagu's pamphlet published by the 'Society for the Diffusion of Knowledge on the Subject of Capital Punishments', and reprinted in the Appendix to *Parliamentary Debates* (1814), Vol. 28, 'Debate in the House of Commons, April 5, 1813, upon Sir Romilly's Bill on the Punishment for High Treason', cols. lxxxi–cxl; for the quotations see cols. lxxxv and xcvi. Romilly's remarkable speech against Frankland's motion is also to be found in his *Speeches*, Vol. 1, pp. 461–479; for his speech when introducing the original Bill on February 17, 1813, see *ibid.*, 430–431.

[91] Vol. 3, p. 100.

agreed to this amendment, for 'as the Lords had consented that it should no longer be the law that the heart and bowels of a man convicted of treason should be torn out of his body while he was yet alive, I thought that what the Lords had allowed us to pass was worth obtaining'.[92] The new Act—54 Geo. 3, c. 146—also provided (section 2) that the King might alter the sentence as to the drawing on a hurdle to the place of execution, might direct that the offender should not be hanged but beheaded, and might also direct how and in what manner the body, the head and the quarters should be disposed of.

Another incident which should be noted here occurred during a debate on the *Insolvent Debtors' Bill*, a measure framed by Lord Redesdale. One of the aims of this Bill was to improve the law relating to insolvent debtors by depriving a creditor of the power to keep his debtor in prison for life. The Member who brought in the Bill introduced into it a clause imposing capital punishment for concealing his or her effects by the debtor.[93] This clause was successfully opposed by Romilly. He observed that 'here was a practical proof of the facility with which a law for depriving a subject of his life might pass unobserved, whilst any effort at repealing a capital punishment was sure to meet with strenuous opposition'. He also said that he knew of only five instances of offenders having been executed under 5 Geo. 2, c. 30 (1732), a similar statute which punished with death the non-surrender or concealment of property by bankrupts.[94]

[92] *Memoirs*, Vol. 3, p. 147. See also *ibid.*, pp. 148–149, for the text of a note he received on this subject from Lord Eldon. He also agreed to Charles Yorke's amendment moved earlier in the debate in the House of Commons, that after the words 'hanged by the neck until he, she, or they may be severally dead', there be added the words 'and be then beheaded', and that 'the head or heads, and body or bodies, of such person or persons, shall be at the disposal of His Majesty and his Successors'; *Parl. Deb.* (1813–14), Vol. 27, April 25, 1814, 'High Treason Punishment Bill', cols. 538–541. For a fuller account see *Parl. Deb.* (1814), Vol. 28, 'Debate on the Bill to alter the Punishment of High Treason', April 25, 1814, cols. clxxvii–clxxxviii. See also Romilly, *Speeches*, Vol. 2, pp. 17–20.

[93] *Parl. Deb.* (1813), Vol. 26, H. C., May 21, 'Insolvent Debtors' Bill', cols. 301–304.

[94] On this Act see Appendix 1, below, p. 641. When speaking in 1818 Romilly mentioned four executions under this Act; according to Basil Montagu there had only been three. See also Romilly, *Memoirs*, Vol. 3, pp. 107–110.

Five years later this subject was investigated by a Committee of the House

The stubborn opposition with which any attempt at relaxing the severity of criminal law was met stood in sharp contrast to the haste with which statutes creating new capital offences were still being enacted. Thus in 1812, under the impact of disturbances which had broken out in certain districts of the country,[95] a statute was passed (52 Geo. 3, c. 16), making it a capital felony to destroy lace frames and machinery.[96] This emergency law was to expire in 1814. It was prolonged by 54 Geo. 3, c. 42, which reduced the punishment to transportation for life, but three years later the death penalty was reintroduced by 57 Geo. 3, c. 126. An attempt to make this offence a capital felony had been successfully resisted some thirty years earlier.[97]

of Commons; see 'Report from the Select Committee on the Bankrupt Laws' (1818), 276, *Parl. Papers* (Reports, 1818), Vol. 6, p. 1. Sir Samuel Romilly was a member of that committee and gave evidence, which is also reproduced in his *Speeches* (1820), Vol. 2, pp. 429–466. Important evidence was also given by Basil Montagu, who said that since the enactment of 5 Geo. 2, c. 30 (1732) —that is for nearly a century—'. . . I doubt whether there have been ten prosecutions; I believe there have been only three executions, and yet fraudulent bankrupts and concealments of property are proverbial and so common as to be supposed almost to have lost the nature of crime'.

The committee reported: 'That the law by which capital punishment is ordered to be inflicted upon fraudulent bankrupts, and upon those who do not surrender, is so severe, and so repugnant to the common sentiments of mankind, that it becomes totally inefficient in its operation; and hence the most flagitious individuals escape with impunity. . . . That it is the opinion of the Committee, the severity of the law against bankrupts, in the cases of non-surrender, or for concealment to the amount of £20, has a tendency to defeat the object of the legislature: it is therefore recommended, that so much of the 5 Geo. 2, c. 30, as subjects persons found guilty of such offences, or either of them, to suffer as felons "without benefit of clergy", should be repealed; and that, in lieu thereof, the punishment of transportation for life, or for any period not less than fourteen years, should be enacted'; pp. 7 and 19.

The capital provision of 5 Geo. 2, c. 30, was repealed by 1 Geo. 4, c. 115 (1820).

[95] On these disturbances and their background see F. O. Darvall, *Popular Disturbances and Public Order in Regency England* (1934), p. 304, *passim*.

[96] The proposal gave rise to lengthy debates in both Houses of Parliament. Doubts were expressed as to the effectiveness of capital statutes in general and it was proposed to establish a rule that the death penalty should never be imposed for any offence unless recommended by a specially appointed parliamentary committee. For the debates on the 'Frame Breaking Bill' see *Parl. Deb.* (1812), Vol. 21, cols. 807–824, 847–853, 859–866, 964–979, 1077–1086, 1166–1168 and 1215–1217. Sir Samuel Romilly opposed the Bill in the House of Commons, and in the House of Lords Lord Lauderdale and the Earl of Rosslyn entered a protest on the *Journals* against going into committee on it; *ibid.*, cols. 1084–1086. Lord Byron opposed the measure in his maiden speech delivered on that occasion; see *ibid.*, cols. 966–972.

[97] See above, pp. 479–484.

§ 5. THE MEASURE OF ROMILLY'S SUCCESS

Thus the only changes of any significance that Romilly had been able to introduce were the repeal of 8 Eliz. c. 4 (stealing from the person) and of 18 Geo. 2, c. 27, and 3 Geo. 3, c. 34 (stealing from bleaching-grounds in England and Ireland respectively). His endeavours to bring about the repeal of 12 Anne, st. 1, c. 7, 24 Geo. 2, c. 45, and in particular 10 & 11 Will. 3, c. 23, which imposed capital punishment for shop-lifting, had been thwarted. It has been seen that his first Bill repealing the shop-lifting Act had been lost in 1810, and the second in 1811, both times in the House of Lords. During the years from 1813 to 1818 he made three further attempts at the revision of this law. In each case the pattern of his defeat was the same.

In 1813 his Bill was adopted by the House of Commons by a strong majority [98] but lost in the House of Lords on a motion of Lord Sidmouth.[99] It was strongly supported by Lord Holland, Lord Grey and Lord Lansdowne, and by Lord Grenville whose short speech counts among the most brilliant in favour of the reform.[1] Taking as the point of departure Lord Eldon's formula '. . . that if a man inclined to commit a crime were told "You may be hanged, and, if not hanged, you must be transported, if you commit such or such an offence", he would be less disposed to commit it, than if he were told, as he would be told by the present Bill, "You cannot be hanged, and you may, or you may not be transported",' Lord Grenville warned the House of the danger of proceeding upon that principle. He also suggested that the question of whether or not capital punishment should be abrogated should never be decided on the strength of general considerations as to how crime can best be prevented, but

[98] *Parl. Deb.* (1812–1813), Vol. 24, H. C., Feb. 17, 1813, 'Criminal Laws', cols. 562–575, and *ibid.* (1813), Vol. 25, H. C., March 26, 'Privately Stealing in Shops Bill', cols. 369–389. Romilly was opposed by Sir William Garrow (then Attorney-General), and Sir Robert Dallas (then Solicitor-General).

[99] *Ibid.*, H. L., April 2, 'Shop-Lifting Bill', cols. 524–527.

[1] Sir Samuel Romilly thus comments upon it in his *Memoirs*, Vol. 3, p. 95: 'For strength of reasoning, for the enlarged views of a great statesman, for dignity of manner, and force of eloquence, Lord Grenville's was one of the best speeches that I have ever heard delivered in Parliament'. Similarly Sir James Mackintosh said that it was '. . . as distinguished for forcible reasoning, profound wisdom, and magnificent eloquence, as any speech I have ever heard on any subject'; *Parl. Deb.* (1819), Vol. 39, col. 797.

that the need for it should be established in relation to each particular offence.[2]

Three years later Romilly's fourth Bill to repeal 10 & 11 Will. 3, c. 23, again passed the Commons, this time without opposition.[3] On that occasion he told the House about the case of a ten-year-old boy who had been convicted of shop-lifting and was at the time of the debate confined in Newgate under sentence of death.[4] The Bill was, however, again lost in the House of Lords.[5]

Romilly's last attempt at the repeal of this Act was made in 1818. According to statistical returns, out of 655 persons

[2] Lord Grenville's speech is not recorded in *Parliamentary Debates*, but together with a short speech by Earl Grey it was published by 'The Society for the Diffusion of Information on the Subject of Capital Punishments' in their series of tracts; see No. 2, *Speeches of Earl Grey and Lord Grenville in the House of Lords, April 2, 1813, in the debate upon Sir Samuel Romilly's Bill for abolishing the punishment of death for privately stealing to the amount of five shillings from a shop* (1831).

[3] See *Parl. Deb.* (1816), Vol. 32, H. C., Feb. 16, 'Privately Stealing Bill', cols. 630–632; *Parl. Deb.* (1816), Vol. 33, H. C., March 15, 'Shop-Lifting Bill', cols. 374–375.

[4] Romilly also said that in September, 1814, newspapers had reported the Recorder of London as having said from the Bench at the Old Bailey that 'it was the determination of the Prince Regent, in consequence of the number of boys who have been lately detected in committing felonies, to make an example of the next offender of this description who should be convicted, in order to give an effectual check to the numerous instances of youthful depravity'; Romilly, *Memoirs*, Vol. 3, p. 234. In reply the Attorney-General explained that a very large proportion of offenders tried at the Old Bailey in recent years were children who had been instructed by their parents to steal in the hope that they would escape punishment on account of their age. 'It became therefore necessary that the law should be executed with respect to these children, with a more considerable degree of severity than formerly'; *Parl. Deb.* (1816), Vol. 33, col. 374. Romilly also mentioned the case of another 16-year-old boy who had recently been convicted of a highway robbery, had been ordered to be hanged and was respited only the night before execution.

[5] See *Parl. Deb.* (1816), Vol. 34, H. L., May 22, 'Shop-Lifting Bill', cols. 683–684.

The rejection of the Bill caused Lord Holland—Romilly's consistent supporter in the House of Lords—to enter upon the *Journals of the House of Lords* the following protest, drafted by Romilly, slightly corrected by himself, and also signed by the Duke of Sussex, the Duke of Gloucester and Lord Lansdowne:

'*Dissentient*:—1st. Because the Statute proposed to be repealed appears to us unreasonably severe, inasmuch as it punishes with Death the Offence of Stealing Property to a very inconsiderable Amount, without Violence, or any other Circumstance of Aggravation.

'2dly. Because to assign the same Punishment for heinous Crimes and slight Offences, tends to confound the Notions of right and wrong, to diminish the Horror atrocious Guilt ought always to inspire, and to weaken the Reverence in which it is desirable that the Laws of the Country should be held.

'3dly. Because severe Laws are, in our Judgement, more likely to produce a Deviation from the strict Execution of Justice than to deter Individuals from

indicted under this Act between 1805 and 1817, 177 were acquitted, 118 capitally convicted, and none executed; in all the remaining 865 cases the accused had been acquitted of the capital charge and found guilty of simple larceny only, the juries having found either that the value of stolen property had been less than five shillings, or that it had not been stolen privately. Romilly's motion was unopposed [6] and the Attorney-General's (Sir Samuel Shepherd) amendment suggesting the redrafting of the preamble, negatived.[7] But once more the Bill was thrown out by the House of Lords.[8] A few months later, on November 2, 1818, Romilly took his life following the death on October 29 of Lady Romilly.[9]

the Commission of Crimes, and our Apprehension that such may be their Effect is confirmed, in this Instance, by the Reflection that the Offence in Question is become more frequent, and the Punishment, probably on account of its Rigour, is seldom or never inflicted.

'4thly. Because the Value of Money has decreased since the Reign of King *William*, and the Statute is consequently become a Law of much greater Severity than the Legislature which passed it ever intended to enact'; *Journals of the House of Lords* (1814–1816), Vol. 50, pp. 640–641.

[6] *Parl. Deb.* (1818), Vol. 37, H.C., Feb. 25, cols. 610–614, and *ibid.*, Vol. 38, H. C., April 14, 'Privately Stealing in Shops Bill', cols. 47–51; see also Romilly's *Speeches*, Vol. 2, pp. 320–329 and 379–383. Romilly was supported by Wilberforce, who called for the revision of 'the entire penal code' and for united efforts to prevent crime by all possible means and to check it in its early stages. In this connection he mentioned Elizabeth Fry, who strove to reform female prisoners at Newgate; *ibid.*, cols. 50–51.

[7] First, he opposed the principle set out in the preamble that 'extreme severity, by rendering conviction more difficult, afforded impunity to crimes'. These words 'might mislead men into a supposition that punishment ought to be proportioned to the precise degree of moral turpitude', while 'severity ought to regard not only the moral turpitude of the offender, but the pernicious consequences of this offence.' Secondly, he deplored the statement that one of the reasons for altering the law was the change in the value of money; this he thought 'pledged the House to alter every other act that was connected with such a variable commodity'; *ibid.*, cols. 47–48. For similar objections advanced in 1808 and the concessions Romilly had then to make in order to save his first Bill see above, p. 499.

[8] *Ibid.*, H.L., June 3, col. 1185.

[9] Romilly's death was lamented by his political opponents no less than by his friends. This is how Lord Eldon reacted to it: 'The Chancellor came into court next morning obviously much affected. As he took his seat he was struck by the sight of the vacant place within the Bar which Romilly was accustomed to occupy. His eyes filled with tears. "I cannot stay here" he exclaimed; and rising in great agitation, broke up his court'; H. Twiss, *The Public and Private Life of Lord Chancellor Eldon, with selections from his Correspondence* (1844), Vol. 2, p. 324.

On the death of Romilly, Thomas Creevey wrote to H. G. Bennet: 'I must advert to the great calamity we have all sustained in the death of poor Romilly. His loss is perfectly irreparable. By his courageous and consistent public conduct, united with his known private worth, he was rapidly acquiring an authority over men's minds that, had his life been spared a few years, would,

Romilly took upon himself the ungrateful task of forcing the subject of the reform of criminal law upon the attention of Parliament at a period notoriously unpropitious to any change. He consistently pressed for the revision of laws the immutability of which had been considered essential to the preservation of social stability. His high sense of public duty and deep conviction made him persevere even when the hopelessness of his endeavours became obvious. In terms of legislation his achievement was negligible.[10] But he succeeded in rousing public opinion and thus made the reform of criminal law a matter of national concern. To his followers he bequeathed a programme to fight for and an example to follow.

I think, have equalled, if not surpassed, even that of Mr. Fox. He indeed was a *leader* that all true Whigs would have been proud to follow, however his modesty might induce him to decline being called so'; *The Creevey Papers* (ed. by Sir H. Maxwell, 1903), Vol. 1, p. 290.

[10] Romilly's statutes are: 48 Geo. 3, c. 129 (1808), repealing 8 Eliz. c. 4 (privately stealing from the person); 51 Geo. 3, c. 41 (1811), repealing 18 Geo. 2, c. 27, and 51 Geo. 3, c. 39 (1811), repealing 3 Geo. 3, c. 34 (privately stealing from bleaching-grounds in England and Ireland respectively); 52 Geo. 3, c. 31 (1812), repealing 39 Eliz. c. 17 (soldiers wandering without a pass); 54 Geo. 3, c. 145 (1814)—'An Act to take away Corruption of Blood save in certain Cases'; and 54 Geo. 3, c. 146 (1814)—'An Act to alter Punishment in certain Cases of High Treason'.

CHAPTER 17

THE COMMITTEE OF 1819

§ 1. INFLUX OF PETITIONS

IT has been stated that one of the most notable results of Romilly's persistent efforts to reform criminal law had been the awakening of public opinion. On December 10, 1818, at the request of all members of the Court of Common Council, a meeting was held 'for the purpose of considering the propriety of petitioning Parliament to revise the Criminal Code'. At this meeting Samuel Favell delivered an address, later issued in pamphlet form,[1] which formed the basis of a Petition of the Corporation of London which the Sheriffs of London presented on January 25, 1819.[2] This was the first time that the Corporation of London expressed their views upon this subject. The petition drew attention to the inordinate number of statutes imposing capital punishment,[3] to the widespread disinclination to put these statutes fully into effect[4] and to the rapid increase in crime[5] which, it was stated, was at least in part due to these two factors.[6] Presenting the petition, Alderman Wood expressed the hope that this subject of the

[1] *A Speech on the Propriety of Revising the Criminal Laws* (1819).

[2] *Parl. Deb.* (1819), Vol. 39, H.C., 'Petition of the Corporation of London, Complaining of the Criminal Law', Jan. 25, cols. 81–88; and *ibid.*, H.L., Jan. 27, cols. 119–124. For the full text of the petition see Appendix 4, below, pp. 728–730.

[3] 'Upwards of two hundred crimes very different in their degrees of enormity are equally subject to the punishment of death, which is enacted not only for the most atrocious offences, for burglary, for rape, for murder, and for treason, but for many offences unattended with any cruelty or violence, for various minor crimes, and even for stealing privately to the amount of five shillings in a shop.'

[4] A tendency displayed by prosecutors, witnesses, judges and jurors alike.

[5] According to figures quoted in the petition, in 1818 the number of prisoners committed for trial in England and Wales was more than twice what it had been in 1812 (13,932 as compared with 6,576) and three times higher than in 1805 (13,932 as compared with 4,605).

[6] 'They urge the House to take into consideration the state of the law itself which produces evasions, dangerous to the community and which must continue to produce them'; as long as the state of the criminal law remains out of harmony with 'the moral and religious sentiments of the nation, the increase of crimes must be progressive'.

highest importance to the honour and character of the country ' will be considered by the House '.[7]

One of the arguments most frequently advanced against Romilly was that the retention of capital punishment even for minor offences was essential for the protection of property, particularly in a wealthy commercial community. This thesis was first undermined in 1811 when owners of bleaching-grounds presented a petition asking for the repeal of the death penalty for theft of their property. Since the change was solicited by those ' who were to receive the protection of the law ', Lord Ellenborough raised no objections and Romilly's Bills were adopted.[8] From this point of view the petition of the Corporation of London was of exceptional importance and could not fail to impress opponents of reform.[9] Moreover, it was not the only one. Two months later a Member of the House of Commons referred to the ' numerous petitions on this subject which are preparing in every part of the kingdom '.[10] In July, 1819, Sir James Mackintosh said that ' the number of the petitioners whose petitions are on our Table, praying for a mitigation of the criminal law, exceeds 12,000 ', and that besides the petitions of the Corporations of London, Norwich and Portsmouth, numerous others had been presented by the grand juries and the clergy.[11]

As the history of the movement for the abolition of the slave trade had shown, the influence of petitions on Parliament

[7] Matthew Wood (afterwards Sir Matthew Wood) was an Alderman of the City of London, and twice Lord Mayor of London (1817–1819). As a Member of the House of Commons he gave steady support to criminal law and prison reforms. He is best remembered as the leader of the partisans of Queen Caroline in 1820.

[8] See above, pp. 512–513.

[9] The effect of this petition was somewhat weakened by the fact that it was followed by a petition from the Quakers presented by Wilberforce; although in its final paragraph the Quakers' petition prayed for such a change of the law as would ' serve the ends of justice ', it opened by stating that the principles of Christian religion required that capital punishment be abolished for all offences. For this petition see *Parl. Deb.* (1819), Vol. 39, H.C., ' Criminal Laws—Petition of the Quakers complaining of their Severity ' Feb. 9, cols. 396–400, and Mackintosh's remarks, *ibid.*, cols. 799–800.

[10] *Parl. Deb.* (1819), Vol. 39, col. 903.

[11] *Parl. Deb.* (1819), Vol. 40, cols. 1535–1536. For the petitions presented from February 1, 1819 to June 3, 1819 see *Journals of the House of Commons* (1818–1819), Vol. 74, pp. 48, 173–174, 176, 180, 184, 187, 194, 202, 208, 214, 221, 231, 239, 249, 260, 266, 269, 272, 279, 285, 293, 307, 314, 325, 360, 392, 424, 443, 455, 461, 477, and 496.

was very considerable.[12] Some weeks after the petitions praying for the reform of criminal law had begun to flow in, the House of Commons—after a long debate—decided to appoint a Committee to inquire into the need for such a revision.[13] The significance of this move was thus most aptly described by a Member of the House: 'If we look, Sir, to the motives which led to this great and important decision, we must in the first place, ascribe it to the previous verdict of a tribunal, to which even the omnipotence of Parliament ought to bow; I mean the verdict of the public opinion, which has loudly and unequivocably pronounced upon the penal code, as it stands in the Statute Book, a sentence of indignant condemnation'.[14]

§ 2. APPOINTMENT OF A COMMITTEE OF INQUIRY INTO THE STATE OF CRIMINAL LAW

The appointment of the committee opposed by Lord Castlereagh

In the light of experience gained during the years under Romilly's leadership, the reformers felt that instead of pressing

[12] On April 28, 1801, Fox wrote to Gilbert Wakefield: 'With regard to the Slave Trade, I conceive the great numbers which have voted with us, sometimes amounting to a majority, have been principally owing to petitions'; *Memorials and Correspondence of Charles James Fox* (ed. by Lord John Russell, 1853–1857), Vol. 4, p. 249.

[13] See below, p. 539.

[14] *Parl. Deb.* (1819), Vol. 39, H.C., 'Criminal Laws', May 8, cols. 903–906, at col. 904. According to the 'Report from the Select Committee on Public Petitions' (1832), 639, *Parl. Papers* (Reports, 1831–1832), Vol. 5, p. 3—880 petitions relating to all matters were presented to the House of Commons in the five years ending 1789; 1,026—in the five years ending 1805; 4,498—in the five years ending 1815; 24,492—in the five years ending 1831.

'The venerable institution of petition, the oldest of all parliamentary forms, (was) the fertile seed of all the proceedings in the House of Commons'; J. Redlich. *The Procedure of the House of Commons* (with an Introduction and Supplementary Chapter by Sir Courtenay Ilbert, 1908), Vol. 2, p. 239.

For the various types of petitions, the number of signatures attached, and abuses of petitioning see Sir Erskine May, *Constitutional History of England* (11th ed. 1896), Vol. 2, pp. 64–70. Sometimes Members presenting a petition, being permitted to address the House in support of it, made long speeches which led to debates. In 1817, Lord Cochrane spoke for two hours when presenting petitions in favour of parliamentary reform; he was followed by Canning; *The Diary and Correspondence of Charles Abbot, Lord Colchester* (ed. by Lord Colchester, 1861), Vol. 2, p. 601. Gladstone records (June 13, 1838): 'I complimented the Speaker yesterday on the time he had saved by putting an end to discussions upon the presentation of petitions. He replied that there was a more important advantage; that those discussions very

for the amendment of particular capital statutes it would be in the interest of the movement if a special Committee of Inquiry into the state of criminal law and its administration generally were set up. The setting up of a parliamentary inquiry would signify a recognition of the pressing importance of the subject and would in itself constitute a major success. The findings of such a Committee would provide a basis for a comprehensive plan of reform.

Thus when on March 1, 1819, Lord Castlereagh moved for the appointment of a Committee on the state of prisons,[15] Sir James Mackintosh moved on the following day for the appointment of a similar Committee on criminal laws.[16] This motion Lord Castlereagh strongly opposed, not on the ground that the subject was undeserving of an inquiry, but because he thought it should be included in the terms of reference of his own Committee. The question was not of merely academic interest. The reformers objected that the inclusion of so vast a subject within the already widely framed terms of reference assigned to the Committee on Gaols would prejudice a thorough

greatly increased the influence of popular feeling on the deliberations of the House; and that by stopping them, he thought, a wall was erected against such influence—not as strong as might be wished. Probably some day it might be broken down, but he has done his best to raise it. His maxim was to shut out as far as might be all extrinsic pressure, and then to do freely what was right within doors'; John Morley, *The Life of William Ewart Gladstone* (1903), Vol. 1, p. 150.

Between 1820 and 1830 the number of petitions in favour of criminal law reform was rapidly increasing, as was their influence; see below, pp. 591–593 and 595–596. In 1827 an anonymously published tract urged the people to come forward 'from every village of the Empire, and represent loudly, but respectfully, the necessity for an immediate mitigation of the Criminal Code'; *A brief Address to the People of England on the Criminal Law*, by an Englishman (1827), p. 12.

[15] *Parl. Deb.* (1819), Vol. 39, H.C., 'Motion for a Select Committee on the State of Gaols and other Prisons', cols. 740–760. Its terms of reference were to be: 'To inquire into the State and Description of Gaols and other places of confinement, and into the best method of providing for the reformation, as well as the safe custody and punishment of offenders'.

[16] *Ibid.*, 'Committee on the Criminal Laws', March 2, cols. 777–846. The Committee was 'to consider of so much of the Criminal Laws as relates to Capital Punishments in Felonies'. These terms were almost identical with the terms which had been assigned to the parliamentary inquiries of 1750 and 1770. The similarity was not accidental, for it was the reformers' desire to invoke an old and respectable precedent. Mackintosh himself described his motion as 'almost *verbatim* the same as a resolution entered on the Journals of the House in the year 1770, when authority was delegated to a Committee for the same purpose'; *ibid.*, col. 778. In contrast to the terms of reference assigned to Lord Castlereagh's Committee they were shorter and much more precise.

inquiry into either matter.[17] Lord Castlereagh then suggested the breaking up of his Committee into ' sections ' each carrying out a part of the general inquiry. This was ruled out by the Speaker [18] as contrary to established parliamentary procedure; '. . . he (the Speaker) had no doubt in stating that when a subject was delegated to a committee, it was delegated entire to every member of which that committee was composed. The House limited the members of the committee for that purpose '.[19]

Defeated on this point, Lord Castlereagh proceeded to defend his original thesis, which was that neither the state of criminal law nor the state of crime warranted the appointment of a special Committee of Inquiry into these matters. His two main propositions were: (a) that the state of crime would appear much less alarming if examined not as a whole but in relation to particular groups of offences; (b) that there was no general increase in crime; the rate of increase in certain groups of offences was determined by factors both transitory and entirely unconnected with criminal law. He divided all crimes into two groups: ' those of the blacker dye . . . (indicating) . . . the existence . . . of deep moral depravity, or national degradation or turbulent temper ', such as murder, killing and maiming, manslaughter, rape, assaults with intent to commit rape and unnatural offences; and offences against property, such as forgery, fraud, highway robbery, burglary and larceny.[20] During the period 1810–1818 offences belonging to the first group did not increase in number, and in some instances even became less numerous. In contrast, those belonging to the second group showed a steady increase.[21]

[17] It was also pointed out that a Committee entrusted with so large an inquiry would naturally take very long to complete its work and in the meantime no Member could propose motions on the relevant subjects without being accused of undue interference.

[18] Charles Manners Sutton.

[19] *Parl. Deb.* (1819), Vol. 39, cols. 752–753, and *ibid.*, H.C., ' Subdivisions of Committees ', March 2, cols. 776–777. Two Members held that the division of a Committee into smaller bodies would be contrary to the practice of the House; that any such Sub-Committees should be appointed by the House; and that only in 1661 and 1667 had this been granted, on very special grounds; *ibid.*

[20] A similar division had been made by Beccaria, and in England by Dawes and Dagge.

[21] The total number of persons committed for trial for all offences rose from 5,146 in 1810 to 13,567 in 1818; for simple larceny—from 3,530 to 9,303. In both these years simple larceny constituted more than two-thirds of all

The causes of this undisputed rise in the incidence of offences against property were purely economic and transitory; more than half of all persons committed for trial in 1818 in England and Wales came from Lancaster, Warwick, York, Middlesex and Surrey,[22] 'notoriously the most populous and manufacturing districts in the kingdom'. Another factor was the transition from war to peace and the release of between three to four hundred thousand men from the army and navy.[23] He warned the House against embarking upon what he called 'some obscure investigations' and 'some unknown work'.[24]

Lord Castlereagh's arguments were a necessary corrective to the reformers' view that the increase in crime was to be attributed mainly to the ineffectiveness of criminal law. From the point of view of the anti-reformers, however, his analysis was by no means flawless. First, his division of offences into two classes would seem to call for a parallel division of punishments. And secondly, his insistence that the state of crime was determined by factors unconnected with criminal

offences; Appendix No. 1, to the 'Report on Criminal Laws' (1819), 585, *Parl. Papers* (Reports), Vol. 8, p. 131.

Lord Castlereagh also drew attention to the significant fact that the more aggravated forms of burglary and robbery 'had been gradually mitigated, and that they were not accompanied by those circumstances of violence and atrocity by which they were formerly attended'.

[22] 6,243 out of 13,567; *ibid.*, p. 133.

[23] On another occasion Lord Liverpool said it ought to be considered 'how far the increase of crimes might have arisen in the last and preceding years, in consequence of the transition from war to peace, and the circumstances naturally attending such a change'; *Parl. Deb.* (1819), Vol. 39, H.L., Jan. 27, cols. 121–122.

The fact that the increase in crimes committed by women was less than in those committed by men provided, according to Lord Castlereagh, yet another argument in support of his thesis that the upward trend in crime 'had been principally owing to the pressure of the times, and to the difficulty with which the habits of war were exchanged for those of peace'.

[24] *Parl. Deb.* (1819), Vol. 39, col. 753. He also insisted that such an inquiry would create the impression among the people '. . . that instead of living, as it has been represented to them by their ancestors they lived, under a mild and merciful government, they were to learn for the first time that the law of England was the most sanguinary code on earth'. Canning, who some years earlier had supported Romilly (above, pp. 504–505), was now against the appointment of a special Committee which he held '. . . would be considered by the country as a condemnation of the existing penal law'; *ibid.*, col. 836. On the subject of obsolete statutes Lord Castlereagh said that although they 'might certainly be fit subjects of inquiry at some time or another . . . surely their absolute and immediate removal from the statute book was not a matter of important and urgent necessity . . . if the suppression of crime were the real object of the House, surely the consideration of obsolete statutes ought not to occupy their immediate attention'; *ibid.*, col. 804.

law disposed of their double argument that the rise in crime precluded the revision of capital statutes and that the revision of those statutes would cause a further rise in crime.

Romilly's successors: Sir James Mackintosh and Sir Thomas Fowell Buxton

The motion for the appointment of a Committee of Inquiry was defended by Sir James Mackintosh and by Sir Thomas Fowell Buxton, the two leaders of the reform movement from the death of Sir Samuel Romilly until 1823, when Sir Robert Peel pledged the government to the revision of certain branches of criminal law. After that, they continued their exertions with a view to broadening the scope of the officially sponsored reforms.

Mackintosh was a man of manifold talents, interested in a wide range of subjects such as philosophy, history, literature and law.[25] A brilliant conversationalist he was not an orator. But his speeches were always full of substance as well as inspired by high principles and in Parliament he was listened to with attention and respect.[26]

Already at an early stage of his public career he became interested in criminal law and its reform. In a charge

[25] Born in 1765, died in 1832. For a vivid portrait see his *Memoirs* (2nd ed. 1836), 2 Vols., edited by his son, R. J. Mackintosh, Fellow of New College, Oxford. Leslie Stephen's article in *D.N.B.* XII, 617, is also very useful. A subtle and on the whole faithful portrait of Mackintosh was drawn by William Hazlitt, 'Sir James Mackintosh', *The Spirit of the Age* (2nd ed. 1825), pp. 209–225; see also H. A. L. Fisher, *The Whig Historians* (1929), pp. 10–12. For a very unfavourable opinion see S. T. Coleridge, *Specimens of the Table Talk* (1851), p. 15. There is no modern, full scale biography.

His *Miscellaneous Works* (1846), 3 Vols., comprise a great deal but not all that he wrote on these matters; it also includes his most important parliamentary speeches. His *History of the Revolution in England in 1688* (1834), is a work of value. He also wrote a short 'History of England' for Lardner's *Cabinet Cyclopædia*. He first became known by his brilliant tract *Vindiciae Gallicae* (published in 1791 and followed by two further editions) which was intended as a reply to Burke's *Reflections on the French Revolution*.

In 1799 and 1800 he gave a course of thirty-nine lectures in Lincoln's Inn; his audience numbered about 150 and included six Peers and twelve Members of the House of Commons. In 1818 he was appointed Professor of 'law and general politics' at Haileybury.

[26] 'Sir James Mackintosh spoke essays', writes Macaulay. And he adds: 'He distinguished himself highly in Parliament. But nevertheless Parliament was not exactly the sphere for him. The effect of his most successful speeches was small when compared with the quantity of ability and learning which was expended on them'; 'Sir James Mackintosh's History of the Revolution', *Works* (Ed. by Lady Trevelyan, 1866), Vol. 6, pp. 78 and 60.

delivered to the grand jury when he was about to relinquish the post of Recorder of Bombay, which he had held from 1801 to 1811, he expressed satisfaction that during his tenure of this office no offender had been executed. This, he maintained, had no adverse influence on the state of crime.[27] His interest in this subject was further stimulated by Romilly's speech of 1810.[28] In 1814 he made a notable speech in support of Romilly's Bill to take away corruption of blood in the punishment of treason and felony,[29] and in 1816 he urged a change in the system of prosecutions for forgery and the uttering of Bank of England notes. Two years later he obtained important statistical data and prevailed on the government to appoint a Commission of Inquiry into the method of preventing the forgery of bank-notes.[30]

Mackintosh was not endowed with the steadfastness which made the strength of Romilly. None the less, spurred on by a high sense of public duty ' he continued to tread the irksome path of the reformer of that period, with an energy which was not native to his character, and which it required at times his deep conviction of the importance of the subject, and his general sympathy with humanity to sustain '.[31] But although he had supported Romilly ever since his entry into Parliament in 1813, his real work for the reform of criminal law only began after Romilly's death. In it he was most effectively helped

[27] ' I have no doubt of the right of society to inflict the punishment of death on enormous crimes, wherever an inferior punishment is not sufficient. I consider it a mere modification of the right of self-defence, which may as justly be exercised in deterring from attack, as in repelling it. . . . My only object is to show that no evil has hitherto resulted from the exercise of judicial discretion in this Court '; ' A charge, delivered to the Grand Jury of the Island of Bombay on the 20th July, 1811 ', *Miscellaneous Works* (1846), Vol. 3, p. 309. On his departure he received an address with a request for his portrait from the Grand Jury as well as from the " Literary Society " of Bombay which he had founded '.

[28] See above, note 29 at p. 332.

[29] *Parl. Deb.* (1813–1814), Vol. 27, cols. 528–532; for a fuller account see *ibid.* (1814), Vol. 28, cols. cxlvi-clvi. On this debate see above, pp. 518–519.

[30] See *Parl. Deb.* (1818), Vol. 37, H.C., Feb. 24, ' Prosecutions for Forgery ', cols. 603–606; *ibid.* (1818), Vol. 38, April 21, cols. 273–284; and May 13, cols. 671–703. On this see below, note 3 at pp. 555–556. Mackintosh records (April 22, 1818) that when he said to Romilly, who had been prevented from attending the debate, ' They gave the papers ', Romilly replied, ' You *made* them give the papers '; *Memoirs of the Life of the Right Hon. Sir James Mackintosh* (ed. by R. J. Mackintosh, 2nd ed., 1836), Vol. 2, p. 355.

[31] *Ibid.*, p. 390.

by Sir Thomas Fowell Buxton.[32] A great humanitarian and philanthropist, with strong religious convictions, Buxton is mainly remembered for the part he played in the movement for the abolition of the slave trade.[33] But his great contribution to that cause should not be permitted to overshadow his merits as one of the outstanding reformers of criminal law.[34]

In 1818 Fowell Buxton published a book entitled *An Inquiry whether Crime and Misery are produced or prevented, by our present system of Prison Discipline* of which five editions were issued in the course of one year.[35] It led to the formation of the 'Society for the improvement of prison discipline and for the reformation of juvenile offenders' which owed so much to his and Samuel Hoare's (jun.) exertions.[36] On receiving this book Wilberforce warmly congratulated the author and expressed the hope that he would soon enter Parliament and thus 'be able to contend in person, as well as with your pen, for the rights and happiness of the oppressed and the friendless. I claim you as our ally in this blessed league'.[37] A year later, in his first parliamentary speech, Buxton made a brilliant contribution to the movement for the

[32] Born in 1786, died in 1845. Much information about his character, family background and public activities may be gathered from *Memoirs of Sir Thomas Fowell Buxton* (ed. by his son Charles Buxton, 3rd ed. 1849); R. H. Mottram's biography *Buxton the Liberator* (1946) is inadequate.

[33] When in May, 1821 Wilberforce—for many years leader of the anti-slavery party in the House of Commons—asked him to take charge of the movement, he was influenced in his choice by Fowell Buxton's speeches on criminal law; Sir Reginald Coupland, *Wilberforce* (1923), p. 471. Fowell Buxton accepted this invitation and from 1822 to 1843 spent prodigious efforts in supporting this cause. In 1840 a baronetcy was conferred upon him, mainly as a recognition of his work in this field. After his death, on the initiative of the Prince Consort, a statue in his memory was erected near that of Wilberforce in Westminster Abbey.

[34] His interest in these matters was also stimulated by his family connections. He married Hannah, daughter of John Gurney and sister of Elizabeth Fry and remained on terms of friendship with Samuel Hoare (jun.), the banker and penal reformer. In his early years he was very much influenced by William Allen; on Allen see above, note 18, at p. 349.

[35] It was translated into French and evoked much interest on the Continent. In India it led to an inquiry into the Madras Gaols.

[36] The Society was an influential body under the patronage of the Duke of Gloucester. Between 1818 and 1832 the Society issued eight Reports and a number of tracts; it also carried out inquiries into the prison system and juvenile delinquency and gave a steady support to the movement for the reform of criminal law.

[37] *Memoirs* (ed. by Ch. Buxton. 1849), p. 65. In 1818 he entered Parliament and continued to represent the borough of Weymouth until 1837. When in 1837 he lost his seat after the dissolution of Parliament twenty-seven boroughs invited him to stand as their candidate.

reform of criminal law. He was always ready to admit doubts and to re-examine his own findings and views. As he put it in one of his speeches in the Commons: 'I do not pretend to say the facts I have stated demonstrate the fallacy of the principle; but I do say, that they make it very questionable. And, surely, it is part of a wise nation, to subject a questionable principle of such infinite importance, to that criterion, which alone can detect error, and discover truth—I mean the criterion of inquiry, of investigation, of experience—the criterion of facts'. This critical attitude, combined with all the qualities of a well-informed and industrious inquirer, made his contribution to criminal law reform particularly effective.[38]

When Romilly died in 1818, criminal law was still in the same state in which he had found it. Commenting upon the vast changes that had taken place in his lifetime, Mackintosh said 'that he could almost think that he had lived in two different countries, and conversed with people who spoke two different languages'.[39]

Extent of the revision proposed by Mackintosh. His division of offences

When restating the programme of the reformers, Mackintosh said that it was not their intention to evolve a new system of laws[40]; nor to abolish capital punishment[41]; nor to deprive the Crown of the prerogative of mercy. Their aim was to

[38] When in 1816 the population of Spitalfields was on the verge of starvation, he made personal investigations on which he based his most effective speech at the Mansion House as the result of which more than forty-three thousand pounds were raised; *D. N. B.* III, 559. In 1839, during a tour in Italy, he made an inquiry into the crimes of some notorious bandits headed by Gasparoni. He also examined the state of prisons in Rome. In his speeches on criminal law he made a most effective use of statistics.

[39] *Op. cit.*, Vol. 2, p. 396.

[40] A system '. . . admirable in its principle, interwoven with the habits of the English people, and under which they long and happily lived . . .'; *Parl. Deb.* (1819), Vol. 39, col. 783. Mackintosh's speech is also included in his *Miscellaneous Works* (1846), Vol. 3, pp. 363–387.

[41] In this respect Mackintosh was in agreement with Romilly, see above, p. 317, but not with Buxton, who had more advanced views on this matter. Writing about the appointment of the Committee on Criminal Laws on which he was to serve, he observes: 'I conjecture that no man on the Committee goes so far as I go—Namely, to the abolition of the punishment of death, except for murder; but all go a very great way, and if we merely make forgery, sheep, and horse stealing not capital, it is an annual saving of thirty lives, which is something, and satisfies me in devoting my time to the subject'; *Memoirs* (ed. by Ch. Buxton, 3rd ed., 1849), p. 74. Romilly and Mackintosh thus

correct 'the errors in policy or legislation' which were 'inconsistent with the deliberate and permanent opinion of the public', and one of the causes of crime.

He proposed to divide all offences into groups according to their gravity and to evolve a corresponding scale of punishments. The first group should include murder and offences likely to cause death, such as shooting or stabbing with intent to inflict malicious injury; the second group should include about ten offences such as arson, highway robbery, piracy and certain serious sexual offences; the third—'a sort of middle class of offences, consisting of larcenies, and frauds of a heinous kind, although not accompanied with violence and terror', a class which constituted what he called 'the debatable ground on this subject'; the fourth should comprise frauds, less serious malicious injuries to property and a number of miscellaneous offences which, taken together, were covered by about a hundred and fifty statutes. He suggested no material changes in the scale of punishments for offences included under the first two headings[42] but urged the abrogation of capital punishment for offences of the third and fourth groups, as well as the repeal of all obsolete statutes which had not been acted upon for at least seventy years.[43]

Chances of impunity under the existing laws

The main proposition which Fowell Buxton set himself to establish was that the chances of impunity were much higher

agreed with Montesquieu (see above, pp. 283–284), but disagreed with Beccaria (see above, p. 284).

Bentham, though he did not adhere to Beccaria's postulate denying society the right to inflict capital punishment, was much more extreme in his views and urged the abolition of the death penalty for most offences, doubting even whether it should be retained for murder; above, pp. 390–391 and below, p. 599. This extreme view was disavowed even by *Westminster Review*, which was the organ of the Utilitarians; see below, p. 599. It was, however, upheld in a number of tracts; see for instance: Beccaria Anglicus (Thomas Wright), *Letters on Capital Punishment addressed to the English Judges* (1807); (Anon.), *Strictures on the Right? Expedience? and Indiscriminate Denunciation of Capital Punishment*, etc. (1814); J. W. Polidori, *Punishment of Death* (1816).

[42] 'Many of the crimes comprehended in them ought to be punished with death; whatever attacks the life or dwelling of men ought to be punished with death'. The unqualified retention of capital punishment for larceny in dwelling-houses is particularly characteristic of the moderation of his proposals.

[43] It will be remembered that a similar attempt at revising the scale of offences was made some thirty-two years earlier by Minchin when he moved for the appointment of a Committee 'to examine into the state of all the penal laws now in force in the Kingdom'; see above, pp. 446–447.

for capital offences than for offences carrying less severe penalties.[44]

An interesting example of the influence of the severity of law on the incidence of convictions is provided by the figures relating to the forgery of bank-notes.

	Total number of persons convicted.	Convicted of forgery of bank-notes (capital offence).	Convicted of having forged bank-notes in possession (non-capital offence).
1797–1803	138	124	14
1810–1817	467	104	363

The total number of convictions for 1810–1817 was more than three times higher than that for 1797–1803. But whereas in the first period nearly all convictions were for the forgery of bank-notes, which was a capital offence, in the second period three-quarters were for having forged bank-notes in possession, which was *not* a capital offence. It would seem therefore that the total number of convictions increased in the second period mainly because during that period a change had taken place in the system of prosecutions, as the result of which a much greater number of offenders could be charged with the less serious offence of having forged bank-notes in possession.[45] This inference is confirmed by the fact that despite the greatly increased number of prosecutions and convictions in the second period, the incidence of acquittals remained practically

[44] For Buxton's speech see *Parl. Deb.* (1819), Vol. 39, cols. 806–824.

[45] By 15 Geo. 2, c. 13, s. 11 the forging or uttering of bank-notes and other securities of the Bank of England was made a felony without benefit of clergy; by 41 Geo. 3, c. 39, knowingly to receive or to have in possession forged bank-notes was made a felony punishable by transportation for fourteen years. When counterfeit notes had been found in the hands of forgers or of those who circulated them, the practice was to frame two bills of indictment against the party: the first, accusing them of having made or uttered forged notes, and the second, of having them in their possession. The subsequent procedure was thus described by M. Cottù, councillor of the Royal Court of Paris, who wrote a remarkable essay on the English system of criminal justice: '. . . when the accused is standing at the bar, in order to take his trial, the counsel for the bank asks the counsel for the prisoner if his client be willing to plead guilty on the second indictment, which only involves transportation; promising him that in that case the bank will relinquish the prosecution on the first, which is a capital crime. If the accused acquiesce in this proposition, he is immediately found guilty on the second indictment, on his own confession; and with regard to the first, the counsel for the bank informs the jury that he does not intend to bring forward his witnesses, and they consequently return a verdict of *not guilty*, for want of evidence. Nor does this sort of transaction take place secretly, or in a corner, but, incredible as it may appear, in open court, in the face of the public, the jury, and the judge'; M. Cottù *The Administration of the Criminal Code in England and the Spirit of the English Government* (London 1820), p. 52. Translated from the French for the *Pamphleteer* (1820), Vol. 16, pp. 1–88.

unchanged. Thus in the second period only one person was acquitted for every eight prosecuted as compared with one acquitted for every three prosecuted in the first period.

	Total number of prosecutions.	Number of acquittals.	Number of convictions.
1797–1803	199	61	138
1810–1817	534	67	467

These figures should not be taken as proving that acquittals were always more numerous in cases involving the death penalty than in other cases. All they do establish is a marked tendency to acquit persons accused of offences which were generally considered not serious enough to warrant the infliction of capital punishment.

A person committing any offence had, according to Fowell Buxton, a five to one chance of evading justice: his offence might never be discovered; if discovered, the offender might not be suspected; if suspected, proof might be wanting; proof being supplied, he might not be apprehended. These were what he called the natural chances of impunity. But for offences which carried excessively severe punishments the chances of impunity were incomparably higher, owing first to the reluctance to prosecute, secondly, to the reluctance of the juries to convict, and thirdly to the commutation of death sentences by the Crown. In conclusion he thus summed up the aggregate effect of these factors: 'It is five to one he (the offender) will not be detected; fifty to one he will not be prosecuted; one hundred to one he will not be convicted, and one thousand to one that the sentence pronounced by the law will never be carried into effect'. As an example bearing out this assertion he quoted some figures relating to the forgery of bank-notes. In 1817, 31,180 forged Bank of England notes had been presented for payment, which meant that 31,180 offences had been committed. For these, 142 persons had been prosecuted, 62 capitally convicted, and 14 executed. What in such circumstances was the deterrent value of the death penalty? 'Our criminal law', he said, 'becomes a species of inverted lottery, in which (calling detection a blank, and escape a prize) the prizes are much augmented and the blanks much diminished in number'.[46]

[46] During the same debate Wilberforce said that offenders are not concerned with '. . . the enormity of the crime, but the chance of escaping punishment . . .';

Obviously Fowell Buxton's calculations can only be accepted as a general indication of certain trends.[47] Even today, when criminal statistics are incomparably more elaborate, the chances of impunity cannot be established with accuracy. None the less it is greatly to his credit to have attempted what was then a new and original inquiry.

Changed attitude of the House of Commons

By their speeches Mackintosh and Fowell Buxton dominated the debate and Mackintosh's motion for the appointment of a 'Committee of Inquiry into the Criminal Laws'[48] was carried against the Government by a majority of nineteen.[49] Charles

in this gamble with life they were encouraged by the existing criminal laws. This was also the view of J. Scarlett; *Parl. Deb.* (1819), Vol. 39, cols. 829–830 and 840. Many years earlier Sir Samuel Romilly stated that '. . . the chances of escape, as the law now stands, are multiplied to such a degree as by rendering impunity more probable than punishment, to operate as a snare for the commission of crime'; *Speeches*, Vol. 1, p. 344. A similar remark was made by Madan; see above, note 39 at p. 242.

[47] Thus one weak point of his calculation is that he compares the number of offences with the number of offenders. In fact many offences, particularly the forgery of bank-notes to which he refers, are often committed by the same offender. On the other hand the number of forged bank-notes presented for payment did not correspond to the number of offences, which in view of at least one Member of the House of Commons was twice as high. A great number of forged bank-notes never found their way back to the Bank but were destroyed; *Parl. Deb.* (1818), Vol. 38, col. 283.

Some of Buxton's other inferences are also open to doubt. For instance he estimates the reluctance to prosecute in capital cases at ten to one, but it is very probable that in respect to at least some offences it was at that time even higher. The ratio of five to one for what he calls the natural chances of impunity may also be an understatement. Finally it should be remembered that different offences have different co-efficients of impunity (to take only two examples: murder and minor larcenies) and that the differences between them may be very considerable.

[48] Among the members of the Committee were: Sir James Mackintosh (Chairman); Fowell Buxton; Wilberforce; Scarlett (afterwards Lord Abinger); Brougham; Lord John Russell; G. P. Holford; H. Bathurst (afterwards Lord Bathurst); Sir Samuel Shepherd, then Attorney-General and Sir Robert Gifford, then Solicitor General.

[49] Surveying the position of the Government in 1819 Sir Archibald Alison writes: 'They had recently sustained several damaging defeats, particularly one, on the amendment of the criminal law, in the House of Commons'. With respect to the recommendations of Mackintosh's Committee (below, pp. 547–551) he further states: '. . . in the Cabinet itself there was a great division on the subject, the majority being in favour of adopting the report of the Committee. Lord Eldon strongly opposed it, in which he was joined by Lord Castlereagh, but they stood nearly alone'; *Lives of Lord Castlereagh and Sir Charles Stewart* (1861), Vol. 3, p. 84.

The defeat of the Government in the House of Commons on the reform

C. F. Greville notes[50] that 'Sir James Mackintosh made a splendid speech on the Criminal Laws; it was temperate and eloquent, and excited universal admiration. The Ministerial party spoke as highly of it as the Opposition themselves'.[51] Samuel Hoare, who was in the House when Fowell Buxton spoke, said: 'I am sure if I had been received in the House as he was, I should not have recovered from the elevating effect of it for twenty years'.[52] The tenor of the debate was very different from that which had prevailed in the years 1808–1818, for except for a few deprecatory remarks there was a visible effort on both sides to examine the question on its merits and in the light of factual information.[53] The

of criminal law was only one of several they sustained during that session. On May 3, Grattan's motion for a Committee on the Roman Catholic question was negatived by a ministerial majority of only two; on May 6 Lord Archibald Hamilton's motion for Scotch Burgh Reform was carried against the government by a majority of five. On May 10, Lord Liverpool wrote to Lord Eldon: '. . . after the defeats we have already experienced during this Session, our remaining in office is a *positive* evil. It confounds all ideas of government in the minds of men. It disgraces us *personally*, and renders us less capable every day of being of any real service to the country, either now or hereafter. If therefore things are to remain as they are, I am quite clear that there is no advantage, in any way, in our being the persons to carry on the public service'; Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon* (1844), Vol. 2, p. 329.

50 *Journal of the Reigns of King George IV and King William IV* (ed. by H. Reeves, 3rd ed., 1875), Vol. 1, p. 19.

51 Wilberforce warmly complimented Mackintosh: '. . . in his long experience of that House, he never had heard a more able address, a more splendid display of profound knowledge of the subject, with such forcible reasoning from the facts which that knowledge had called forth. It was that kind of reasoning which was most calculated to convince—reasoning deduced from facts and from long experience'; *Parl. Deb.* (1819), Vol. 39, col. 828. Canning, though he opposed Mackintosh's motion, said of his speech: 'Combining luminous arrangement and powerful argument with chaste and temperate eloquence, (it) had been at the same time no less commendable for what it omitted than for what it contained. . . . and whilst his honourable and learned friend had held a straightforward course towards the object of his motion, he had, with a dexterity highly creditable to his prudence and wisdom, steered clear of the shoals and quicksands by which that object was surrounded'; *ibid.*, col. 831.

52 *Memoirs of Sir Thomas Fowell Buxton* (ed. by Ch. Buxton, 3rd ed. 1849), p. 73. Fowell Buxton, with his characteristic modesty, wrote about his speech to J. J. Gurney as follows: 'Well, the effort is over. Last night came the grand question. I spoke for nearly an hour. I was low and disspirited, and much tired (bodily) when I rose. I cannot say I pleased myself. I could not at first get that freedom of language which is so essential, but I rose with the cheers of the House, and contrived to give much of what was on my mind. Everybody seems to have taken a more favourable opinion of the speech than I did. The facts were irresistible'; *ibid.*, p. 72.

53 It is interesting to note the following observations which Wilberforce made during the debate: 'He not only had derived great pleasure from what he had

sustained interest with which these speeches were listened to was an acknowledgment of the national importance of the subject. Nine years earlier only sixty-seven Members were present during a debate on Sir Samuel Romilly's Bill to repeal capital punishment for larceny in dwelling-houses,[54] a fact on which he thus bitterly commented: 'I do think it strange that the Highgate Archway or the Holloway Water Bills should obtain a fuller attendance than a measure of such vital importance'.[55] In 1819, the presence of 275 Members was symptomatic of the House of Commons' changed attitude towards this question. In 1810 Lord Ellenborough called the reform of criminal law 'this system of innovation upon the criminal law, by persons speculating in modern legislation'[56]; in 1819 another opponent—Lord Castlereagh—defined it as 'this most grave and most important business'.[57]

§ 3. THE REPORT OF THE COMMITTEE

The Report of the Select Committee of 1819 is a document of permanent value; it constitutes an outstanding accomplishment of a large project. No official investigation of such a scope into the criminal law and its effects had ever been attempted previously. The Committee reviewed the general state of crime in the community, assessed the punishments awarded by the courts and estimated the attitude of the public to the penal system of the country: but further than this, they submitted a constructive plan of reform.[58]

heard, but also from what he had not heard in the course of the discussion: namely, those arguments, or rather stage objections, against alterations of, or inquiry into, old laws and customs, which had been so vehemently urged at former periods. It was a pleasure to him to find that which every man acquainted with life must have seen, that the opinions of prejudice faded before truth, like the dusk before the more perfect light of day. He remembered once to have heard opinions urged against alterations of sanguinary laws, which were urged with as much apparent fear as if the person proposing those alterations were about to introduce the horrors of the French Revolution. He had heard opinions at that time which any man would blush to hold at the present day. No such objections were, however, made on this occasion'; *Parl. Deb.* (1819), Vol. 39, col. 828.

[54] See above, p. 505.

[55] *Memoirs* (1840), Vol. 2, note 2 at pp. 318–319.

[56] *Parl. Deb.* (1811), Vol. 19, Appendix, col. XC.

[57] *Ibid.* (1819), Vol. 39, col. 802.

[58] 'Report from the Select Committee on Criminal Laws' (1819), 585; *Parl. Papers* (1819), Vol. 8, p. 1. The Committee was appointed on March 2, 1819, and the Report ordered to be printed on July 6 of the same year; see *Parl. Deb.* (1819), Vol. 39, col. 845, and *ibid.*, Vol. 40, cols. 1518–1536.

Method of Inquiry

The Committee was appointed 'to consider so much of the criminal laws as relates to capital punishment in felonies, and to report their observations and opinions of the same, from time to time, to the House'. In the Committee's interpretation of these terms of reference, their task was '. . . to ascertain, as far as the nature of the case admitted by Evidence, whether, in the present state of the sentiments of the people of England, Capital Punishment in most cases of offences unattended with violence, be a necessary or even the most effectual security against the prevalence of crimes'.[59] This was a bold and imaginative approach.[60] The Committee were well aware that the state of public opinion could not 'be deducted from the state of sentiments of isolated individuals chosen at random and brought before the Committee by accident or coincidence'. Witnesses had, therefore, been most carefully selected from various social classes and professional groups. Out of sixty-one persons whom they examined, the great majority belonged to the following four groups: shopkeepers and tradesmen, merchants and manufacturers, insurance brokers and brokers to merchants, bankers.[61] General questions were not asked, general replies not accepted and opinions on criminal justice as a whole not sought. The Committee searched for facts, particularly for such as derived directly from the personal experience of witnesses. The only general question was whether witness believed that his views were shared by other persons belonging to his social or professional group. Some of the typical questions asked were:—

> Have you made any observation on the effect of capital punishments for a certain class of offences?
> Have you heard that opinion repeatedly expressed?

[59] *Op. cit.*, p. 3.

[60] Professor Jerome Hall rightly emphasises 'the thoroughness . . . and the modernity of its approach', and its importance for all interested '. . . in the effect of public opinion upon the actual operation of legal rules'; *Theft, Law and Society* (Boston, 1935), p. 102.

[61] Farmers and landed classes in general were not well represented, possibly because cattle-stealing and other similar offences were not reviewed by the Committee. On the question of the extent to which the views of these witnesses could be held faithfully to represent the views of other members of their respective social or professional groups see below, note 6 at p. 556.

Have you observed much disinclination to prosecute for certain offences among your acquaintance, on account of the capital punishment of death?

What are the offences with respect to which that reluctance chiefly prevails?

Have you ever experienced that disinclination to prosecute in cases of forgery?

Have you reason to believe that that disinclination is general among the traders in the City of London?

Have you any reason to doubt that the reluctance prevails in consequence of the capital punishment?

If you were to receive in payment a forged note of the Bank of England, should you be prevented from prosecuting or informing the Bank of England, by the apprehension of the punishment of death?

If the punishment were less than death, would you be willing to co-operate with the Bank in convicting the offender?

Should not you consider it as your absolute duty?

In those cases you have mentioned, in which you have not prosecuted, were you at all deterred by the expense or inconvenience it might possibly personally occasion you?

Do you think that the same reluctance would prevail if the punishment were anything less than death?

Does the same disinclination prevail with respect to offences attended with violence?

The remaining witnesses examined by the Committee had been selected from among those directly connected with the administration of criminal justice.[62] Evidence was thus given by experienced clerks to the magistrates, a solicitor with extensive criminal practice,[63] two leading London magistrates,[64] two prison chaplains [65] and two gaol keepers.[66]

[62] It was a deliberate policy of the Committee not to seek the views of the judges; see below, pp. 545–547. The only judge who gave evidence was Sir Archibald Macdonald.

[63] James Harmer, who during his twenty-three years' practice had been in contact with more than 2,000 prisoners. In 1837 he was again asked to give evidence, this time before the Second Committee on Criminal Law; as in 1819, it was then insisted that great weight should be attached to the information which he supplied.

[64] P. Colquhoun and G. B. Mainwaring.

[65] Each with five years' experience.

[66] One had been a keeper of Newgate and of other prisons for nearly half a century. The information collected by the Committee from prison chaplains and gaolers may be grouped under the following headings: (a) The reaction of offenders to the death sentence pronounced upon them by the court; (b) their attitude in prison when awaiting a possible reprieve; (c) the opinions of

The inquiry was conducted mainly with a view to collecting information relating to larceny in shops or in dwelling-houses unattended with violence, and forgery. The need for a consolidation and digestion of certain branches of criminal law [67] and the question of secondary punishments with which to replace the death penalty were also explored, though not with the same thoroughness.[68]

Characteristic of the empirical approach of the Committee to the subject of their inquiry are the two Appendices to their *Report*. The first consists of twenty-five statistical returns concerning the state of crime and the administration of criminal justice in certain districts of the country. These returns, compiled by clerks to the courts under the Committee's direction, cover various periods of time, often dating back to the seventeenth century. It is to be doubted whether any other country possesses equally well-arranged returns for so early a period. The Committee's opinion that they are 'probably unparalleled in the history of criminal law' is certainly well founded.[69] No less remarkable is the second Appendix which consists of a synoptical 'Table of Criminal Law, 25 Edw. III to 59 Geo. III'. It divides offences into

other prisoners on executions and their attitude towards those capitally convicted; (d) the attitude and opinions of those usually attending public executions.

In his *Memoirs* (Feb. 27, 1818) Romilly notes the following information imparted to him by Elizabeth Fry: 'I learned from her some curious facts respecting the effects produced by capital punishments. Her observations are the more valuable, as she has such opportunities of seeing and conversing with the prisoners. She told me that there prevails among them a very strong and general sense of the great injustice of punishing mere thefts and forgery in the same manner as murders: that it is frequently said by them, that the crimes of which they have been guilty are nothing when compared with the crimes of Government towards themselves: that they have only been thieves, but that their governors are murderers. There is an opinion too, very prevalent among them, that those who suffer under such unjust and cruel sentences are sure of their salvation'; *Memoirs* (1840), Vol. 3, pp. 332–333.

[67] This subject formed a large part of the evidence given by Sir Archibald Macdonald and Sir William David Evans.

[68] The Committee emphasised in their *Report* that they had decided to omit this subject since it was to be inquired into by Lord Castlereagh's Committee on Gaols. None the less the Committee expressed some views upon it; see below, note 79 at p. 518.

[69] See for instance returns Nos. 4 and 5, which give a full account of convictions and executions for London and Middlesex from 1699 to 1755; a similar return for the Home Circuit (comprising Herts, Essex, Kent, Sussex and Surrey) from 1689 to 1718, from 1755 to 1784 and from 1785 to 1814; *op. cit.*, Appendix, pp. 146–174.

seven main groups, each of which is further subdivided, and records all changes in the punishments imposed for them. The changes are recorded chronologically and details are given of all the relevant statutes. The table is invaluable as a guide to the history of penal methods in general and throws much light on the extension of capital punishment during more than 300 years.[70]

Judges not invited to give evidence

It has been mentioned that although the Committee drew their witnesses from various social classes and professional groups and invited the co-operation of a number of persons engaged in the administration of criminal justice, the only judge who gave evidence was Sir Archibald Macdonald, sometime Chief Baron of the Exchequer.[71] The exclusion of the judges was not accidental but was the result of a deliberate policy. The Committee based their decision first on the ground that it would be inappropriate '. . . to desire the opinion of the present Judges, out of consideration to the station and duties of those respectable magistrates. It appeared unbecoming and inconvenient that those whose office it is to execute the Criminal Law should be called on to give an opinion whether it ought to be altered. As the judges could not with propriety censure what they might soon be obliged to enforce, they could scarcely be considered as at liberty to deliver an unbiassed opinion'.[72] Their second

[70] As far as can be judged from the 'Evidence', this material was collated by Sir William David Evans, a barrister, former stipendiary magistrate for Manchester and in 1818 Vice-Chancellor of the County Palatine of Lancaster, who put this result of his long researches at the disposal of the Committee; *op. cit.*, 'Evidence', pp. 39 and 41. Sir Thomas Fowell Buxton made similar researches; see above, p. 5. Evans had a wide knowledge both of criminal and civil law. He compiled a digest of statutes and wrote a learned introduction to it on the history of consolidation and digestion; *A collection of Statutes connected with the general administration of the Law* (1817), 8 Vols. A third edition issued in 1829 was edited by A. Hammond.

[71] He was Solicitor-General from 1784–1788 and Attorney-General from 1788-1793; became Chief Baron of the Exchequer in 1793, and retired in 1813; see also above, pp. 14 and 342–343.

[72] The Committee had, however, requested the attendance of a number of retired judges. Of these, Sir William Grant and Sir Vicary Gibbs found it inconvenient to attend, the Committee stating in their Report that they had 'reason to believe that both adhere to the opinions which they formerly maintained in Parliament on opposite sides of this question'. Sir James Mansfield and Sir Allan Chambré appeared to have no opinion on the subject

reason was as follows:—'. . . highly as the Committee esteem and respect the Judges, it is not from them that the most accurate and satisfactory evidence of the effect of the Penal Law can reasonably be expected. They only see the exterior of criminal proceedings after they are brought into a court of justice. Of the cases which never appear there, and of the causes which prevent their appearance, they can know nothing. Of the motives which influence the testimony of witnesses, they can form but a hasty and inadequate estimate. Even in the grounds of Verdicts, they may often be deceived. From any opportunity of observing the influence of punishment upon those Classes of men among whom malefactors are most commonly found, the Judges are, by their stations and duties, placed at a great distance'.[73]

Against the evidence of the judges, the Committee set the evidence of those who had a personal experience of crime, either because they belonged to the class of persons who most suffered from it, or because by virtue of their occupation they were in constant touch with criminals: '. . . on the Traders of the cities of London and Westminster, Your Committee have principally relied for information. To the clerks at the office of magistrates, and to the officers of criminal courts who receive information and prepare indictments, to experienced magistrates themselves, and to the gaolers and others, who in the performance of their duties have constant opportunities of observing the feelings of offenders, the Committee have also directed their inquiries; their testimony has been perfectly uniform'.[74]

The two arguments adduced by the Committee in support of their decision to exclude the judges are unconvincing. The first was based on a misplaced sensibility; the implication of the second was that since the judges could throw but little light on such matters as, for instance, the effect of penal laws, their views on any other matter connected with reform were irrelevant. This was a totally unwarranted contention. Moreover, the Committee had themselves contradicted their own

and at their own request the Committee dispensed with their attendance. Lord Erskine was absent from London when the Committee proposed to examine him, but the Committee were 'well assured that his opinions concur with their own'.

[73] *Op. cit.*, p. 9.

[74] *Ibid.*

argument by inviting a number of retired judges and, in particular, by attaching special importance to the evidence given by Sir Archibald Macdonald.[75] They thus created an impression damaging to their prestige, namely that the evidence of a judge was of value only if it coincided with their own views. Their action had no doubt been dictated by an apprehension, largely justified, that judges were not at that stage favourably disposed towards reform. They were unquestionably in a difficult position, but the course they decided to take could hardly fail to meet with strong reprobation.[76]

Recommendations of the Committee:

(a) Obsolete statutes

The repeal or amendment of obsolete statutes was according to the Committee a proposition 'the least likely to give rise to differences of opinion', although 'as regards the number and choice of them, different sentiments must always be expected'. The Committee held that the following statutes should be considered obsolete: (a) statutes which 'by mere levity and hurry have raised an insignificant offence, or an almost indifferent act, into a capital crime'; (b) statutes relating to offences which had long been acknowledged not serious enough to warrant the imposition of the death penalty; (c) emergency capital Acts still in force although the circumstances which caused their enactment no longer prevailed; (d) statutes which had fallen into disuse.[77] Forestalling the objection that in some cases the law might appear useless because it had already accomplished its purpose, the Committee contended that the statutes they proposed to repeal did not fall within that category.[78]

[75] 'Your Committee beg leave to direct the attention of the House to the evidence of Sir Archibald Macdonald, on this and other parts of the general subject, in which that venerable person has stated the result of many years experience in the administration of Criminal Law'; *op. cit.*, p. 8.

[76] See for instance 'Report from the Select Committee on Criminal Laws', *Quarterly Review* (1820–1821), Vol. 24, pp. 195–270 at pp. 229–230; and *Parl. Deb.* (1821), N.S., Vol. 5, col. 953.

[77] The Committee considered that if a statute had not been used for a hundred years in Middlesex, sixty years in the counties round London, and fifty years in Western Circuit districts, it was proof enough that it had become unnecessary.

[78] Sir James Mackintosh said on this point: This argument '. . . if it be applicable at all, it is applicable only to those conspicuous crimes the penalty attached to which is generally known. It must be wholly inapplicable to those obscure

These 'obscure laws, obscure crimes, and obscure penalties' they divided into two groups: Group (1)—such as cover acts 'so nearly indifferent as to require no penalty' and acts not so injurious as to warrant capital punishment but which should be treated as misdemeanours at Common Law; Group (2)—such as cover acts which though dangerous should yet not be punished capitally but only with transportation or imprisonment with hard labour.[79] In the ensuing table all statutes singled out by the Committee are grouped under these two headings[80]:—

OBSOLETE STATUTES: GROUP (1) (Statutes, or part of statutes, to be repealed.)

1.	1 & 2 Ph. & M. c. 4	– Egyptians remaining within the Kingdom one month.
2.	18 Car. 2, c. 8	– Notorious thieves in Cumberland and Northumberland.
3.	9 Geo. 1, c. 22[81]	– Being armed and disguised in any forest, park, etc.
4.	do.	– do. in any warren.
5.	do.	– do. in any high road, open heath, common or down.
6.	do.	– Unlawfully hunting, killing or stealing deer.
7.	do.	– Robbing warrens, etc.
8.	do.	– Stealing or taking any fish out of any river or pond.
9.	do.	– Hunting in His Majesty's forests or chases.

laws, obscure crimes, and obscure penalties, the very existence of which it requires extraordinary effort on the part of the most accurate and well informed lawyer habitually to remember; and which are rarely mentioned but by those who wish to produce an impression unfavourable to the character of our general code'; *Parl. Deb.* (1819), Vol. 40, cols. 1524–1525.

[79] On the subject of secondary punishments there was a marked divergence between the evidence of some leading witnesses and the views of the Committee. Sir Archibald Macdonald, Sir William David Evans, G. B. Mainwaring and James Harmer, all noted the ineffectiveness of transportation and the existing prison system and advocated detention with hard labour and strict diet. But the Committee held that 'in their present imperfect state they (transportation and imprisonment) are sufficient for such offences'; they also confidently asserted that 'in the more improved condition in which the Committee trust all the persons of the kingdom will soon be placed, imprisonment may be hoped to be of such a nature as to answer every purpose of terror and reformation'.

[80] It may be doubtful whether all statutes included in these two groups fall within the Committee's definition of 'obsolete statutes'; see, in particular, Nos. 3 and 10 of Group (2).

[81] Known as the Waltham Black Act; see on this, above, pp. 49–79.

10. 9 Geo. 1, c. 22 – Breaking down the head or mound of a fish pond.
11. 9 Geo. 1, c. 28 – Being disguised within the mint.
12. 12 Geo. 2, c. 29 – Injuring Westminster bridge, and other bridges by other Acts.

OBSOLETE STATUTES: GROUP (2) (Statutes, or part of statutes, to be amended.)

1. 31 Eliz. c. 9 – Taking away any maid, widow, or wife etc.
2. 21 Jac. 1, c. 26 – Acknowledging or procuring any fine, recovery, etc.
3. 4 Geo. 1, c. 11, s. 4 – Helping to the recovery of stolen goods.
4. 9 Geo. 1, c. 22 – Maliciously killing or wounding cattle.
5. do. – Cutting down or destroying trees growing, etc.
6. 5 Geo. 2, c. 30 – Bankrupts not surrendering, etc.
7. do. – Concealing or embezzling.
8. 6 Geo. 2, c. 37 – Cutting down the bank of any river.
9. 8 Geo. 2, c. 20 – Destroying any fence, lock, sluice, etc.
10. 26 Geo. 2, c. 28 – Making a false entry in a marriage register, etc., five felonies.
11. 27 Geo. 2, c. 15 – Sending threatening letters.
12. 27 Geo. 2, c. 19 – Destroying bank, etc., Bedford level.
13. 3 Geo. 3, c. 16 – Personating out-pensioners of Greenwich Hospital.
14. 22 Geo. 3, c. 40 – Maliciously cutting serges, etc.
15. 24 Geo. 3, c. 47 – Harbouring offenders against the revenue Acts when returned from transportation.

Recommendations of the Committee:

(*b*) *Larceny*

The Committee recommended the repeal of only three capital statutes relating to larceny but felt that a much wider measure of reform was in fact advisable. The statutes they selected had several times been discussed in Parliament during the eight years from 1810 to 1818. They were:—

1. 10 & 11 Will. 3, c. 23 – Privately stealing in a shop to the amount of five shillings;
2. 12 Anne, st. 1, c. 7 – Privately stealing in a dwelling-house to the amount of forty shillings;
3. 24 Geo. 2, c. 45 – Privately stealing from vessels in a navigable river to the amount of forty shillings.

The Committee recommended that punishment for all these offences should be reduced to transportation or imprisonment. It will be remembered that a similar reform had been proposed by Sir Samuel Romilly, whose Bills to this effect had been adopted by the House of Commons.[82]

Recommendations of the Committee:

(c) Forgery

Whereas proposals to repeal or to amend obsolete statutes and to abolish capital punishment for larceny in dwelling-houses, shops or on board ships had been put before Parliament on several previous occasions, the reform of the forgery law was proposed for the first time. The Committee recommended that all statutes relating to forgeries should be re-arranged and consolidated; they also proposed the following changes in the punishments appointed for forgery and some allied offences: (a) For the first offence of uttering forged notes, capital punishment was to be replaced by transportation or imprisonment; the second offence to continue to carry the death penalty. (b) For knowingly possessing forged notes—transportation for fourteen years to be changed to transportation or imprisonment with hard labour at the discretion of the court. The Committee held that this change should be extended to all offences punishable with transportation. (c) Capital punishment to be retained for forgery of Bank of England notes but abolished for that of other notes, which should be punished by transportation or imprisonment.[83] To these recommendations should be added the proposal to repeal 26 Geo. 2, c. 23, imposing capital punishment for making a

[82] Restating the need for this reform the Committee said: 'Numerous and respectable witnesses have borne testimony, for themselves and for the classes whom they represent, that a great reluctance prevails to prosecute, to give evidence, and to convict, in the cases of the three last mentioned offences; and that this reluctance has had the effect of producing impunity to such a degree that it may be considered as among the temptations to the commission of crimes'.

[83] The Committee objected to the practice of giving rewards for the detection of crimes but held that in view of the great difficulty of discovering forgeries the advisability of offering substantial rewards for their detection should be seriously considered. A similar proposal was made in the 'Report of the Commissioners appointed to inquire into the mode of preventing the Forgery of Bank Notes' (1819), 2, *Parl. Papers* (Reports, 1819), Vol. 11, p. 303; see below, note 3, at p. 556. The Committee also recommended that in every town of sufficient importance there should be an agent authorised by the Bank of England to stamp all forged notes presented to him, thus making their circulation considerably more difficult.

false entry in a marriage register,[84] which the Committee included in the class of obsolete statutes.[85]

§ 4. EFFORTS TO IMPLEMENT THE COMMITTEE'S RECOMMENDATIONS

The efforts to implement these recommendations were made in two stages: the first covered proposals relating to obsolete statutes and to larceny[86] and the second—those relating to the law of forgery.[87] They met with determined opposition and very little was ultimately accomplished.

Opposition to the repeal of certain obsolete statutes and of statutes relating to larceny

Three statutes enacted in 1820 fell far short of what the Committee recommended. The relevant Bills were brought in by Sir James Mackintosh. The first, *The Capital Felonies Repeal Bill* covered Group (1) of Obsolete Statutes which the

[84] See above, p. 549.

[85] In addition to these recommendations the Committee also made a number of tentative suggestions. Thus when proposing the repeal of the death penalty for privately stealing in shops, dwelling-houses and on board ships on navigable rivers, they pointed out that it might be expedient to extend the revision to certain forms of arson and burglary; they held that the exact scope of this revision would be easier to determine were the laws of arson and burglary consolidated, and 'the same result, though in a less degree, might be expected from a similar operation in other important branches of criminal law'.

The Committee further suggested that it should be made possible for the judges not to pronounce death sentences except when they were likely to be executed.

The Committee's third suggestion was very interesting, namely, the establishment of inexpensive and easily accessible jurisdiction with simplified forms of procedure for the trial of minor offences; punishments pronounced in such courts should be predominantly corrective. It would seem that in making this suggestion the Committee were mainly concerned with the trial of young offenders. For a similar suggestion made by Fielding see above, note 46, p. 414.

[86] See *Parl. Deb.* (1819), Vol. 40, H.C., July 6, cols. 1518–1536; *Parl. Deb.* (1820), N.S., Vol. 1, H.C., May 9, cols. 227–237, and May 19, col. 480; *ibid.*, June 26, col. 1338; *Parl. Deb.* (1820), N.S., Vol. 2, H.C., June 30, cols. 137–138; *ibid.*, H.L., July 17, cols. 491–496, and July 18, cols. 524–528.

See also Bills: 1 Geo. 4, sess. 1820, 51, *Parl. Papers* (Public Bills, 1820), Vol. 1, pp. 27–28; 1 Geo. 4, sess. 1820, 52, *ibid.*, pp. 35–36; 1 Geo. 4, sess. 1820, 53, *ibid.*, pp. 39–40; 1 Geo. 4, sess. 1820, 79, *ibid.*, pp. 55–57; 1 Geo. 4, sess. 1820, 80, *ibid.*, pp. 59–66; 1 Geo. 4, sess. 1820, 225, *ibid.*, pp. 69–75; 2 Geo. 4, sess. 1821, 394, *ibid.* (1821), Vol. 1, pp. 549–550; 2 Geo. 4, sess. 1821, 395, *ibid.*, pp. 553–554.

[87] See *Parl. Deb.* (1821), N.S., Vol. 5, H.C., 'Forgery Punishment Mitigation Bill', May 23, cols. 893–973; May 25, cols. 999–1001; and June 4, cols. 1099–1114.

See also 1 Geo. 4, sess. 1820, 78, *Parl. Papers* (Public Bills, 1820), Vol. 1,

Committee recommended for repeal.[88] The Bill was adopted by the House of Commons but in the House of Lords Lord Eldon objected to the repeal of eight capital provisions of the Waltham Black Act.[89] The Bill was accordingly amended and in this severely truncated form it passed into law (1 Geo. 4, c. 116).[90]

The second Bill—*The Capital Felonies Commutation of Punishment Bill*—covered Group (2) of Obsolete Statutes singled out by the Committee for amendment.[91] Between them these statutes covered nineteen offences for all of which the Bill purported to repeal capital punishment and to impose transportation or imprisonment in its stead. However, before this Bill passed into law it was very materially altered. Mackintosh himself withdrew from it three statutes: 26 Geo. 2, c. 23 (death penalty for five offences of making false entry in a marriage register), 21 Jac. 1, c. 26 (*ditto* for acknowledging or procuring any fine, recovery, etc.), and 24 Geo. 3, c. 47 (*ditto* for harbouring offenders against revenue acts when returned from transportation).[92] A further six statutes covering seven offences were eliminated by the House of Lords.[93]

pp. 43–44; 2 Geo. 4, sess. 1821, 393, *ibid.* (1821), Vol. 1, pp. 537–538; 2 Geo. 4, sess. 1821, 562, *ibid.*, pp. 541–542; 2 Geo. 4, sess. 1821, 593, *ibid.*, pp. 545–546.

[88] See above, p. 548.

[89] The decision not to repeal these sections of the Waltham Black Act (9 Geo. 1, c. 22) was symptomatic; it showed that there was little prospect of effecting any significant reforms for some time to come. Since the death of Lord Ellenborough on September 13, 1818, the opposition to reform in the House of Lords had been led by Lord Eldon: 'In the former instance in which these bills were discussed', he said, 'they had the benefit of the experience and knowledge which distinguished that great man (Lord Ellenborough). . . . Instructed by his authority they had again and again rejected these bills'.

Lord Eldon was strongly supported by the Earl of Liverpool, the Earl of Bathurst and Lord Redesdale. The Marquis of Lansdowne supported the reformers; *Parl. Deb.* (1820), N.S., Vol. 2, cols. 491–496 and 524–528.

[90] It repealed the following four statutes: 1 & 2 Ph. & M. c. 4, s. 5 (Egyptians remaining within the Kingdom, etc.); 18 Car. 2, c. 3 (Notorious thieves in Cumberland and Northumberland); 9 Geo. 1, c. 28, s. 3 (Being disguised within the Mint); and 12 Geo. 2, c. 29, s. 5 (Injuring Westminster bridge, etc. It also repealed all other Acts which imposed capital punishment for the destruction of bridges. On some of these Acts see below, Appendix 1, p. 621.

[91] On this group see above, p. 549.

[92] Nos. 10, 2, 15 of Group (2) of Obsolete Statutes; see above, p. 549. For the amended Bill see 1 Geo. 4, sess. 1820, 225, *Parl. Papers* (Public Bills, 1820), Vol. 1, pp. 69–75.

[93] They were: 9 Geo. 1, c. 22 (maliciously killing or wounding cattle); *ditto* (cutting down or destroying trees growing, etc.); 6 Geo. 2, c. 37 (cutting down the bank of any river); 27 Geo. 2, c. 15 (sending threatening letters); 27 Geo. 2,

Thus ultimately the new law (1 Geo. 4, c. 115) covered only four statutes.[94] Referring to this very substantial amendment of the Bill, the influential *Quarterly Review* stated that 'the Capital Felonies Commutation of Punishment Bill may be said to be virtually postponed'. The *Review* paid a compliment to the House of Lords 'which on this occasion again acted as a floodgate against the tide of legislation which is now rolling so impetuously through the House of Commons'. It also predicted that unless the measures coming before the House of Commons received 'their due share of attention and examination, we cannot see how the laws and business of the country can be prevented from being involved, at no distant period, in a state of confusion which it is painful to anticipate, and of which the consequences will only be fully developed when they have become irremediable'.[95]

c. 19 (destroying bank, etc., Bedford level); 3 Geo. 3, c. 16 (personating outpensioners of Greenwich Hospital); 22 Geo. 3, c. 40 (maliciously cutting serges); see Nos. 4, 5, 8, 11, 12, 13, 14 of Group (2) of Obsolete Statutes, above, p. 549.

[94] 31 Eliz. c. 9 (Taking away any maid, widow, or wife, etc.); this statute had been suggested for repeal by the Committee of 1770, see above, p. 429. 4 Geo. 1, c. 11, s. 4 (Helping to the recovery of stolen goods); see Appendix 1, p. 622. 5 Geo. 2, c. 30 (Bankrupts not surrendering, etc.), and *ditto* (concealing and embezzling); see on this above, note 94, at pp. 520–521. 6 Geo. 2, c. 37 (cutting down the bank of any river); see Appendix 1, p. 621. These are Nos. 1, 3, 6, 7 and 8 of Group (2) of Obsolete Statutes, above, p. 549. For all these offences 1 Geo. 4, c. 115, appointed transportation for life or for any term of not less than seven years, or imprisonment with or without hard labour, for any term not exceeding seven years.

[95] 'Report from the Select Committee on Criminal Laws', *Quarterly Review* (1820–1821), Vol. 24, pp. 232 and 233. This remarkable article, running to seventy-five pages (pp. 195–270), which may well be called the 'Counter-Report', was written by John Miller of Lincoln's Inn. In the *Quarterly Review* it was published anonymously but it was later considerably enlarged and included in Miller's book, *An Inquiry into the present state of the Statute and Criminal Law of England* (1822); see 'On the Criminal Law of England', pp. 87–332.

The evidence of the Report is challenged on the ground that witnesses were selected from among persons known to have been supporters of criminal law reform, that they were not always representative of their social class, that representatives of certain groups were not examined at all, that their number was too small to allow any general conclusions to be drawn from their depositions, that the questions were tendentious, that in the Committee itself those holding opposite views were not represented in sufficient number, and finally that the judges were not asked to state their opinion. The Committee is further criticised for underestimating the difficulty of evolving an effective system of alternative penalties. The recommendations are rejected because they are based on a false assessment of the gravity of the offences to which they refer and on an erroneous caution regarding the ineffectiveness of capital punishment. The only reforms which according to the author should be introduced are the raising

Sir James Mackintosh further brought in three Bills to repeal the death penalty for privately stealing in a shop to the amount of five shillings (10 & 11 Will. 3, c. 23), in a dwelling-house to the amount of forty shillings (12 Anne, st. 1, c. 7) and from vessels in a navigable river to the amount of forty shillings (24 Geo. 2, c. 45).[96] Of these, the second and third had to be withdrawn when the Law Officers of the Crown intimated that they would oppose them.[97] The first was adopted by the House of Commons but was very materially amended by the House of Lords: instead of abolishing capital punishment for privately stealing in shops it was agreed only to restrict its scope by raising the value of stolen property from five shillings to fifteen pounds.[98] This was a most disappointing result, particularly since the abolition of the death penalty for this offence had been continually pressed for by Sir Samuel Romilly whose Bills effecting this change had been adopted by the Commons on several occasions, and since the need for this reform was again restated by the Report of 1819. But even this slight alleviation of the extreme severity of the punishment for a common offence against property was in some

of the value of stolen property in statutes concerning larceny and the repeal of a few obsolete statutes. The retention of the Waltham Black Act he considers essential, though a re-drafting of the Act might be desirable. The criteria on which to base decisions as to what constitutes an obsolete statute are rejected. A more stringent enforcement of capital punishment is recommended and a warning is uttered against the spirit of reform in general. He further recommends the postponement of the revision of criminal law until the consolidation and digestion of all such laws have been accomplished. Reforms carried out on the Continent are subjected to many penetrating criticisms.

In contrast to the *Quarterly Review*, the *Edinburgh Review* gave its unqualified support to the Report of 1819 and urged an immediate adoption of all its recommendations; 'Report of the Select Committee on Criminal Laws', *Edinburgh Review* (1821), Vol. 35, pp. 314–353. This article—published anonymously—was written by William Hazlitt and is included in his *Complete Works* (ed. by P. P. Howe, 1931), Vol. 19, pp. 216–255.

The *Times*, in a leader of July 8, 1819, expresses the hope '. . . that the Report of the Committee will pave the way for legislative resolutions tending to a more efficient execution of the laws . . .'.

[96] See recommendations of the Committee of 1819, above, p. 549.

[97] *Parl. Deb.* (1820), N.S., Vol. 1, cols. 137–138. The Attorney-General was then Sir Robert Gifford (afterwards Lord Gifford), and the Solicitor-General, Sir John Singleton Copley (afterwards Lord Lyndhurst).

[98] 1 Geo. 4, c. 117. By this Act stealing in a shop, warehouse, etc., to the value of between five shillings and fifteen pounds was to be punished by transportation for life or for any term not less than seven years or by imprisonment with or without hard labour for any term not exceeding seven years.

For similar amendments later introduced by Peel see below, p. 582. For Mackintosh's cogent criticism of them see below, note 41 at p. 565.

quarters regarded as too radical. The previously quoted article in the *Quarterly Review*, for instance, praised the new Act as effecting a 'material improvement upon the old law', but at the same time regretted the omission of a clause which would authorise the infliction of capital punishment 'where the criminal had been repeatedly convicted of acts of theft before'.

The 'Forgery Punishment Mitigation Bill'

It cannot be doubted that the Committee's recommendation to repeal capital punishment for larceny in shops, in dwelling-houses and on navigable rivers had strong public support. These reforms had on several occasions been approved by the House of Commons.[99] The need for them had been re-emphasised by witnesses examined by the Committee of 1819,[1] and the death penalty appointed for the relevant offences was seldom actually executed.[2] The reform of the forgery law raised much more controversial issues. Some dissatisfaction was expressed with the state of the law relating to forgery and to the uttering of Bank of England notes.[3] It was also maintained that forgery is only an aggravated form of theft

[99] See above, pp. 517 and 522–523.

[1] The validity of this part of the evidence was on the whole accepted and even the *Quarterly Review* held that some amendment of these statutes ought to be considered; see above, note 95 at p. 554.

[2] Out of forty-one persons convicted of shop-lifting in 1818 none was executed; out of 142 convicted of larceny in a dwelling-house to the value of 40s., only four were put to death.

[3] Strong objections to the discretionary power given to the Counsel for the Bank of England to prosecute either for forgery and uttering or for having forged bank-notes in possession was expressed during several debates in the House of Commons in the years 1816 and 1818. The extensive recourse to this second alternative in cases when it was apparent that the accused was guilty of forgery was regarded as an acknowledgment that the law was too severe. On these and other criticisms see *Parl. Deb.* (1816), Vol. 33, H.C., April 24, 'Forged Notes', cols. 1178–1179; *ibid.* (1818), Vol. 37, H.C., Feb. 24, cols. 603–606; *ibid.* (1818), Vol. 38, H.C., April 21, cols. 272–284, May 1, cols. 432–435, and May 13, cols. 671–703.

See also the following Returns: 'Bank Notes presented and paid, proved to be forgeries from 1812–1816' (1816), 325, *Parl. Papers* (Accounts and Papers, 1816), Vol. 13, p. 401; 'Account of forged notes presented to the Bank from Jan. 1, 1801 to Dec. 31, 1811' (1812), 130, *ibid.* (1812), Vol. 9, p. 273; 'Prosecutions by the Bank' (1812), 149, *ibid.*, p. 275; 'Prosecutions for forging and uttering Bank of England Notes' (1818), 222, and 260, *ibid.* (1818), Vol. 16, pp. 161 and 163. 'Expense incurred by the Bank of England in Prosecutions for forging their Notes, etc.' (1818), 297, *ibid.*, p. 171. But it should be noted that the main purpose of these debates was not so much to bring about the

and that capital punishment should be abolished for at least some of its less serious kinds.[4] On the other hand it was felt in many quarters that in a commercial country like England, forgery was an exceptionally serious crime.[5] Again, almost all of the witnesses examined by the Committee of 1819, and they were men of undisputed respectability holding high positions in the banking world, testified to a great reluctance to prosecute for forgery and held that for this reason it would be expedient to abolish capital punishment for it. But among these witnesses there were only twelve bankers and it was contended that 'to settle on which side the preponderance of public opinion lies' a much wider inquiry was needed.[6] Indeed, forgery laws were much more strictly enforced than any other capital laws relating to offences against property.[7]

revision of the forgery law, as to criticise the new policy of the Bank of England in suspending cash payments.

Concern was also expressed by the 'Report of the Commissioners appointed for inquiring into the mode of preventing the Forgery of Bank Notes' which states that 'the great quantity of Forged Small Notes which have lately been found in circulation have all issued from a very few Plates only; and the fabrication of them is chiefly confined to one particular Part of the Country, and carried on by men of skill and experience and possessed of a very considerable command of capital'. It considers it remarkable that '. . . whilst so many Utterers are continually brought to justice, the actual Forger should very rarely indeed be detected . . .', and concludes: '. . . we cannot refrain however from adding, to this statement, our opinion that there must be some culpable remissness in the local Police of these districts within which the actual Fabricators of Bank Notes are more than suspected to reside, and to carry on their trade with impunity'; (1819), 2, pp. 2 and 3, *Parl. Papers* (Reports, 1819), Vol. 11, p. 303.

[4] See the valuable pamphlet *On the Punishment of Death, in Case of Forgery; its Injustice and Impolicy maintained* published anonymously in 1818; see also an article under the same title in the *Edinburgh Monthly Review* (1819), Vol. 1, pp. 260–276, and *The Black Book or Corruption Unmasked* (1820), pp. 256–262.

[5] This was acknowledged even by foreign legal authors who were opposed to its being punished with death. Thus Pelegrino Rossi writes that 'dans un pays comme l'Angleterre, la falsification des billets de banque produit un mal matériel (danger et alarme) extrêmement grave . . .'; *Traité de Droit Pénal* (4th ed., 1872), Vol. 1, p. 304. The book was first published in 1829.

[6] *Quarterly Review* (1820–1821), Vol. 24, p. 214. The author mentions that there were seventy-one banking houses in London with probably 284 partners and at least 250 banking houses in the country with a further 750 partners. To this total of 1,034 bankers must be added about 100,000 manufacturers and merchants of importance. 'We trust', he adds, 'the legislature will not be satisfied that the jury of 12 men who have been examined, however respectable they may be, are sufficiently numerous to answer for so large a body in a matter of so great moment'.

[7] The data in the ensuing table relate to the whole of England and Wales. The table has been computed on the basis of Appendix No. 1 to the already quoted *Report on Criminal Laws* (1819), 585, pp. 128 and 132.

	Robbery.		Burglary.		Horse-stealing.		Forgery and Uttering Forged Instruments.	
	Death Sentences.	Executions.	Death Sentences.	Executions.	Death Sentences.	Executions.	Death Sentences.	Executions.
1810	39	6	88	18	58	4	27	18
1818	107	13	346	19	130	1	86	24

In 1810 less than one out of every six persons sentenced to death for robbery was executed, for burglary one out of every five, and for horse-stealing only one out of every fifteen. In the same year two out of every three persons sentenced to death for forgery were executed. In 1818 the ratio of executions to capital convictions for forgery, though lower than in 1810, was still much higher than for any of the other three offences.[8]

In spite of this division of opinion the reformers decided to try to implement the recommendations of the Committee of 1819. It has been noted that in 1820 Sir James Mackintosh had to withdraw his two larceny Bills because it had been intimated to him that they would be opposed by the Law Officers of the Crown. For the same reason he also had to withdraw his *Bill for mitigating the severity of Punishments in certain cases of Forgery.*[9] A year later he prepared another Bill—*Forgery Punishment Mitigation Bill*[10]—the defence of which was entrusted to Sir Thomas Fowell Buxton. No one

[8] The total number of offenders executed for forgery and uttering forged instruments in the years 1810–1818 was 143.

In the seven years 1812–1818, 636 offenders were put to death for all offences. Of these, 117—or about one-fifth—were executed for forgery and uttering forged instruments; the number for murder was 138, to which may be added the 25 executions for shooting at, stabbing, maiming, and administering poison, with intent to murder. Among all the other offences against property only for burglary was the number of executions as high as for forgery (117). But whereas for forgery 117 offenders were executed out of 324 sentenced to death, for burglary 117 were executed out of as many as 1,403 sentenced to death. Eighty-six offenders were executed for robbery and the remaining 153 executions were for seventeen other offences; 'Criminal offenders. Statements of the Number of Criminal offenders committed for Trial in England and Wales' (1833), 135, p. 21, *Parl. Papers* (Accounts and Papers, 1833), Vol. 29, p. 1.

[9] 1 Geo. 4, sess. 1820, 78, *Parl. Papers* (Public Bills, 1820), Vol. 1, pp. 43–44; see also *Parl. Deb.* (1820), N.S., Vol. 1, col. 480. This Bill was a revised and somewhat more moderate version of an earlier draft. He did not proceed with it although leave had been given to bring it in.

[10] 2 Geo. 4, sess. 1821, 393, *Parl. Papers* (Public Bills, 1821), Vol. 1, pp. 537–538.

could have made a stronger case for it. His speech,[11] which also appeared in pamphlet form,[12] is in many respects superior even to Sir Samuel Romilly's *Observations on the Criminal Laws of England.* John Miller, the author of the already quoted article in the *Quarterly Review* and a stubborn opponent of the reform, referred to it as 'one of the most powerful and eloquent speeches ever addressed to a deliberative assembly in favour of extreme mitigation of punishment. . .'[13]

The main premises of Fowell Buxton's speech were not new but they were supported by powerful arguments founded on facts collected with great care and skilfully interpreted. One striking illustration of the contention that the most severe punishment is not in itself necessarily the most effective in preventing crime may be quoted here.[14] Taking as his basis the state of crime in the county of Lancaster during the periods 1798–1801 and 1814–1818, Fowell Buxton demonstrated that the incidence of four of the offences under examination was considerably higher in the second period than in the first; all these offences carried capital punishment. The only offence which not only did not increase but became markedly less frequent was stealing from bleaching-grounds, the death penalty for which had been abolished in 1811.[15]

[11] *Parl. Deb.* (1821), N.S., Vol. 5, cols. 900–952.

[12] *Severity of Punishment; Speech of Thomas Fowell Buxton, Esq., in the House of Commons, Wednesday, May* 23, 1821, *on the Bill for Mitigating the Severity of Punishment in certain cases of Forgery, and the Crimes connected therewith* (1821).

[13] *An Inquiry into the present state of the Statute and Criminal Law of England* (1822), p. v. Thomas Denman (afterwards Lord Denman, Lord Chief Justice), who later took a prominent part in the movement for the reform of criminal law (see on this below, p. 604), said: 'More of wisdom, more of benevolence, more of practical demonstration, he had never witnessed in the course of his Parliamentary career'; *Parl. Deb.* (1821), N.S., Vol. 5, col. 1110. Wilberforce praised its '. . . powerful arguments and persuasive eloquence'; *ibid.*, col. 964; and Mackintosh called it 'a speech which contained the cleverest and most extended view of this great question, and which, he felt himself bound to say, was the most powerful appeal that he had ever had the good fortune to hear within the walls of Parliament'; *ibid.*, col. 965.

[14] '. . . The punishment of death is supposed to be necessary for the prevention of crime. Prevention of crime, then, being the only plea by which capital severity is considered to be justified, it becomes the only test by which it can be tried. . . . We have gone on long enough taking it for granted, that capital punishment does restrain crime; and the time is now arrived in which we may fairly ask, does it do so?'

[15] See on this above, pp. 512–513.

County of Lancaster

	1798–1801	*1814–1818*
Highway Robbery	31	77
Burglary	30	108
Horse-Stealing	7	31
Stealing in dwelling-houses	4	45
Stealing from bleaching-grounds	28	9

Commenting upon this trend Fowell Buxton said:—

> 'If I prove this offence (stealing from bleaching-grounds) has increased, but only in the same proportion with other offences, I prove my first point, for the reasons which I have already assigned.[16] But, if I go a step further, and prove, that while all other crimes have increased, this alone has remained stationary, *a fortiori* I prove my point: but, what if I go a step, and a very great step further, and prove that, while other offences have increased with the most melancholy rapidity, this, and this alone, has decreased as rapidly—that there is only one exception to the universal augmentation of crime, and that one exception the case in which you have reduced the penalty of your law—if I do this, and upon evidence which cannot be shaken, have I not a right to call upon the noble lords opposite, and upon His Majesty's ministers, either to invalidate my facts, or to admit my conclusions?'

The facts concerning the state of juvenile delinquency, the utter ineffectiveness in dealing with first offenders and the demoralisation prevalent in all prisons which he brought to the knowledge of the House were most alarming. 'We rest our hopes on the hangman', he said, 'and in this vain and deceitful confidence in the ultimate punishment of crime, forget the very first of our duties—its prevention.'

After a long debate, the voting took place at two o'clock in the morning and Mackintosh's Bill was committed by 118 votes to 74. This was undoubtedly a victory for the reformers, but the price which had been exacted for it was very high. During its passage through the House the Bill had been so materially altered that it finally bore little resemblance to the original measure.[17] Initially Mackintosh proposed to abolish

[16] By this Buxton meant that if a crime which had ceased to be capital continued to increase in the same proportion as other, still capital crimes, no inference could be drawn from this fact as to the restraining influence of the death penalty.

[17] The supporters of the Bill felt some embarrassment at having gone so far in compromise. Mackintosh explained that 'no one could expect to carry any

capital punishment for all forgeries (first offences) except the forgery of Bank of England notes. This exception he justified by the nation-wide circulation of Bank of England notes, whereas private negotiable securities mainly circulated among men of means, professionally trained to exercise the greatest vigilance. The inconsistency of this argument considerably weakened his case, for it could be argued that if transportation or imprisonment were considered inadequate to deter potential offenders from forging Bank of England notes, they would be equally inadequate in preventing forgeries committed on other bankers. Indeed the retention of capital punishment for the forgery of county bank-notes was the next concession which Mackintosh had to make. He further agreed to except the forgery of wills,[18] the forgery of marriage entries or licences under the Marriage Act[19] and forgeries connected with transfers of stock.[20]

measure in a country like this, without some concessions to the opinions of others. He regretted the necessity of making the exceptions to the principle of this bill, which he had been urged to propose; for, according to his own opinion, the better course would be universal adoption of his principle '. During the same debate Thomas Denman affirmed ' that he did not abandon any portion of the measure, except from absolute necessity. He took all he could obtain, and he took it thankfully; but he regretted that he could not procure the whole of what he desired '.

[18] This was urged by the Solicitor-General (Sir John Singleton Copley). In defence of this clause of the Bill, Lushington said that forgery of wills was a very rare offence, only three cases having come before the courts in thirteen years. It was not an easy crime to commit, particularly with the purpose of passing real property, because then it was necessary to forge the names of three witnesses as well as that of the testator.

He drew the attention of the House to the fact that no punishment was provided for the very serious crime of destroying a will; *Parl. Deb.* (1821), N.S., Vol. 5, cols. 956–957. Two years later Lushington brought in a Bill to supply this omission; *Parl. Deb.* (1823), N.S., Vol. 8, col. 704.

Stephen Lushington (1782–1873) was an ardent reformer and a staunch churchman. Educated at Eton and at Christ Church, Oxford, he was elected a fellow of All Souls; in 1808 he attained the degree of D.C.L.; and in 1840 was elected a bencher of the Inner Temple. In 1838 he became judge of the High Court of Admiralty and was sworn a member of the Privy Council; *D. N. B.*, XII, 291. He entered the House of Commons for the first time in 1806 and since then for more than thirty years consistently upheld all progressive measures. In 1819 he gave evidence before the Committee on Criminal Law and from then on took an increasingly active part in the movement for reform.

[19] Lushington said that he could find no evidence of that offence having been committed either before or since it had been made punishable with death, and could therefore see no reason for making it a capital felony ' except the strange desire, the extraordinary anxiety for the multiplication of capital punishment '.

[20] Very considerable changes had also been introduced with respect to the

When the already severely truncated Bill was read a third time, yet another amendment excepting from it ' any promissory notes, bills of exchange, or order for payment of money drawn by, or upon, or made payable by any banker ' was adopted by a small majority of 109 votes to 102.[21] The question was then put ' that the bill do pass ". By that time many upholders of the Bill, convinced that no further opposition was intended, had left the House. Thus when the Marquis of Londonderry,[22] from the beginning an opponent of the Bill, proposed that it should be put to the vote, this move was strongly resented by Sir James Mackintosh, Lord John Russell and Brougham who called it ' a Parliamentary stratagem ' and ' a manœuvre '. However, Lord Londonderry persisted, the House divided and the Bill was rejected by a majority of six, 121 voting against and 115 for it.[23]

§ 5. THE HOUSE OF COMMONS PLEDGED TO REFORM

Though the practical success of the reformers in the years 1819–1821 was insignificant,[24] they prepared the mind of the public for change by discussion and debate. In opposing

secondary punishment which was to replace the death penalty. Mackintosh at first proposed transportation for not less than three, and not more than fourteen years. This was opposed by some of his own supporters who declared that transportation was not a punishment at all. Mackintosh then accepted the suggestion that the death penalty should be replaced by imprisonment with hard labour for not less than six, and not more than ten years. This was adopted, though the Attorney-General (Sir Robert Gifford) seemed to be right in contending that it was ' a punishment unknown to the law of this country '.

21 This change was so material that one of Mackintosh's supporters was quite justified in saying that ' the whole bill might as well be thrown out altogether '.

22 Lord Castlereagh, who became Marquis of Londonderry on the death of his father, first Marquis of Londonderry, on April 11, 1821.

23 The concessions made by Mackintosh are regarded by some as a serious mistake; see for instance Harriet Martineau, *The History of England during Thirty Years' Peace: 1816–1846* (1849), Vol. 1, p. 266, and Sir Spencer Walpole, *History of England from the Conclusion of the Great War in 1815* (1903), Vol. 2, pp. 144–145. These concessions were subsequently exploited by opponents of the reform of the forgery law during the debates on Sir Robert Peel's forgery Bill of 1830.

24 The restriction of the capital provision of 10 & 11 Will. 3, c. 23 to larceny in shops to the value of fifteen pounds instead of five shillings (1 Geo. 4, c. 117), and the repeal or amendment of a few obsolete statutes (1 Geo. 4, c. 115 and 1 Geo. 4, c. 116).

reform the Government was defending an unpopular cause.[25] In March 23, 1820 Peel wrote to John Wilson Croker[26]:

> 'Do not you think that the tone of England—of that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs, which is called public opinion—is more liberal, to use an odious but intelligible phrase—than the policy of Government? Do not you think that there is a feeling, becoming daily more general and more confirmed—. . . in favour of some undefined change in the mode of governing the country? . . . Will the Government act on the principles on which, without being very certain, I suppose they have hitherto professed to act? Or will they carry into action moderate Whig measures of reform? Or will they give up the Government to the Whigs, and let them carry these measures into effect? Or will they coalesce with the Whigs, and oppose the united phalanx to the Hobhouses and Burdetts, and Radicalism? I should not be surprised to see such a union.'

Two years later Lord Liverpool's administration was reconstructed, an event which is described as 'the first public and parliamentary recognition of the steady rise of that liberal tide which reached its flood in 1830'.[27] Canning,[28] Frederick John Robinson,[29] William Huskisson and Robert Peel entered the government.[30] Peel, whose mind was open to

[25] '. . . the Whig Opposition . . . by defending popular rights and popular interests . . . acquired a popularity which speedily deserted their Conservative antagonists. On the questions of retrenchment, of the public expenditure, of Criminal Law Reform, of West Indian Slavery, of Popular Education, and of Parliamentary Reform, the Ministers were ranged on the unpopular, the opposition on the popular side'; Sir George Cornewall Lewis, *Essays on the Administrations of Great Britain from 1783 to 1830* (ed. by Sir Edmund Head, 1864), p. 422.

[26] J. W. Croker, *Correspondence and Diaries* (ed. by L. J. Jennings, 2nd ed., 1885), Vol. 1, p. 170.

[27] J. R. Thursfield: *Peel* (1898), p. 58. W. R. Brock observes that 'the ministry of 1822 to 1827 was the first of those nineteenth-century governments which, without being called "reforming", may certainly be called "improving"'; *Lord Liverpool and Liberal Toryism 1820 to 1827* (1941), p. 76.

[28] Became Secretary for Foreign Affairs and Leader of the House of Commons. Though he opposed the appointment of the Committee of 1819 (see above note 24 at p. 531) he was in favour of a moderate reform of criminal law.

[29] Afterwards Viscount Goderich and Earl of Ripon.

[30] Peel entered the House of Commons in 1809, at the age of twenty-one. In 1810 he became Under-Secretary for War and the Colonies in Perceval's administration. In 1812 when Lord Liverpool became Prime Minister, he accepted the post of Chief Secretary for Ireland which he held until 1818. In January 1822 he became Home Secretary in succession to Viscount Sidmouth and remained in office throughout the last years of Lord Liverpool's

inquiry,[31] could certainly be expected to take up the work of reform in criminal law. It is this conviction that actuated Mackintosh and Fowell Buxton in handing over to him their task. They also expected that officially sponsored reforms would cease to be regarded as Party measures. Before taking this step, however, they resolved to induce the House of Commons to take up a position from which it would be difficult to withdraw and to commit the Government to certain definite reforms. This was the purpose of Sir James Mackintosh's two motions: the first on the 'Efficacy of the Criminal Laws' proposed on June 4, 1822,[32] and the second on the 'Rigour of Criminal Laws'—on May 21, 1823.[33]

The first motion was to the effect 'That this House will, at an early period of the next session, take into their most serious consideration the means of increasing the efficacy of the Criminal Laws, by abating their undue rigour; together with measures for strengthening the Police, and for rendering the punishment of Transportation and Imprisonment more effectual for the purposes of example and reformation'. Its importance lies in that it linked up the revision of criminal law with the reform of secondary punishments and of the police system.[34] The motion was opposed by Sir Robert

administration. When in April, 1827 Canning formed a new government Peel refused to enter it and remained out of office until January, 1828, when he again became Home Secretary in the government of the Duke of Wellington. This time he remained at the head of the Home Department until November, 1830. Thus from 1822 to 1830 Peel was Home Secretary for seven years. He was Prime Minister from 1834 to 35 and from 1841 to 46.

From April, 1827 to January, 1828 the office of the Home Secretary was held first by W. Sturges Bourne, and then from July, 1827 by the Marquis of Lansdowne who served first under Canning and then under Viscount Goderich.

[31] The following incident may be quoted as an example: In 1819 Peel was appointed chairman of the Parliamentary Committee to consider the state of the Bank of England with reference to the expediency of the resumption of cash payments. Although in 1811 he voted against Horner's resolutions recommending resumption at the conclusion of his inquiry he declared in the House of Commons that 'from the nature of that evidence, and of the other information he had received, he felt himself called upon to state, cordially and honestly, that he was a convert to the doctrines regarding our currency which he had once opposed'. He moved a series of resolutions for the resumption of cash payments which led to the passing of what is known as 'Peel's Act'.

[32] See *Parl. Deb.* (1822), N.S., Vol. 7, H.C., 'Criminal Laws', cols. 790–805.

[33] *Parl. Deb.* (1823), N.S., Vol. 9, 'Criminal Laws', cols. 397–433.

[34] Mackintosh was in favour of transportation, though he would have it confined mainly to incorrigible offenders and to those who might be reformed by being removed from their surroundings. None the less he regarded imprisonment

Gifford, then Attorney-General,[35] and by Peel,[36] but was adopted by 117 votes to 101. Thus the government was left in no doubt as to the urgency of this issue.[37]

The second motion comprised nine resolutions—drafted by Mackintosh—which were intended to serve as a basis for future Bills. Apart from restating the recommendations of the Committee of 1819, which demanded the repeal of certain obsolete statutes including the Waltham Black Act,[38] the amendment of other obsolete statutes,[39] the revision of the

as the most important secondary punishment and insisted that prisons should be reorganised so as to allow for the segregation of various classes of offenders. The emphasis which he laid on the reformatory function of punishments stands in sharp contrast to the general opinion on these matters. Sydney Smith of the *Edinburgh Review* thus described his conception of a prison regimen: "The real and only test, in short, of a good prison system is the diminution of offences by the terror of the punishment . . . Miss Fry is an amiable excellent woman, and a thousand times better than the infamous neglect that preceded her; but hers is not the method to stop crimes. In prisons which are really meant to keep the multitude in order, and to be a terror to evil doers, there must be no sharing of profits—no visiting friends—no education but religious education—no freedom of diet—no weavers' looms or carpenters' benches. There must be a great deal of solitude; coarse food; a dress of shame; hard, incessant, irksome, eternal labour; a planned and regulated and unrelenting exclusion of happiness and comforts"; 'The Third Report of the Committee of the Society for the Improvement of Prison Discipline, etc.'; *Edinburgh Review* (1821–1822), Vol. 36, pp. 359–374 at p. 374; reproduced in *Works of the Rev. Sydney Smith* (4th ed., 1848), Vol. 2, pp. 244 and 269. See also his letter of March 27, 1826 to Peel; *Sir Robert Peel from his private correspondence* (ed. by C. J. Parker, 1891), Vol. 1, pp. 402–403.

On the other hand it is difficult to ascertain what Mackintosh meant by reformation: he was for instance strongly in favour of the tread-wheel; see on this below, note 43 at p. 565. On the regimen which according to Bentham would be conducive to reformation see above, pp. 392–393.

[35] He opposed the motion on the ground that it 'went to pledge the House to a measure which would cast a censure on the whole of our criminal law' and if adopted would still leave the House in the dark regarding Mackintosh's further intentions.

[36] Peel informed the House that he was about to submit to the House of Commons a number of projects, one for the improvement of prison discipline, another for setting up 'a rigorous preventive police, consistent with the free principles of our free constitution' and yet another aiming at the reform of the system of transportation. On the difficulties he encountered in promoting the establishment of an effective police force see below, p. 588.

[37] Harriet Martineau remarks that the 'loud cheers' which followed the result of the vote '. . . excited much expectation throughout the country as to the fidelity with which the Commons would redeem their pledge on the arrival of the Session of 1823'; *History of England* (1849), Vol. 1, p. 266.

[38] Except the two clauses on wilfully setting on fire and wilfully and maliciously shooting at a person; see on these above, pp. 68–73. For statutes see above, Group (1) of Obsolete Statutes, p. 548.

[39] See above, Group (2) of Obsolete Statutes, p. 549.

forgery law[40] and the abolition of capital punishment for larceny in shops, dwelling-houses and on board ships,[41] the resolutions also demanded the abolition of that punishment for horse-, cattle- and sheep-stealing.[42] In all these cases the death penalty was to be replaced by transportation for life or for a limited term and by imprisonment with or without hard labour. But while holding that secondary punishments ' seemed to him the only end by which we could escape from capital punishment ', Mackintosh commended the tread-mill, that ' species of hard labour which had hitherto been attended with such salutary effects '.[43] Of the remaining two resolutions one asked that the death sentence should not be pronounced unless expected to be carried out. The second proposed to ' take away the forfeiture of goods and chattels in the case of suicide ', and ' to put an end to these indignities which are practised on the remains of the dead, in the cases of suicide and high treason '.

[40] On the lines suggested by the Committee; see above, pp. 550–551.

[41] Mackintosh strongly deprecated the amendment of 10 & 11 Will. 3, c. 23, effected by 1 Geo. 4, c. 117. The value of stolen property should not be made a criterion on which to base the offender's punishment, for—he held—there was no moral difference between stealing a large or a small sum, nor should the property of the rich be protected by more severe penalties than that of the poor. Criminal laws ' should not only not be unequal, they should be above the suspicion of inequality '.

[42] On these statutes see below, Appendices 1 and 2, pp. 633 and 675–678.

[43] This opinion was very prevalent at that period. According to Peel the efficacy of the tread-mill ' was acknowledged ' though he thought its duration should be limited to fourteen years.

The more correct designation is tread-wheel. It was first imposed by 19 Geo. 3, c. 74, s. 32, relating to prison organisation and is mentioned by Jeremy Bentham in ' Panopticon ', *Works* (Bowring), Vol. 4, pp. 147 and 158–160. It was in use at the Gloucester County Gaol in 1811. In 1818 Sir William Cubitt constructed a simplified type of tread-wheel to be installed in all prisons. Tread-wheels grinding corn, or not grinding anything at all, or raising water, were installed in a great number of prisons. The severity of this punishment varied according to the number of hours, the height of the steps of the wheel and the rapidity of its rotation.

Between 1823 and 1825 the deterrent value of the tread-wheel and its effect on the health of prisoners were examined in a number of official papers. See for instance ' Copies of all Communications made to, or received by, the Secretary of State for the Home Department, reporting the use of Tread Wheels in Gaols or Houses of Correction ' (1823), 113, in *Parl. Papers* (Accounts and Papers, 1823), Vol. 15, p. 307; ' Copy of Correspondence between the Secretary of State and the Visiting Magistrates of Prisons in which the Tread Wheel has been introduced ' (1824), 45, *ibid.* (1824), Vol. 19, p. 147. ' A detailed statement respecting the Tread Mills in the several Gaols of England and Wales; showing the Diameter of the Wheels; the Number of Steps on their Circumference; the Number of Prisoners each Wheel will hold at one time; the Number on; the Number off; the Hours of Labour in Summer and in Winter; and the Number

When introducing these resolutions Mackintosh said he did not intend to bring in any further Bills because 'he must foreknow their fate'. The resolutions were put to the vote and rejected by a small majority,[44] mainly owing to Peel's opposition. But this was largely a formal defeat. Replying to Mackintosh, Peel made known the decision of the Government to consider the whole question of criminal law[45]; he 'conceded the proposition of the necessity of some amendment. There could be no necessity for him and Mackintosh to debate that point. The real question between them was only as to degree.'[46]

of Steps made in one minute' (1824), 247, *ibid.*, p. 165; 'Copies of Papers showing the Result of Inquiries made by the Secretary of State for the Home Department as to the effect of the Tread Wheel in the Prisons where it has been installed' (1825), 34, *ibid.* (1825), Vol. 23, p. 567. See also the *Fifth Report of the Society for the Improvement of Prison Discipline and the Reformation of Juvenile Offenders* (1823), pp. 129–172, and their *Sixth Report* (1824), pp. 304–307; see further John Watt Briscoe, *A Letter on the Nature and Effects of the Tread-wheel* (1824); Sir John Cox Hippisley, *Prison Labour* (1823); John Headlam, *A Letter to the Rt. Hon. Sir Robert Peel on Prison Labour* (1823); J. M. Good, *Letter to Sir John Cox Hippisley on the mischiefs incidental to the Tread-wheel* (2nd ed., 1824).

[44] 86 votes to 76.

[45] In an important article on law reform in the *Edinburgh Review*, Thomas Denman quotes a passage from the *Quarterly Review* (1816), Vol. 15, p. 574, comparing Romilly to Robespierre ('We have . . . our professor of humanity like Robespierre who wrote a treatise against the punishment of death'). Referring then to Peel who on behalf of the government acknowledged the need for such a reform, he writes: 'And such is the ordinary routine. Common sense requires an obvious improvement: an Opposition member brings it forward, and is overpowered by sarcasms, invectives, and majorities. But public opinion decides at once in its favour, and gradually diminishes the majority, in each succeeding year, till the scale is turned, and independent men of all parties become anxious to see the alteration effected. Suddenly the minister proposes the reprobated project as a government measure, and converts, while he laughs at, his former adherents'; 'Traité des Preuves Judiciaires . . . de Bentham', *Edinburgh Review* (March, 1824), Vol. 40, pp. 169–207, at p. 182. The article in the *Review* was not signed; on Denman's authorship see: Sir Joseph Arnould, *Memoir of Thomas, First Lord Denman* (1873), Vol. 1, p. 246.

The above quoted comparison of Romilly with Robespierre may be explained by the fact that strange as this may seem, Robespierre was against capital punishment and in 1791 made a passionate speech on this subject in the Assembly. Extracts from his speech are quoted by Henry Remy in *Les Principes Généraux du Code Pénal de 1791* (Paris, 1910), pp. 64–69.

[46] Mackintosh and Fowell Buxton continued to take an active interest in the movement. In 1830 they were at the head of the opposition against Peel; see below, pp. 590–595.

CHAPTER 18

SIR ROBERT PEEL AND BEYOND

§ 1. THE RANGE OF PEEL'S WORK IN PENAL DEVELOPMENTS

Its significance

WHEN Peel first became Home Secretary he found already set the pattern of reform in criminal law. The re-organisation of the police force had been persistently urged by Patrick Colquhoun, an active and enlightened London magistrate, whose detailed proposals had even been partially implemented.[1] The foundations for the revision of criminal law had been laid down by Romilly, Mackintosh, Fowell Buxton and the Committee of 1819.[2] Improvements in criminal procedure and in the form of the law constituted an important part of Bentham's programme of reform. Peel recognised the need for these changes and under him the Home Department developed into a centre of effective penal administration[3]; as

[1] Dr. Patrick Colquhoun proposed the establishment of a board of commissioners of police for the whole of London in his *Treatise on the Police of the Metropolis* (1795), a widely read book which ran to several editions (a 6th edition was published in 1800). Very important also is his *Treatise on the Commerce and the Police of the River Thames* (1800); it led to the establishment of an effective Thames police, which he helped to organise.

The lives and works of Henry and John Fielding, who anticipated Colquhoun in this field, is the subject of two excellent recently published monographs: B. M. Jones, *Henry Fielding* (1933); and R. Leslie-Melville, *The Life and Work of Sir John Fielding* (1934). But there is as yet no modern account of the manifold activities of Colquhoun. 'The Memoir of P. Colquhoun', *European Magazine* (1818), Vol. 73, pp. 187, 305, 409 and 497, written by his son-in-law Dr. Yeats when Colquhoun resigned from his office of police magistrate, is sketchy and inadequate.

[2] Some of his biographers are inclined to take the view that Peel should have acknowledged what he owed to their exertions in the same way as he acknowledged his debt to Fox, H. Grattan, W. Plunket and Canning in respect to Catholic emancipation, and to Cobden in respect to the corn laws; Sir Lawrence Peel, *A Sketch of the Life and Character of Sir Robert Peel* (1860), p. 139. But J. MacCarthy maintains that 'to adopt them was to acknowledge them'; *Sir Robert Peel* (1906), p. 89.

[3] 'Lord Sidmouth (Peel's predecessor) at the Home Office', observes Lord Dalling and Bulwer, 'had . . . been a barrier against all improvement'; *Sir Robert Peel* (1874), p. 29. Miss A. A. W. Ramsay writes that '. . . when, one day in January, 1822, Mr. Peel walked into the Home Office, it was as if a door opened on the outer world, and a fresh wind blew through

Lord Manners put it in a letter of April 4, 1826, 'you have made the office of Secretary for the Home Department of infinitely more consequence than it has ever been in the hands of your predecessors. The well managing of our foreign affairs and interests may be more striking and brilliant, it is by no means more substantial or more important. I am not flattering you, but merely speaking the truth and doing you justice '.[4]

Peel outlined his proposed amendments of the criminal law in a well-documented and restrained speech in the House of Commons on March 9, 1826.[5] What he accomplished in this field provides one more illustration of his remarkable capacity for assessing the practical possibilities of the hour and his

the dim corridors, dispersing the enchanted mists—a wind that was the breath of the opening nineteenth century'; *Sir Robert Peel* (1928), p. 66. See also George Barnett Smith, *Sir Robert Peel* (1881), p. 41, who writes that 'Peel's policy at the Home Office was in striking contrast to the policy of *laissez faire* pursued by his predecessor'.

[4] Lord Manners (Thomas Manners Sutton) Lord Chancellor of Ireland, in a letter to Peel; *Sir Robert Peel from his Private Correspondence* (ed. by Ch. S. Parker, 1891), Vol. 1, p. 400.

[5] See *Parl. Deb.* (1826), N.S., Vol. 14, March 9, 'Consolidation of the Criminal Laws', cols. 1214–1244. Peel's speech (cols. 1214–1239) was later published in pamphlet form; see *Substance of the Speech of the Right Hon. Robert Peel in the House of Commons, etc., on moving for leave to bring in a Bill for the Amendment of the Criminal Law and a Bill for Consolidating the Laws relating to Larceny* (1826), pp. 50–51. All ensuing references are to this edition of the speech.

In his efforts to improve criminal law Peel was assisted by Henry Hobhouse and by Gregson.

Hobhouse was Under-Secretary of State for the Home Department from 1817–1827. Professor Arthur Aspinall notes in his recently published *Diary of Henry Hobhouse* (1947) that at that time there was no clear-cut distinction between the Permanent Under-Secretary and the Parliamentary Under-Secretaries. He also mentions that the Home Office Papers in the Public Record Office 'record his (Hobhouse's) diligence and thorough competence as Under-Secretary'; 'Introduction', p. v. Hobhouse enjoyed Peel's complete confidence: 'In my absence', Peel wrote to him in August, 1822, 'pray open all letters, private or not, addressed to me. I have no secrets'; Parker, *op. cit.*, Vol. 1, p. 305. When sending his speech of 1826 to Hobhouse he enclosed the following note: 'I cannot send you this without assuring you that I feel that the chief merit of the works to which it refers belongs to you'; *ibid.*, p. 399. After Hobhouse had retired in 1827 Peel continued to communicate with him on his various penal and police reforms. In 1828 Hobhouse was made a Privy Councillor. He was one of the Ecclesiastical Commissioners for England and chairman of the Somerset Quarter Sessions. Under his direction the Record Commission published the *State Papers of Henry VIII* in eleven volumes. He laid down a permanent system of arrangement of State papers.

Gregson was a well-known barrister practising on the Northern Circuit. He framed Peel's Bills of consolidation as well as the Police Bill. Peel

outstanding administrative efficiency.[6] He extended the reform to the whole system of criminal justice, drawing within its orbit all the most important departments of law and its administration. He thus made it his concern to ensure the better prevention and detection of crime; to render secondary punishments more effective; to improve criminal procedure so as to reduce the chances of impunity; to abrogate obsolete statutes and to digest and consolidate others; to supply omissions in law which allowed certain acts to be committed with impunity; and to revise the scale of punishments. While anxious to introduce these most extensive reforms, he yet proposed 'no encroachments upon civil liberty, no extension of executive authority, no rash subversion of ancient institutions, no relinquishment of what is practically good, for the chance of speculative and uncertain improvement'.[7]

Unequal value of his reforms

The extent of the changes effected in each of these sections varied considerably. Also their value was unequal. Perhaps

acknowledged in generous terms his debt both to Hobhouse and Gregson; see his *Speech* (1826), p. 48, and *Parl. Deb.* (1830), N.S., Vol. 23, col. 1184. Peel had already thought of offering Gregson the post of Under-Secretary in 1828; Parker, *op. cit.*, Vol. 2, p. 37. According to A. Hayward, *Juridical Tracts, Part I* (1856), p. 86, Gregson was later appointed to this post. In 1834 he was about to be entrusted with the task of preparing and examining Bills for Parliament, but Peel informed Goulburn that he was not likely to accept it, and added: 'I fear you will find no man at all comparable to Gregson'; Parker, *ibid.*, p. 268.

On the part played by Anthony Hammond see below, note 31 at p. 576.

[6] See on this *Private Letters of Sir Robert Peel* (ed. by George Peel, 1920), p. 4 and particularly Walter Bagehot, 'The Character of Sir Robert Peel', *Biographical Studies* (1895), pp. 18–21.

When preparing the Dissenters' Marriage Bill, the English Tithe Bill and the Irish Tithe Bill, he was working from seven in the morning until long after midnight; *D. N. B.*, XV, 659. The amount of energy and time he spent in attending to the routine business of the Home Office was stupendous. He was anxious to acquire first hand knowledge on all matters.

[7] On several occasions he referred with pride to his achievements. In 1827, shortly after the formation of Canning's ministry, he said: 'Tory as I am, I have the further satisfaction of knowing that there is not a single law connected with my name, which has not had for its object some mitigation of the severity of the criminal law, some prevention of abuse in the exercise of it, or some security for its impartial administration'; *Parl. Deb.* (1827), N.S., Vol. 17, H.C., 'New Administration', col. 393, at col. 411. And in his *Address to the Electors of the Borough of Tamworth* (1834), p. 7, he said: 'I never will admit that I have been, either before or after the Reform Bill, the defender of abuses, or the enemy of judicious reforms. I appeal with confidence, in denial of the charge, to the active part which I took in the great

the most important was the establishment of a modern police force, a reform which he carried out in spite of strong opposition,[8] and which for some time continued to be the object of sharp controversy.[9]

His contribution to the reform of secondary punishments was of lesser import. The two Acts revising and consolidating various statutes relating to imprisonment and transportation were very useful.[10] But it was extremely difficult to eradicate the many evils inherent in the system of transportation and in any case this penalty was unlikely to be made use of much longer. As regards imprisonment, some hundred and fifty small municipal prisons and houses of correction were left

question of the currency—in the consolidation and amendment of the criminal law—in the revisal of the whole system of the Trial by Jury '.

As G. Kitson Clark remarks, '. . . he gained great praise especially from the other side of the house and he did not find such praise distasteful'; *Peel and the Conservative Party* (1929), p. 17. See for instance the tribute paid to his work by James Scarlett (afterwards Lord Abinger), *Parl. Deb.* (1823), N.S., Vol. 9, col. 430; and by John Cam Hobhouse (afterwards Lord Broughton), *Parl. Deb.* (1826–1827), N.S., Vol. 16, cols. 643 and 645. See also the warm support given to Peel by the *Westminster Review*; 'Criminal Law', *Westminster Review* (January, 1827), Vol. 7, pp. 91–115.

This praise was not unmingled with some jealousy, for the Whig reformers saw him 'reap the fruit of their long and patient efforts'; M. Guizot, *Memoirs of Sir Robert Peel* (1857), p. 21. There was also some suspicion that he might not go far enough; thus when Peel outlined his projected reforms, Mackintosh sarcastically remarked that Peel's 'conduct reminded him of an expression of a friend of his, with respect to another person, that he was a great friend to general principles, but had an exception for every particular case'; *Parl. Deb.* (1823), N.S., Vol. 9, col. 431.

[8] See on this below, p. 588.

[9] Professor J. R. M. Butler rightly observes that 'the charge against the Duke of Wellington of aiming at a military government was inconsistent with the attacks on Peel's new police'; *The Passing of the Great Reform Bill* (1914) p. 164. When in 1833 a policeman was killed by rioters, the jury returned verdict of 'justifiable homicide'.

To prepare the way for his 'Bill for Improving the Police in and near the Metropolis' Peel had first moved for the appointment of a Select Committee to inquire 'into the causes of the increase of the number of commitments and convictions in London and Middlesex for the year 1827 and into the state of the police of the metropolis and the districts adjoining thereto'; see the 'Report from the Select Committee on the Police of the Metropolis' (1828), 533, *Parl. Papers* (Reports, 1828), Vol. 6, p. 1. He introduced his Bill in 1829 and made an important speech on this subject; *Parl. Deb.* (1829), N.S., Vol. 21, H.C., April 15, 'Metropolis Police Improvement Bill', cols. 867–884 and cols. 1487–1488; for the debate in the House of Lords see *ibid.*, cols. 1750–1753.

On the police system established by Peel see W. L. Melville Lee, *A History of Police in England* (1901), pp. 217–261; J. F. Moylan, *Scotland Yard* (1929), pp. 17–28; and Ch. Reith, *The Police Idea* (1938), pp. 223–253.

[10] 4 Geo. 4, c. 64 (1823) and 5 Geo. 4, c. 84 (1824) respectively. The work on the statute relating to transportation had been initiated by Lord Sidmouth, Peel's predecessor at the Home Office.

outside the scope of his Act and, more important still, no action was taken in respect to its most vital provisions.[11] Undue stress was laid on the supposed reformative value of the tread-wheel and of solitary confinement, no special treatment introduced for young and first offenders[12] and use of the punishment of whipping considerably extended.[13] It should be noted, however, that these limitations were then common

[11] It should be noted, however, that the still very rudimentary state of central administrative authority was a very serious obstacle. Peel had at his disposal no official staff which would inform him of what was going on in prisons. There were no Home Office inspectors or Government doctors; Sidney and Beatrice Webb, *English Prisons under Local Government* (1922), p. 107. According to the same authors (*ibid.*), Peel initiated the departmental supervision of prison administration.

[12] Remarkably progressive suggestions on this subject were made by Sir Eardley E. Wilmot, *A Letter to the Magistrates of England on the Increase of Crime; and An Efficient Remedy Suggested for their Consideration* (2nd ed., 1827). While acknowledging that Peel's amendments rendered the prevention of crime more effective, he holds that they did not provide a remedy for the 'early imprisonment' of offenders under twenty-one years of age, which he calls 'the great and primary cause from which crime originates'. He suggests the setting up of special tribunals composed of two justices to deal with crimes (particularly larceny) committed by this class of offenders; a change in the law of larceny which would bring it within the competence of such tribunals; and to empower these tribunals to pass sentences of whipping or detention in corrective establishments set up for this purpose, such detention 'not to exceed a limited time, to be appointed by the act, and to be shortened afterwards according to circumstances'; or to discharge such offenders 'without punishment at all'. To this *Letter* he added a 'Sketch of an Act of Parliament for altering the Law of Simple Larceny as affecting Juvenile Offenders'.

Wilmot was a Justice of the Peace for the County of Warwick; he was actively interested in prison reform and wrote several tracts on this subject.

[13] Pelegrino Rossi certainly exaggerated when, referring to whipping imposed by Peel's Act, he wrote: 'Cette phrase: *And if a male, to be once, twice or thrice publicly or privately whipped*, est une des parties les plus saillantes des deux lois du 21 Juin 1827. On la retrouve si souvent, qu'en lisant ces statuts, on croit presque approcher d'une plantation de sucre: on entend claquer les fouets'; *Traité de Droit Pénal* (4th ed., Paris, 1872), Vol. 1, p. 41. But the number of cases in which whipping was appointed was very considerable; see for instance below, p. 578, note 41 at p. 579 and p. 586.

In 1823 an important return was published giving the number of persons who had been sentenced to be whipped during the seven years ending in January, 1823: 'Punishment of Whipping' (1823), 280, *Parl. Papers* (Accounts and Papers, 1823), Vol. 15, p. 273. The total number of persons whipped during that period was 6,959. In the same year Grey Bennet, supported by Lushington, Lennard and Hobhouse, moved for the abolition of this punishment; the motion was opposed by Peel, who said that it is 'peculiarly incumbent upon those who advocated the necessity of mitigating the severity of penal code, in respect to capital punishment, to be aware of rendering such an experiment impracticable by narrowing too much the scale of minor punishments'; *Parl. Deb.* (1823), N.S., Vol. 8, H.C., 'Punishment by Whipping', April 30, cols. 1437–1442, at cols. 1440–1441. The motion was defeated.

to many reformers,[14] and that Peel himself felt deep anxiety about the state of secondary punishments. In a remarkable letter of March 24, 1826, to Sydney Smith of the *Edinburgh Review*, he wrote[15]:—

> 'I admit the inefficiency of transportation to Botany Bay, but the whole subject of what is called secondary punishment is full of difficulty; . . . I can hardly devise anything as secondary punishment in addition to what we have at present. We have the convict ships. . . . There is a limit to this, for without regular employment found for the convicts, it is worse even than transportation . . . Solitary imprisonment sounds well in theory, but it has in a peculiar degree the evil that is common to all punishment, it varies in its severity according to the disposition of the culprit. . . . To some intellects its consequences are indifferent, to others they are fatal. . . . Public exposure by labour on the highways, with badges of disgrace, and chains, and all the necessary precautions against escape, would revolt, and very naturally, I think, public opinion in this country. . . . As for long terms of imprisonment without hard labour, we have them at present, for we have the Penitentiary with room for 800 penitents. When they lived well, their lot in the winter season was thought by people outside to be rather an enviable one. . . . We reduced their food . . . there arose a malignant and contagious disorder which at the time emptied the prison, either through the death or removal of its inmates. The present occupants are therefore again living too comfortably, I fear, for penance . . . I despair of any remedy but that which I wish I could hope for—a great reduction in the amount of crime.'

In his reforms of criminal procedure,[16] Peel was guided by the principle that the most perfect law is that 'which most

[14] See on this above, pp. 391–394 and 565. In sharp contrast stands the remarkable article by James Mill on 'Prisons and Prison Discipline' in the *Encyclopædia Britannica* (Supplement to the 4th, 5th and 6th ed., 1824), Vol. 6, pp. 385–395 (signed F. F.); see also William Roscoe, *Additional Observations on Penal Jurisprudence and the Reformation of Criminals* (1823), and *Observations on Penal Jurisprudence and the Reformation of Criminals* (Part 3, 1825). The increase of crime led to the overcrowding of prisons, which made reform more difficult. 'The real truth is', wrote Peel to Sydney Smith on March 24, 1826, 'the number of convicts is too overwhelming for the means of proper and effectual punishment'; Parker, *op. cit.*, Vol. 1, p. 402.

[15] Parker, *op. cit.*, Vol. 1, pp. 401–402.

[16] See 7 Geo. 4, c. 64, 'An Act for improving the Administration of Criminal Justice in England' (1826); 7 & 8 Geo. 4, c. 28, 'An Act for further improving the Administration of Justice in Criminal Cases in England' (1827); 6 Geo 4,

certainly ensures the conviction of the guilty man, and the acquittal of him who has been unjustly accused. But the acquittal of the innocent ought, in justice to innocence, to be upon the merits of the case . . . the law ought to ensure that conviction and acquittal upon principles not capable of being misapplied and perverted '.[17] Among other changes he introduced the ballot, instead of selection, in the appointment of special juries in all cases, both criminal and civil; he improved regulations regarding the duties of coroners; transferred a vast volume of crimes from the jurisdiction of the assizes to that of the quarter sessions and from the quarter sessions to justices of the peace; empowered the courts to award expenses to the prosecution in cases of misdemeanour[18]; defined in what cases a prisoner might be admitted to bail in felony; required magistrates to take depositions in misdemeanours as well as felonies; altered the law as to prisoners refusing to plead, challenging above the legal number of jurors, etc.; improved the law relating to the trial of accessories before or after the fact; provided for the trial of offences where the exact locality could not be ascertained; simplified the mode of describing the ownership of property in all cases and the legal terminology to be used, and in general limited the instances in which an indictment after verdict or after confession could be quashed owing to certain verbal errors or omissions. He also increased the number of judges and established a Third Assize.[19] These changes substantially

c. 50, ' An Act for consolidating and amending the Laws relative to Jurors and Juries ' (1825); see also 9 Geo. 4, c. 15 (1828), ' An Act to prevent a Failure of Justice by reason of Variance between Records and Writings produced in Evidence in support thereof '.

[17] *Op. cit.*, pp. 39–40.

[18] Though it was contended that this change led to some abuses. ' It is not to be doubted that it has greatly increased the number of commitments and has been the cause of many persons being brought to trial, who ought to have been discharged by the magistrates. . . . Nor is this a trifling evil. People do not come out of gaol as they went in '; Lord Brougham, ' Law Reform Speech ', *Speeches* (1838), Vol. 2, p. 376. See also Sir Eardley E. Wilmot, *A Letter to the Magistrates, etc.* (2nd ed., 1827), pp. 4–5.

[19] More frequent gaol deliveries were the subject of several debates in the House of Commons in 1819 and 1820 when a number of returns had been produced concerning the length of detention before trial. See, for instance, *Parl. Deb.* (1819), Vol. 39, cols. 211–212; *ibid.*, cols. 293–296; *Parl. Deb.* (1820), N.S., Vol. 2, cols. 216–217 (Petition from Norwich presented by Sir James Mackintosh). See also a tract by Robert Fellowes (Justice of the Peace for the county of Norfolk), *Observations on the Plan for a more frequent Delivery of the Gaols* (1820).

enhanced the efficacy of the administration of criminal justice without in the least encroaching upon the freedom, or endangering the security, of the subject.

The emphasis on consolidation

Peel's four most important statutes relating to criminal law are 7 & 8 Geo. 4, c. 29 (1827)—concerning larceny and allied offences; 7 & 8 Geo. 4, c. 30 (1827)—concerning malicious injuries to property; 9 Geo. 4, c. 31 (1828)—concerning offences against the person[20]; and 11 Geo. 4 & 1 Will. 4, c. 66 (1830)—concerning forgery.[21] These Acts are primarily measures of consolidation and digestion and as such represent a considerable achievement.[22] Judged by modern standards Peel's method might appear somewhat mechanical[23]; also it could not fail to appear insufficient to Bentham and his followers, who asked for a fusion of the Common Law and the Statute Law and the framing of a rigid code.[24] Such objections would, however, be irrelevant. If the value of these Acts is measured by what they replaced, they certainly

[20] This statute is known as the 'Lord Lansdowne Act' for it was introduced by Lord Lansdowne when he succeeded Peel at the Home Office in 1827. But the work on it was initiated by Peel, who later carried it through.

These three Acts, together with the Acts relating to criminal procedure and the jury system, were published with annotations by a number of contemporary commentators. See, for instance, J. F. Archbold, *Peel's Acts* (1830), 2 vols.; *An Alphabetical Arrangement of Mr. Peel's Acts* (2nd ed., 1830), by a Barrister; Isaac Espinasse, *The Five Acts called Mr. Peel's Acts* (1827).

[21] On this Act see below, pp. 590–595.

[22] On Feb. 4, 1828, Peel wrote to Henry Hobhouse: 'I hold in my hand the five Acts comprised in one small volume. It contains the substance of what was before spread over one hundred and thirty Acts of Parliament. In this I find great encouragement to proceed, and I do not despair of effecting great good of the same kind'; Parker, *op. cit.*, Vol. 2, pp. 37–38.

[23] It should be noted that 24 & 25 Vict. c. 96, although passed thirty-four years later, was thus sharply criticised by Stephen: 'The arrangement of the Act is so strange that a person who, with no previous knowledge of the subject, attempted to find out from it what was the English law relating to the punishment of theft, and other similar offences, would be simply bewildered. Though it contains 123 sections, and is nearly as long as the *Strafgesetzbuch* of the German empire, it contains no definition of theft'; *H. C. L.*, Vol. 3, p. 146.

[24] 'Mr. Peel is for consolidation in contradistinction to codification; I for codification in contradistinction to consolidation': Bentham to Daniel O'Connell, July 15, 1828, 'Memoirs of Jeremy Bentham', *Works* (Bowring), Vol. 10, p. 594. He was highly critical of all that Peel did in the field of law reform. Bowring records that he said: 'Peel is weak and feeble . . . he has done all the good he is capable of doing, and that is but little. He has given a slight impulse to law improvement in a right direction'; *ibid.*, p. 571. For a brief reference to Bentham's views on codification see above, note 18 at pp. 363–364.

constituted a very material improvement.[25] Apart from repealing most of the obsolete statutes and supplying a number of omissions,[26] they consolidated some fifty statutes relating to malicious injuries to property[27]; some ninety others (from *Charta de Forestae* to 7 Geo. 4, c. 69) relating to larceny and allied offences[28] and some fifty-six dealing with offences

[25] 'The mere collection of dispersed statutes under one head', remarked Peel, 'is an easy process compared with the more important task of rejecting what is superfluous, clearing up what is obscure, weighing the precise force of each expression, ascertaining the doubts that have arisen in practice, and the solution which may have been given to those faults by decisions of the Courts of Law'; *op. cit.*, p. 44.

According to J. T. B. Beaumont, in 1821 there were 750 Acts of Parliament applicable to criminal law and nearly 400 relating to proceedings before Justices of the Peace; *An Essay on Criminal Jurisprudence with the Draft of a New Penal Code* (1821), p. 5.

[26] Such as to rob a furnished house (as distinct from robbing furnished lodgings); theft or destruction of fish in a stream passing between two estates (as distinct from a stream passing in or through an estate); theft of securities for property in foreign funds and of mercantile instruments entitling the holder to the payment of money abroad (as distinct from the same offence in respect to British funds); theft of title deeds or wills; forgery of acceptances of foreign bills of exchange.

[27] Repealed by 7 & 8 Geo. 4, c. 27; law consolidated by 7 & 8 Geo. 4, c. 30. Some twenty statutes related to the protection of trees and shrubs only. The confused state of the law is well illustrated by the following Act, which Peel quoted in his *Speech* of 1826: 'An Act for the better securing the Duties of Customs upon certain goods removed from the outports and other places to London; for regulating the fees of His Majesty's Customs in the province of Senegambia in Africa; for allowing to the Receivers General of the Duties on Offices and Employments in Scotland a proper compensation; *for the better preservation of hollies, thorns, and quicksets, and of trees and underwoods in forests, chases, and private grounds, and of trees and underwoods in forests and chases*; and for authorising the exportation of a limited quantity of an inferior sort of barley called bigg from the port of Kirkwall in the Island of Orkney'. 'Now, Sir', Peel continued, 'what I propose is not to lessen the security which the law gives to the owner of madder roots, not to throw open the holly or thorn to wanton depredation, but merely to transplant them to a more congenial soil than the province of Senegambia'; *op. cit.*, p. 17.

[28] Repealed by 7 & 8 Geo. 4, c. 27; law consolidated by 7 & 8 Geo. 4, c. 29. Among these statutes were seven relating to receivers of stolen property which were consolidated in ss. 54–57 of the new Act. The law on this subject was materially improved: where the original offence amounted to felony, the receiver could now be tried as an accessory after the fact, or as a substantive felon; in misdemeanour, he could be prosecuted for a misdemeanour; and where the offence was punishable on summary conviction, he could be summarily convicted. A receiver could be tried either in the same place as the principal was to be tried in or where he had the property, or where the receiving took place. In the eighteenth century changes along these lines had been strongly urged by Henry Fielding and Peter Colquhoun.

Section 25 (running to about 100 words) of the same Act consolidated some

against the person.[29] The consolidation of the forgery law was a still more formidable undertaking. The statutes on this subject which in Lord Lansdowne's words 'must ever remain in the pages of history a curious monument of prurient legislation', were 'a sea of confusion through which not even the most skilful lawyer can dive to collect a definite notion of the principles on which the enactments have been made'.[30] Out of about a hundred and twenty current statutes on forgery sixty imposed capital punishment, often for several modalities of the same offence. All these statutes were now reduced to one Act running to about six pages.[31] The scope of Peel's

twelve statutes relating to horse-, sheep-, and cattle-stealing. On a similar digestion proposed by Bentham see above, note 18 at p. 364.

An Act imposing capital punishment which escaped Peel's attention and was not included in 7 & 8 Geo. 4, c. 29, was 52 Geo. 3, c. 143, relating to letter-stealing. The relevant offence ceased to be capital in 1835.

[29] 9 Geo. 4, c. 31, 'An Act for consolidating and amending Statutes in England relative to Offences against the Person'.

[30] *Parl. Deb.* (1830), N.S., Vol. 25, H.L., June 22, 'Punishment of Death for Forgery', cols. 580–594, at col. 582.

[31] For a survey of leading statutes concerning forgery and allied offences see below, Appendix 1, pp. 642–650. On the confused state of this branch of law see the 'Report from the Select Committee on the Criminal Law of England' (1824), 205, *Parl. Papers* (Reports, 1824), Vol. 4, p. 39, and the 'Further Report from the Select Committee on the Criminal Law of England' (1824), 444, *ibid.*, p. 347. This Committee was appointed on the motion of Dr. Lushington with a view to initiating the consolidation and amendment of criminal law. The reports of this Committee as well as the appendices were largely written by Anthony Hammond.

Hammond published several books on various branches of criminal law with drafts of consolidation. See *The Criminal Code: Coining* (1825); *The Criminal Code: Forgery* (1826); *The Criminal Code: Burglary, Housebreaking, Church-robbing* (1826); *The Criminal Code: Simple Larceny, etc.* (1828), 2 vols. (4 parts). These books testify to the author's remarkable industry and contain much information on the state of the law, but his projects of consolidation are of no value. It would seem that at a certain stage Peel entrusted Hammond with the task of preparing some projects of digestion, but he later denied that Hammond's work was carried out under official auspices. Hammond contradicted this statement in *A Letter to the Members of the Different Circuits upon the Criminal Code*, etc. (1826).

According to *D. N. B.*, VIII, p. 1124, Hammond's *Criminal Code* formed the basis of Peel's Acts of consolidation. This, however, does not seem to be the case. The Acts were framed by Gregson (note 5 at pp. 568–569). See also on this incident 'Criminal Code', *Jurist* (March, 1827), Vol. 1, p.1, on pp. 8–10. But it cannot be doubted that Hammond's work was of great help to Peel.

Hammond also published the following books on jurisprudence and consolidation in general: *Scheme of a Digest of the Laws of England, with Introductory Essays on the Science of Natural Jurisprudence* (1820); *On the Reduction to Writing of the Criminal Law of England* (1829). In 1825 he was consulted by the Commissioners for the revision of the laws of the State of New York. See *Commissioners appointed to revise the statute laws of the State of New York; Correspondence between Commissioners and A. Hammond* (1826).

Acts may be judged by the fact that they covered more than three-quarters of all offences.[32]

But at that period the reform of criminal law meant much more than an improvement in the form of the law or in the definition of offences. The central issue was the mitigation of its severity and particularly the restriction of capital punishment. It is in this respect that Peel's reform proved the least stable. Barely four years after the enactment of his most important statutes, he witnessed their repeal and the introduction of new, far-reaching changes, which he opposed.[33]

[32] It is difficult to agree with Sir Thomas Erskine Holland, who states that 'the criminal legislations of Sir Robert Peel, which extended from 1826 and 1832, did but little for the form of the law'; *Essays upon the Form of the Law* (1870), pp. 52–53. A. Hayward aptly remarks when referring to Peel's Acts: 'To prove the extent of alteration effected by these Acts and the amount of practical benefit resulting from them, little more is necessary than to compare one of the best Treatises on Criminal Law composed prior to them, with one composed subsequently . . .'; *Juridical Tracts, Part I* (1856), p. 86.

It should be noted, however, that Peel's consolidation was inferior to the project of a penal code which Edward Livingston prepared in 1821 for the State of Louisiana. Although Livingston was inspired by Bentham (see above, note 5 at p. 358), his code bears the imprint of his powerful and original mind. According to Sir Henry Maine he was 'the first legal genius of modern times'; 'Roman Law and Legal Education', *Village Communities* (7th ed., 1895), p. 360. Livington's penal code was published in England in 1824 under the title *Project of a New Penal Code for the State of Louisiana.* On the circumstances attending this publication see Bentham's letter to Livingston (February 23, 1830), *Works* (Bowring), Vol. 11, pp. 35–36. The code evoked considerable interest in England and was often quoted by penal reformers mainly because it proposed to abolish capital punishment even for murder; see, for instance, J. Sydney Taylor, *A comparative View of the Punishments annexed to Crime in the United States of America and in England* (1831); and an enthusiastic article, 'Project of a New Penal Code', in the *Westminster Review* (January, 1825), Vol. 3, pp. 58–87. See also William Ewart's reference to it in a speech in the House of Commons in support of a more drastic revision of criminal law; *Parl. Deb.* (1832), 3rd ser., Vol. 11, col. 950.

For a new edition of Livingston's 'System of Penal Law', comprising a Code of Crimes and Punishments, a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, and a Book of Definitions, see *Complete Works of Edward Livingston on Criminal Jurisprudence* (New York, 1873), 2 vols., with an introduction by Salmon P. Chase, Chief Justice of the United States. For Livingston's views on the subject of punishment and the death penalty see *ibid.*, pp. 187–226. On Livingston's codification of criminal law, see C. H. Hunt, *Life of Edward Livingston* (New York, 1864), pp. 255–275.

[33] On October 12, 1822, Peel wrote to Lord Liverpool: '. . . I really do not think that there is, when the question is looked at in its details, any irreconcilable difference upon points of any real importance between the reasonable advocates for the mitigation of the criminal law and the reasonable defenders of it'; C. D. Yonge, *The Life and Administration of Robert Banks, Second Earl of Liverpool* (1868), Vol. 3, p. 216. This view was not corroborated by subsequent events.

§ 2. THE EXTENT OF PEEL'S REVISION OF CRIMINAL LAW

Abolition of benefit of clergy and of the distinction between petty and grand larceny. Change in the punishment of accessories after the fact

The abolition in 1827 of benefit of clergy (7 & 8 Geo. 4, c. 28, s. 6)[34] would by itself have made a theft above the value of a shilling punishable by death, but section 7 of the same statute provided that no one convicted of a felony should suffer death unless this felony had been expressly made capital. Henceforth a felony was to be punished at the discretion of the court by transportation for seven years or by imprisonment for not more than two years; in addition, male offenders could also be sentenced to be whipped, privately or in public, once, twice or three times.[35] Imprisonment could be with or without hard labour and the court could direct that the offender be kept in solitary confinement for the whole or any part of such imprisonment.[36] By section 11, offenders convicted of a second offence were to be transported for life or for not less than seven years, or imprisoned for not more than four years with the possible addition of whipping. This provision whereby recidivists could be transported for life was well in line with the prevailing tendency to make greater use of this penalty,[37] which in view of the progressive abrogation of capital punishment was regarded by many as the best remaining protection against crime.[38]

[34] ' An Act for further improving the Administration of Justice in Criminal Cases in *England* '. The Act did not include 1 Edw. 6, c. 12, s. 14 (1547), by which every peer was given a privilege equivalent to the benefit of clergy. When Lord Cardigan was tried in 1841 following a duel it was thought that in the event of a conviction he would claim this benefit; *R.* v. *Cardigan* (1841), 4 St. Tr. (N.S.) 601, note (*a*) at p. 666. The question was later resolved by 4 & 5 Vict. c. 22, which repealed the Act of Edward 6 and provided that peers accused of felony should be liable to the same punishment as other persons.

[35] The whipping of women in private was abolished by 1 Geo. 4, c. 57 (1820), which imposed in its place imprisonment with hard labour for not more than six months or solitary confinement for not more than seven days. The public whipping of women was abolished in 1817 by 57 Geo. 3, c. 75.

[36] It would seem that 7 & 8 Geo. 4, c. 28, s. 9, was the first statute to give to the courts a *general* authority to order solitary confinement for all classes of offenders.

[37] See on this above, pp. 500–501 and below, p. 603 and note 60 at p. 606.

[38] In a *Charge delivered to the Grand Jury of Wiltshire at the Summer Assizes, 1827* (1827), pp. 20 and 22, Lord Chief Justice Best (afterwards Lord Wynford) welcomed the extension of transportation for life not only to ' . . . many offences

The second change consisted in the abolition of the distinction between petty and grand larceny.[39] Until then a second offence of grand larceny, which was a theft above twelve pence, was punishable by death. By doing away with the distinction, Peel greatly reduced the number of capital felonies. This was, however, a formal rather than a real change; as he himself said, '. . . it was not very material; as it rarely occurred that the penalty of death was put in force when a man was convicted of grand larceny a second time '.[40] But the influence on the system of trial was very material, for whereas by the old law grand larceny had to be tried by higher tribunals, Peel's reform brought all cases of simple larceny within the jurisdiction of lower courts. Prosecutions and trials were thus made both less protracted and less expensive. The same courts could also try accessories to such larceny.[41]

which under the old law were capital, but (to) some offences that were not capital and were not liable to transportation for life before the passing of the late statutes '; for, as he put it, '. . . their (offenders') children are reared up as beasts of prey, vice in them is instinctive, and therefore incorrigible '.

A permanent removal of 'convicts in general, including minor offenders as well as felons, to parts beyond the seas; except in cases of extreme youth ' was also suggested by Randle Jackson (a magistrate); see *Considerations on the Increase of Crime . . . addressed to the Magistracy of the County of Surrey* (1828), p. 12. This tract is reprinted in the *Pamphleteer* (1828), Vol. 19, p. 307.

Similarly the *Quarterly Review* writes: 'We agree with those who think this more extensive application of this punishment highly salutary, especially in cases of second offences of larceny, where the confirmed vicious courses of the prisoner leave no chance of amendment; . . . When guilt arrives at a certain point of infamy and aggravation, we believe the entire removal of the individual to a new scene of life affords at once the only security to society against his future crimes and the contagion of his habits, and the only chance left for himself of regaining decency and respectability '; (Jan., 1828), Vol. 37, 'Amendments of the Criminal Law ', pp. 147–193 at p. 172.

[39] 7 & 8 Geo. 4, c. 29, s. 2 (1827), 'An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith '.

[40] *Parl. Deb.* (1826–27), N.S., Vol. 16, H.C., Feb. 22, 1827, 'Criminal Laws Consolidation Bills ', cols. 632–646, at col. 635. But Peel also added that it was desirable 'that the law in this particular case should be clear and determinate, for it was one of the first objections brought by foreigners against the criminal laws of England, that we condemned men to death for crimes, who were never executed, and whose sentence was, in fact, never intended to be carried into effect '.

[41] The punishment for simple larceny and for any felony made punishable like simple larceny, except in cases otherwise provided for, was transportation for seven years or imprisonment for not more than two years; male offenders could also be ordered to be whipped twice or thrice, publicly or privately. Imprisonment could be with or without hard labour or in solitary confinement, according to the direction of the court.

A change in the punishment of a certain class of accessories should also be noted. Most capital statutes also extended the death penalty to principals in the second degree and to accessories before and after the fact. Peel somewhat relaxed this uniform and rigid system. In all felonies, whether capital or not, the principal in the second degree and the accessory before the fact were still punishable in the same manner as the principal in the first degree, but accessories after the fact were only liable to be imprisoned for not more than two years.[42]

Repeal of capital punishment for certain kinds of larceny. Repeal of the Waltham Black Act. Some further changes

Some years before the enactment of these wider measures of revision and consolidation, Peel implemented two out of three reforms in the law of larceny which had been repeatedly urged by Romilly and later by Mackintosh and Fowell Buxton. By an Act of 1823[43] he abolished capital punishment for larceny to the value of forty shillings on board ships on navigable rivers[44] and for larceny in shops.[45] This was no new departure in the movement for reform, but the smooth passage of Peel's Act through both Houses of Parliament stood in sharp contrast to the difficulties which Mackintosh and Buxton had encountered.

In addition to these changes capital punishment was repealed for two kinds of larceny only: larceny in a booth or tent and in a church or chapel. By 5 & 6 Edw. 6, c. 9, s. 5, larceny in a booth or tent[46] when the owner, his wife, children or servants were present, had been made a non-

[42] 7 & 8 Geo. 4, c. 29, s. 61; except receivers of stolen property who were to be punished more severely; see ss. 54 and 55.

On the unsatisfactory state of the law on this subject before the passing of this Act, see Peel, *Speech* (1826), pp. 32–33.

[43] 4 Geo. 4, c. 53; later embodied in 7 & 8 Geo. 4, c. 29, consolidating the law of larceny.

[44] Imposed by 24 Geo. 2, c. 45.

[45] This change was effected by the repeal of 1 Geo. 4, c. 117, which retained the death penalty for thefts in shops but raised the value of stolen goods from 5s. to £15, a concession which Mackintosh had been forced to make; see on this above, p. 554.

[46] 'Burglary . . . cannot be committed by breaking into any inclosed ground, or any booth, or tent, erected in a market, or fair, though the owner may lodge therein'; Russell *On Crimes* (2nd ed., 1826), Vol. 2, p. 13.

clergyable offence.[47] Peel held that 'people who kept such open booths ought to guard their property sufficiently themselves and not look for laws of unreasonable severity to protect it'.[48] The Act of Edward was repealed by 7 & 8 Geo. 4, c. 27 (1827). Larceny in a church or chapel with or without breaking in or out had been made a capital offence by 1 Edw. 6, c. 12.[49] Peel included this offence in his general Act consolidating the law of larceny (7 & 8 Geo. 4, c. 29) section 10 of which enacted that 'if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel shall break out of the same, any such offender being convicted thereof, shall suffer death as a felon'. Thus capital punishment was upheld for larceny in a church or chapel if committed with breaking in or out, but was abolished for larceny unaccompanied by such breaking.

Another Act—4 Geo. 4, c. 54 (1823)—repealed the Waltham Black Act, a Bill to this effect having been thrown out by the House of Lords only two years earlier.[50] The two provisions of the Waltham Black Act then still upheld were those imposing capital punishment for setting on fire and for maliciously shooting at any person.[51] The new Act also repealed 27 Geo. 2, c. 15, which made it a capital offence to send threatening letters. By a further statute (4 Geo. 4, c. 46) the death penalty was abolished for cutting down the bank of any river, destroying the banks (Bedford level), and personating pensioners of Greenwich Hospital.[52] In addition, 4 Geo. 4, c. 46, and 4 Geo. 4, c. 53, repealed the capital provisions of three statutes hitherto not included in any project of reform.

[47] According to Hale this Act was then 'of great and daily use'. On this Act, see above, p. 45.

[48] A commentator observes that one reason for taking this course was that in principle 'the legislature has determined no longer to lend any assistance to the maintenance of fairs'; another was 'the falling into disuse of such wandering and uncertain domiciles'; *An Alphabetical Arrangement of Mr. Peel's Acts*, by a Barrister (2nd ed., 1830), p. 77.

[49] On this Act see below, Appendix 1, p. 635.

[50] Above, p. 552.

[51] These two offences were later embodied in 7 & 8 Geo. 4, c. 31 (1827), concerning malicious injuries to property; their definition was redrafted but the death penalty still upheld.

[52] 6 Geo. 2, c. 37; 27 Geo. 2, c. 19; and 3 Geo. 2, c. 16, respectively. All these statutes had been singled out for amendment by the Committee of 1819; above, p. 549: Group (2) of Obsolete Statutes, Nos. 8, 11, 12, 13.

They were 4 Geo. 3, c. 37, s. 16, and 22 Geo. 3, c. 40, ss. 1, 2 and 3 (destruction of linen yarn, cloth, etc., and of machinery used in their manufacture)[53] and 22 Car. 2, c. 5, s. 3 (theft or embezzlement from naval stores).[54] In addition, by a statute passed in 1825, capital punishment was abolished for certain offences connected with the quarantine laws.[55] It was also abolished for a number of offences against the revenue laws, such as assaulting or opposing by force and violence officers of the customs.[56] This last change is of particular interest for it was the first instance of the death penalty having been abolished for any offence committed with violence.

A change in the law of larceny in dwelling-houses and in that of burglary

The repeal of capital punishment for larceny in dwelling-houses had been pressed for by Romilly and later by Mackintosh and Fowell Buxton. Although in 1823 Peel had declared himself against any change of the law on this subject,[57] some years later he included this statute (12 Anne, st. 1, c. 7) within his Act of consolidation (7 & 8 Geo. 4, c. 29, s. 12). The death penalty was still upheld, but the value of stolen property for the theft of which it could be inflicted was raised from forty shillings to five pounds. Sydney Taylor thus commented upon this change[58]: 'Sir Robert Peel's "amended" law—the 7 & 8 Geo. 4, c. 29, has substituted for the forty shillings of the former statute,—*five pounds*, as the sum which fixes *the price of human life*! This additional £3 does not even cover the difference in the value of money

[53] On these statutes see below, Appendix 1, p. 656.

[54] This statute was one of the few which provided an alternative penalty, which was to be inflicted only if the offender refused to be transported or if, when transported, he unlawfully returned to England.

[55] 6 Geo. 4, c. 78, ss. 21, 25; on the state of law before the passing of this Act see below, Appendix 1, pp. 625–626.

[56] 6 Geo. 4, c. 80, s. 143, and 6 Geo. 4, c. 108, s. 59. On the state of law before these changes see below, Appendix 1, pp. 626–628. The consolidation and amendment of this very confused branch of law owe much to the work of Huskisson and Robinson.

[57] *Parl. Deb.* (1823), N.S., Vol. 9, col. 427.

[58] *A comparative view of the punishments annexed to crime in the United States of America and in England* (1831), p. 47. Issued as Pamphlet No. 4 by the 'Society for the Diffusion of Information on the subject of Capital Punishment'. On J. Sydney Taylor, who was one of the most persistent critics of the reforms introduced by Peel, see below, pp. 597–598.

between the time of King William, and that of George the Fourth '.[59]

The second amendment related to the law of burglary. Here Peel restricted capital punishment by circumscribing the place in which burglary had to be committed in order to be a capital offence. Until then burglary could be committed in a wide range of places; not only in dwelling-houses but also in such buildings as warehouses, barns, stables, cow-houses, dairies, even though not under the same roof as the dwelling-house, provided they were part and parcel thereof.[60] It had also been determined that an outhouse within the ' curtilage ' or some common fence with the mansion was part and parcel of that mansion.[61] The consolidation of the law of burglary with a view to subsequent revision had been touched upon by the Committee of 1819.[62] Peel referred to burglary in his speech of 1826, in which he outlined the main changes he proposed to introduce, and raised this subject a year later, on March 13, 1827, on the motion that his Bills be read a first and second time. He then suggested an amendment which he ultimately incorporated in 7 & 8 Geo. 4, c. 29.[63] By section 11 of this statute burglary was a capital offence only if committed in a building forming a part of the dwelling-house or connected with it by means of a covered and enclosed passage. Burglary committed in any building within the same curtilage as the dwelling-house but not directly connected with it ceased to be capital.[64] According to a commentator, even before this

[59] Referring to this change Peel himself said: ' The sum of 40s. had been fixed, as necessary to constitute the capital offence, in the reign of Queen Anne. Considering the different circumstances of the country, the amount which he now proposed was not materially greater '; *Parl. Deb.* (1826), N.S., Vol. 15, H.C., April 17, ' Larceny Laws Bill ', cols. 291–293 at col. 292.

[60] Hale, 1 P.C. 558; Hawkins, 1 P.C. 290; Blackstone, 4 Comm. 225.

[61] Hale, *ibid.*, 559; Hawkins, *ibid.*; Blackstone, *ibid.*; East, 2 P.C. 493.

[62] See above, note 85 at p. 551.

[63] *Parl. Deb.* (1826–27), N.S., Vol. 16, H.C., March 13, 1827, ' Criminal Laws Consolidation Bills ', cols. 1155–1163 at col. 1157.

[64] Section 13. The penalty was to be transportation for life or for not less than seven years, or imprisonment for any term not exceeding four years (with hard labour or solitary confinement) and whipping, privately or publicly, once, twice, or thrice, at the discretion of the court.

This change also affected the class of offences not amounting to burglary but usually included under house-breaking and stealing. Section 12 of 7 & 8 Geo. 4, c. 29, related to three such offences; one, already referred to (see above, p. 582), was stealing in a dwelling-house to the value of five pounds or more; the second was breaking and entering any dwelling-house and stealing therein any property to any value; and the third, stealing to any value in a dwelling-

change the death penalty had rarely been inflicted for burglaries in out-buildings not directly connected with the dwelling-house.[65] The decisions on this subject were, however, somewhat conflicting, often depending upon points of great refinement.[66]

Death sentences not to be pronounced unless likely to be executed

By yet another statute passed in 1823 (4 Geo. 4, c. 48)[67] a court could abstain from pronouncing the death sentence on persons convicted of any crime except murder, 'wherever such court shall be of opinion that, under the particular circumstances of any case, the offender or offenders, are a fit and proper subject to be recommended for the Regal Mercy'. In

house, any person therein being put in fear. All three offences remained capital but the definition of a dwelling-house was narrowed in the same manner as in burglary.

Furthermore Peel's change in the law of burglary also had an interesting repercussion on the offence of stealing from shops. Although Peel abolished the capital punishment appointed for it by 10 & 11 Will. 3, c. 23 (see above, p. 580), this penalty could still be inflicted in some cases under another statute. Owing to the broad definition of the 'dwelling-house', shops were sometimes considered to be a part of it and when a theft in any such shop amounted to forty shillings or more, the case could be tried under 12 Anne, st. 1, c. 7 (privately stealing in a dwelling-house to the amount of forty shillings); see on this John F. Archbold, *Peel's Acts* (2nd ed., 1830), Vol. 1, pp. 53–54. See also *R.* v. *Hancock and Others* (1810), Russ. & R. 170; *R.* v. *Lithgo* (1818), Russ. & R. 357; and *R.* v. *Chalking and Another* (1817), Russ. & R. 334. Even when Peel repealed the statute of Anne and raised to five pounds the value of property for the theft of which capital punishment could be inflicted, larceny in shops could still be punished with death in cases when it amounted to £5. The change in the definition of a dwelling-house further materially reduced the number of such cases.

[65] *An Alphabetical Arrangement of Mr. Peel's Acts*, by a Barrister (2nd ed., 1830), pp. 39–40.

[66] See in particular *R.* v. *Hancock and Others* (1810), Russ. & R. 170; see also *R.* v. *Sefton* (1811), Russ. & R. 202; *R.* v. *Chalking* (1817), Russ. & R. 334; *R.* v. *Lithgo* (1818), Russ. & R. 357; *R.* v. *Clayburn and Dunning* (1818), Russ & R. 360; and *R.* v. *Westwood* (1822), Russ. & R. 495.

Edward E. Deacon observes that Peel's statute '. . . disposes of innumerable cases in the books handed down in succession from one author to another, in which *warehouses, barns, stables, cow-houses, dairy-houses, and outhouses*—though not under the same roof, nor being even contiguous to the dwelling-house—have been considered as parcel of the dwelling-house, for the purposes of burglary. These cases need only now be referred to as a matter of amusement, wherein many ingenious arguments will be found reported, as to what was within, and what without the *curtilage*, and as to the degree of contiguity that was necessary to render outbuildings part and parcel of the dwelling-house'; *A Digest of the Criminal Law of England* (1836), Vol. 1, p. 185.

[67] The statute did not apply to the courts of criminal justice in the City of London.

every such case the recording of the judgment was to have the same effect as if it had been pronounced and the offender reprieved by the court. The inevitable effect of this statute was further to increase the number of commutations of death sentences.[68]

Revision of the scale of lesser punishments

Apart from the changes relating to capital offences Peel also extensively readjusted the scale of punishments for lesser offences against property. The law relating to the protection of property in orchards, gardens and nursery grounds may be quoted as an example. By 6 Geo. 4, c. 127, passed in 1825, entering into any orchard, garden, etc., and carrying away any trees, plants, shrubs, fruit or vegetables was a felony punishable by transportation. Only a year later Peel commented upon the excessive severity of this Act.[69] It was replaced by 7 Geo. 4, c. 69 (1826), which was subsequently included in Peel's Act of consolidation (7 & 8 Geo. 4, c. 29, ss. 42, 43). In contrast to the rigidity of 6 Geo. 4, c. 127, the new Act adjusted the punishment to various modalities of the offence, distinguishing between stealing, destroying or damaging any plant, root, or fruit in a garden, orchard or nursery ground, and the same offence committed in any land, open or inclosed *not* being a garden, orchard, or nursery ground. It also took note of such circumstances as the value of the stolen property and the offender's previous convictions. The punishment for the first offence was made less severe than for the second. On first conviction, the offender was liable to be punished by imprisonment with or without hard labour

[68] Asked by the Committee of 1819 whether the simultaneous pronouncement of the death sentence upon a great number of offenders, few of whom were likely to be executed, weakened the effect of capital punishment, the Rev. H. S. Cotton replied that this was the case. He had seen offenders 'behaving in a most indecent manner', cracking nuts, looking up to the galleries and nodding to their companions or acquaintances. This was confirmed by Thomas Shelton, Clerk of the Arraigns at the Old Bailey, one of the most important witnesses examined by the Committee. He also said that in cases of murder the sentence made 'a great impression . . . on the mind of the offender, and also on the mind of every person present'; for other crimes, the 'greater part by far' heard the verdict 'with great indifference'; 'Report on Criminal Laws' (1819), 585, *Parl. Papers* (Reports), Vol. 8, pp. 63 and 23. For proposals to change this practice see above, note 85 at p. 551.

[69] *Speech* (1826), p. 24; see also *Parl. Deb.* (1826), N.S., Vol. 15, H.C., April 27, 'Stealing in Gardens and Hot Houses', cols. 717–718.

for not more than six months or by a fine above the value of the stolen property but not exceeding twenty pounds. On second conviction, the offence was made a felony to be punished by transportation for seven years or imprisonment not exceeding two years (with or without hard labour or solitary confinement) to which whipping (public or private) once, twice, or thrice could be added. By section 68 of the same Act a justice of the peace was empowered to discharge first offenders summarily convicted before him upon their making satisfactory compensation for both damages and costs, or for either one or the other. This important clause was primarily intended for young offenders. Under section 72, the offender could appeal to the court of quarter sessions. A similar though somewhat lower scale of punishments was appointed for this offence if committed in places other than a garden, orchard or nursery.

These were very notable improvements,[70] particularly since similar changes were effected in respect to a great number of offences falling within the group of malicious injuries to property.[71] But the appointed penalties being still very severe, another outcome of the change was a material

[70] 'It has been judged, and with much truth, that persons who lay in gaol for many weeks before their trial, for some petty theft, who might by possibility have been innocent of the charge against them, whether guilty or not guilty, were injured in their health and morals by the society and confinement of a gaol, that a party who might in the first instance have been reclaimed by kind advice or moderate punishment, became familiarised with vice, and prepared for the commission of deeper crimes. Now, therefore, that authority has been given to extend mercy when a fit object shall be found, to punish with moderation a young offender, or inflict a proportionate fine upon one more practised in guilt'; *An Alphabetical Arrangement of Mr. Peel's Acts*, by a Barrister (2nd ed., 1830), p. 53.

[71] See, for instance, the extensive differentiation in punishment provided by ss. 19 and 20 for cutting and damaging trees or by ss. 21 and 22 for damaging any plant, fruit or vegetable growing in a garden or elsewhere. A development on these lines had already been initiated about 1820. See, for instance, 1 Geo. 4, c. 56 (1820), 'An Act for summary Punishment, in certain Cases, of Persons wilfully or maliciously damaging or committing Trespasses on public or private Property'.

For an attempt to differentiate between various kinds of assaults, see 9 Geo. 4, c. 31, ss. 27–29. Persons committing common assault or battery not attended with aggravating circumstances were to be tried by two justices of the peace and could be sentenced to pay a fine not exceeding five pounds including costs, or in default of payment could be imprisoned for not more than two months. It is interesting to note that a similar amendment was suggested in 1826 in a pamphlet (by a magistrate) 'A Letter to the Right Hon. Robert Peel, etc., on the Present State of the Law with respect to Assaults'; reprinted in the *Pamphleteer* (1826), Vol. 26, pp. 460–465.

extension of the jurisdiction of justices of the peace and of courts of quarter sessions, as well as a considerable increase in the number of cases tried by them—an important development on which conflicting views were held.[72]

Peel against further changes

These were the changes beyond which Peel did not think it advisable to go.[73] A number of circumstances influenced him in forming this opinion. It has been mentioned[74] that he rightly considered the revision of criminal law as only a part of a wider scheme of reform embracing the whole system of criminal justice. He attached particular importance to the

[72] 'The punishment of *solitary confinement*', observes Deacon, 'has been but lately introduced into the criminal law of England. Judiciously administered to hardened offenders, or for crimes of great enormity, its effects would certainly be most salutary and beneficial; but when indiscriminately applied, either as to the offence, or as to its duration, it is calculated to work much evil . . . When a juvenile delinquent, therefore, of not more than twelve years of age, has been sentenced to six months' imprisonment, and *one month's solitary confinement*, for a petty theft!—a sentence which the author once heard pronounced at the quarter sessions—the propriety of vesting a power in any magistrate to inflict this dreadful punishment, to an extent only limited by his discretion, his humanity, or his caprice, may well be doubted by those who have anxiously considered the due proportion of punishment to crime'; E. E. Deacon, *Digest of the Criminal Law of England* (1836), Vol. 2, pp. 1244–1245.

In a spirited pamphlet Charles Bird criticises the extension of summary jurisdiction which he calls a 'violation in the laws of my country'. In support of his objections he quotes Blackstone who, in a well-known passage draws attention to the dangers of such changes. See *Letters to the Right Hon. Robert Peel, M.P., on the Effect and Object of His Alteration in the Law of England, with Reference to the Extension of the Jurisdiction of Justices of the Peace* (2nd ed., 1827).

As regards the competence of quarter sessions, Sir Thomas Freemantle asked the House of Commons in 1833 'whether the quarter sessions, as at present constituted, possessed an amount of legal knowledge, experience, and influence, to constitute it a tribunal to which so great a portion of the criminal business of the country could be entrusted', and moved for a return which would throw some light on their activities; *Parl. Deb.* (1833), 3rd. Ser., Vol. 15, H.C., 'Diminished Jurisdiction of Judges', Feb. 14, cols. 637–639. For the return see 'Prisoners for Trial; Punishment of Death Abolition' (1833), 65, *Parl. Papers* (Accounts and Papers, 1833), Vol. 29, p. 365.

[73] 'He was not prepared to say whether or no it might not be necessary to go further in the plan of reducing the number of capital convictions. Much had lately been done, and much remained to do; . . . Willing as he felt, however, to reduce the amount of capital convictions, he advised the House not to be led away too far by mistaken feelings. If Parliament were to proceed too rapidly to overthrow the existing enactments, a strong prejudice might arise in the country against measures that were intended for the public good; and thus the great object of justice and humanity might be defeated'; *Parl. Deb.* (1826–1827), N.S., Vol. 16, cols. 635 and 636.

[74] Above, p. 569.

establishment of an effective police force. But the opposition to this project was then still very considerable, a fact which could not fail to convince Peel of the need for caution in relaxing the severity of the law. The Committee of inquiry which at his suggestion had been instituted in 1822[75] stated in their *Report* that 'it is difficult to reconcile an effective system of police, with that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society in this country; and Your Committee think that the forfeiture or curtailment of such advantages would be too great a sacrifice for improvements in police, or facilities in detection of crime, however desirable in themselves if abstractedly considered'.[76] On February 4, 1828, Peel wrote to Henry Hobhouse: '. . . What must I do with the Police? I fear throughout the whole country it is most defective. . . . It has always appeared to me that the country has entirely out-grown its police institutions. The difficulty in this, as in ten thousand cases, is to devise any general rule which shall apply to a society so varying in its subdivisions as ours is.'[77] But although his attention had already been drawn in 1826 to the need for strengthening the police even in agricultural districts and provincial towns,[78] by 1829 he had only succeeded in re-organising and making more effective the police in Westminster and some other parts of London.[79]

Another important circumstance was that crime continued to increase. In the period 1821–1827 commitments in England and Wales (excluding London and Middlesex) showed an increase of 86 per cent. over the period 1811–1817; convictions had increased by 105 per cent. The increase in London and

[75] *Parl. Deb.* (1822), N.S., Vol. 6, H.C., March 15, 'Police of the Metropolis', cols. 1165–1166.

[76] 'Report from the Select Committee on the Police of the Metropolis' (1822), 440, *Parl. Papers* (Reports, 1822), Vol. 4, p. 101.

The author of a pamphlet published anonymously in the same year complained that no action had so far been taken even to implement the recommendations of the Police Report of 1816; *Considerations of the Police Report of 1816 with a Plan for effectually suppressing the Trade of Thieving* (1822). On the state of the police in 1822 see G. B. Mainwaring (a well-known London magistrate), *Observations on the present state of the Police of the Metropolis* (2nd ed., 1822).

[77] Parker, *op. cit.*, Vol. 2, p. 37.

[78] *Ibid.*, Vol. 1, pp. 404–405.

[79] On the inadequacy of this reform see 'The New Police Bill', *Jurist* (April, 1829), Vol. 2, pp. 460–469.

Middlesex, though not so sharp, was considerable, commitments having increased by 48 per cent., and convictions by 55 per cent. Although this upward trend could in part be ascribed to the increase in population, to improved methods of detection and trial and to less disinclination to prosecute, the existence of a considerable real increase in the incidence of crime could not be discounted.[80]

It should also be noted that unlike Sir Samuel Romilly and the Committee of 1819, Sir Robert Peel sought the advice of the judges on all his Bills.[81] He consulted Justice Bailey, Baron Hullock, Justice Holroyd, Justice Burrough and Justice Gaselee[82]; his collaboration with Lord Tenterden, then Lord Chief Justice, was particularly close,[83] and Lord Tenterden took charge of his Bills in the House of Lords.[84] But if the

[80] Appendix 'C' to the 'Report from the Select Committee on the Police of the Metropolis' (1828), 533, and 'Report from the Select Committee on Criminal Commitments and Convictions' (1828), 545, *Parl. Papers* (Reports, 1828), Vol. 6, pp. 304 and 419.

[81] By so doing he gained warm support from many quarters. Commenting upon this collaboration between Peel and the judges the *Quarterly Review* writes: 'Not only have the public witnessed and applauded this advance towards an improved system—Mr. Peel has acted throughout his task with the advice and concurrences of technical lawyers, and the approbation and assistance of the experienced judges of the realm. In the judicious caution which has restrained him from pushing his reforms beyond the point to which they could be accompanied by the concurrence of the practical executors and ministers of the law, he has even stopped short, in some instances, of the extent to which lawyers conceived he might proceed. . . . By this wise caution he has earned the confidence of the public, and, while he has acquired for himself the character not more of an enlightened than of a safe and practical legislator, he has paved the way for an easy accomplishment of further improvements, when time and circumstances render them fitting'; (January, 1828), Vol. 37, 'Amendments of the Criminal Law', p. 193.

[82] Peel, *Substance of a Speech* (1826), p. 48.

[83] See, for instance, the remarks made by Lord Chief Justice Best (afterwards Lord Wynford) in his *Charge to the Grand Jury of Wiltshire at the Summer Assizes* (1827), pp. 18 and 19. How close this collaboration was can be gathered from the following extract from an article, 'Criminal Law Report; including a Digest of the Common Law relating to Theft', *Law Magazine* (Feb., 1835), Vol. 13, p. 1. See pp. 7–8, where it is stated: 'All the bills were submitted to the judges, and underwent the most careful revisal of some of the most experienced criminal lawyers of the land. We were once favoured with a sight of the drafts submitted to the late Lord Tenterden, and there is scarcely a clause but appears to have undergone some sort of amendment at his hand'. This article (unsigned) was contributed by A. Hayward and is included (with additions) in his *Juridical Tracts, Part I* (1856), pp. 78–95.

[84] *Parl. Deb.* (1827), N.S. Vol. 17, col. 592. On moving for the second reading, Lord Tenterden strongly supported all the five Bills and paid the following tribute to the Home Secretary: 'It was fortunate for the country when a gentleman of comprehensive mind, not bred to the law, turned his attention to the subject, for those who were bred to the law were too often, by habit, dull

judges thus associated themselves with a limited revision of capital laws, a development of very great significance, they were not prepared to lend assent to much wider schemes of reform. During a subsequent debate on the law of forgery it became apparent that both Lord Tenterden and Lord Lyndhurst, then Lord Chancellor, considered it unsafe to go beyond what Peel had already accomplished.[85]

§ 3. AN ATTEMPT TO STEM THE MOVEMENT: THE FORGERY ACT

The Bill consolidating the law of forgery which Peel brought in on April 1, 1830,[86] proposed little change in the punishment of this offence. Peel himself said that 'after deliberate consideration he had attained to the honest conclusion, that it would be better to preserve the punishment of death for forgery than abandon it'.[87] He did not preclude the possibility of a gradual mitigation in the future but considered it unwise to proceed further at this stage.[88] Although generally welcomed as a measure of consolidation, the Bill became the object of sharp controversy on account of the great number of cases in which it retained capital punishment.[89] The

to its imperfections. He could not help thinking that the bills would be most valuable to those who were engaged in the administration of justice in the country'; *ibid.*, col. 1261.

[85] Below, pp. 594 and 603. At the same time capital statutes were being administered in an increasingly merciful manner. In the seven years ending 1817, out of 35,259 convicted of all offences (capital and non-capital), 4,952 were sentenced to death and 584 executed. In the seven years ending 1831, out of 85,257 convicted for all offences 9,316 were sentenced to death and 410 executed. Thus although in the second period the number of death sentences was almost twice as high as in the first, the number of executions had decreased considerably; 'Criminal Offenders' (1832), 282, *Parl. Papers* (Accounts and Papers, 1831–1832), Vol. 23, p. 133.

[86] *Parl. Deb.* (1830), N.S., Vol. 23, H.C., April 1, 'Law of Forgery', cols. 1176–1184.

[87] *Ibid.*, Vol. 24, col. 1043. The *Times* in a leader of April 3, 1830, wrote that it would be 'extremely dangerous' to go beyond the proposal outlined by Peel, but it admitted that 'never, perhaps, was the crime more fertile in statutes, more impregnated with cruel and indiscriminate sincerity . . .'.

[88] Though he admitted that '. . . it was impossible to conceal from ourselves that capital punishments were more frequent, and the criminal code more severe on the whole, in this country, than in any other country in the world'; *ibid.*, Vol. 23, col. 1179.

[89] Thus Brougham said: 'The cases of Forgery which the Bill exempted from the punishment of death were so rare, that, practically speaking, they were as nothing. The degree of improvement in the law, therefore, which the Bill was calculated to effect could not be rated higher than zero'; *ibid.*, Vol. 24, col.

debates in the House of Commons which lasted four months, rank highly among the great debates of a period famed for the high standard of parliamentary discussions.[90] They were marked by a genuine realisation of the importance of the question and a sincere endeavour on the part of many Members to free themselves from political prejudices. Peel, who intervened three times,[91] was opposed by Mackintosh, Fowell Buxton, Brougham, Lord John Russell, and a number of other Members—an enthusiastic group of reformers who in the years to come became the promoters of new schemes of revision.[92] The debate in the House of Lords was equally animated. The contrasting views were upheld with much vigour on the one side by Lord Lyndhurst, Lord Eldon and Lord Wynford and on the other, by Lord Holland, the Duke of Richmond and the Marquis of Lansdowne.[93]

Throughout these four months petitions continued to flow in from all parts of the country. As Brougham remarked,

1058. Thomas Lennard emphatically denied that Peel's Bill had any practical importance: '. . . He admitted that it had some merit as being a good digest of the law of forgery; but as a practical mitigation of the law it was of no value whatever'; *ibid.*, Vol. 25, col. 55. Fowell Buxton held that should the Bill pass, the law of forgery would retain 'a great deal too much of its original ferocity'; *ibid.*, Vol. 23, col. 1185. He was sure 'that a strong wish existed among the bankers, and other respectable classes of the community, throughout the country, to see the law altered in that respect'; *ibid.*, Vol. 24, cols. 12–13. Mackintosh, when presenting the petition of Edinburgh, said that 'the House was behind the country—not the country behind the House—in the progress of extended and liberal notions on this subject'; *ibid.*, Vol. 24, col. 1034.

[90] For the debates in the House of Commons see *Parl. Deb.* (1830), N.S., Vol. 23, 'Revision of the Criminal Law', March 18, cols. 541–542; *ibid.*, March 22, 'Forgery', col. 710; *ibid.*, April 1, 'Law of Forgery', cols. 1176–1188; *ibid.*, April 5, 'Forgery', cols. 1269–1270; *ibid.*, April 5, 'Forgery', cols. 1274–1275; *ibid.*, Vol. 24, April 8, 'Forgery', cols. 11–14; *ibid.*, April 26, 'Death for Forgery', cols. 35–37; *ibid.*, May 3, 'Forgery', cols. 328–329; *ibid.*, May 4, 'Law relating to Forgery', cols. 389–390; *ibid.*, May 13, 'Punishment of Death for Forgery', cols. 674–680; *ibid.*, May 14, 'Forgery', cols. 708–709; *ibid.*, May 24, 'Forgery', cols. 1014–1015; *ibid.*, 'Forgeries Punishment Bill', cols. 1031–1061; *ibid.*, Vol. 25, June 7, 'Forgery', cols. 46–81; *ibid.*, June 8, 'Forgery', cols. 175–176.

[91] See *Parl. Deb.* (1830), N.S., Vol. 23, cols. 1176–1184; *ibid.*, Vol 24, cols. 1043–1054; *ibid.*, Vol. 25, cols. 67–71.

[92] Stephen Lushington, William Ewart, Thomas Lennard; see above, note 18, at p. 560, and below, note 37 at p. 601, and p. 605.

[93] See *Parl. Deb.* (1830), N.S., Vol. 25, 'Forgery Bill', H.L., June 15, 'Forgery', col. 347; *ibid.*, June 22, 'Forgeries Punishment Bill', cols. 580–594; *ibid.*, July 1, 'Forgeries Punishment Bill', cols 838–856; *ibid.*, July 13, 'Forgery', cols. 1160–1164.

'the Table groaned' with them[94]; close on two hundred are recorded in the *Journals* of the House of Commons and of the House of Lords.[95] One of the most important was signed by seven hundred and thirty-five bankers and directors of joint stock companies from two hundred and fourteen cities and towns. It urged the abolition of the death penalty for all forgeries and expressed the hope that 'the House will not withhold from them (the petitioners) that protection of their property which they would derive from a more lenient law'.[96] It was calculated that this petition voiced the opinion of approximately half of all the bankers in the country.[97] Highly symptomatic was the petition from six hundred and ninety-seven inhabitants of Edinburgh, signed by eighteen leading bankers, a number of professors, thirty prominent members of the bar and a large section of the clergy.[98] Another one was signed by N. M. Rothschild, Overend, Gurney & Co., and Sanderson & Co., prominent bankers and bill brokers. The purpose of this petition, signed by a Jew, a Dissenter and a member of the Church of England, was to demonstrate that the reform of the forgery law was desired by all bankers,

[94] *Parl. Deb.* (1830), N.S., Vol. 24, col. 1058. Lennard challenged Members of the House to take a map of England and 'to put the finger upon any place from which a petition had not come'. In his *Collection of Press Cuttings*, Vol. 1, p. 177, Francis Place included a most interesting publication consisting of a map of Great Britain showing the places from which petitions were sent in 1830; see *Petition Map. Ought the Crime of Forgery to be punished with Death. The State of Public Opinion on this important Question* (3rd ed., 1831).

In 1822 Place himself wrote three remarkable articles on the need for a revision of criminal law. See 'Criminal Law. Punishment of Death', *British Luminary* (June 9, June 16, and June 23, 1822). The articles are included in Place's *Collection of Press Cuttings*, Vol. 1, pp. 5–7.

[95] See *Journals of the House of Commons* (1830), Vol. 85, Index, 'Criminal Law' and 'Forgery'; and *Journals of the House of Lords* (1830), Vol. 62, 'Petitions', No. 35, pp. 1552–1553.

[96] *Journals of the House of Commons* (1830), Vol. 85, p. 463; for the full text see Appendix 4, pp. 730–731.

[97] It was drafted by Fowell Buxton at the suggestion of John Barry, secretary of the 'Society for the Improvement of Prison Discipline and the Reformation of Juvenile Offenders'; see Buxton, *Memoirs* (ed. by Ch. Buxton, 3rd. ed., 1849), pp. 199–200.

[98] *Journals of the House of Commons* (1830), Vol. 85, p. 416. Mackintosh divides petitions into three classes: those solely concerned with the grievances of the petitioners; those voicing complaints about matters of general public interest; and those founded on a principle apparently contrary to the immediate interests of the petitioners, which deserve the most serious consideration; *Parl. Deb.* (1830), N.S., Vol. 24, cols. 1034–1035.

irrespective of their religious denomination.[99] These three signatories handled annually negotiable securities exceeding sixty million pounds.

In the course of the debate Mackintosh proposed two amendments. The first was rejected by a small majority [1] but the second, proposing to repeal the death penalty for all forgeries except the forgery of wills, was adopted, though again by a small majority.[2] Thus defeated, Peel declared that 'his sentiments remained entirely unchanged' and that the Commons 'would soon have reasons to regret the decision to which they had come'. The amended Bill, henceforth entrusted to Mackintosh, passed the House of Commons.[3]

Some insight into the attitude of Sir Robert Peel and the Duke of Wellington in face of this serious reverse may be gained from the *Political Diary* of Lord Ellenborough.[4] On June 8, 1830, he records [5]:

> 'Cabinet at 3. The diplomatic expenses were carried only by 18, and the abolition of the punishment of death for forgery

[99] *Journals of the House of Commons* (1830), Vol. 85, pp. 422–423; see also *Parl. Deb.* (1830), N.S., Vol. 25, col. 588.

[1] By 134 votes against 118.

[2] By 151 votes against 138.

[3] As an alternative penalty Mackintosh originally proposed imprisonment to be followed by transportation; his proposal was attacked by Peel and others on the ground that its severity would not help to remove the reluctance to prosecute.

The *Quarterly Review* expressed the view that whatever the punishment, there would always be a strong reluctance to initiate proceedings for forgery: '. . . forgery is a crime peculiarly committed *against* the rich, and the offender, therefore, finds sympathy with the poor. All the humbler and many of the middling classes who dread the sheep-stealer, the burglar, and the robber, and who see them hanged without much reluctance, lavish their sympathy on the forger, of whose depredations they are in little terror. On the other hand, forgery being generally committed by persons of education and refinement, weak minds in the numerous classes of this description are apt to indulge in a sentimental and self complacent tenderness for the criminal, which they withhold from the plunderer of ruder character and coarser proceedings. The forger is thus pitied by the poor, who have neither banking accounts nor dividend-warrants; and by the refined and luxurious who sympathise most with the necessities upon a large and artificial scale; who show their liberality by appreciating talent even when abused; and are shocked at the spectacle of one of themselves in the condemned cell of Newgate'; 'Punishment of Death', *Quarterly Review* (March 1832), Vol. 47, pp. 175–176

[4] Lord Ellenborough (Edward Law) was the eldest son of Lord Chief Justice Ellenborough. In the Wellington administration he held the office of Lord Privy Seal. Afterwards he held other high State offices and in 1841 was appointed Governor-General of India; *D. N. B.*, XI, 662. Like his father he was strongly against the reform of criminal law.

[5] Edward Law, Lord Ellenborough, *A Political Diary, 1828–1830* (ed. by Lord Colchester, 1881), Vol. 2, p. 264.

was carried by 18. This is a very serious state of things; with such a Parliament there is no depending upon the carrying of any measure, and Peel is quite disgusted. As to the Forgery Bill it might be difficult to find juries to convict when a majority has decided against the punishment of death. I am satisfied that the property of many will be exposed to much danger by the abolition of the punishment of death.'

Again on June 16, he notes[6]:—

'. . . Peel spoke after dinner with much *ennui* of his position in the House of Commons. He complained that it really was not worth a man's while to be there for so many hours every night. The sacrifice was too great. He said the Radicals had brought the House into such a state that no man could do business but themselves. He seemed not well, and thoroughly out of humour.

'We had some discussion about the Forgery Bill. We are to see the Governor and Deputy-Governor of the Bank, etc. The Duke is much indisposed to acquiesce in the Commons' amendment. Peel thinks that after the vote of the House of Commons no verdicts will be obtained; but may not a contrary vote of the House of Lords turn public opinion into its former course? I think it may.'

In the House of Lords the Bill was severely criticised by Lord Eldon, Lord Lyndhurst and Lord Tenterden and as the result of numerous amendments reverted to the form in which it had been presented by Peel.[7] These amendments were approved by the Commons. But although the new Act —11 Geo. 4 & 1 Will. 4, c. 66 (1830)—upheld capital punishment for forty-two kinds of forgery,[8] after 1830 no offender was put to death in England for this offence.[9]

[6] *Ibid.*, p. 271.

[7] For the text of the Bill as passed by the Commons (incorporating Mackintosh's amendment) see *Parl. Papers* (Public Bills, 1830), Vol. 1, pp. 417–434. For the text of the Bill after it had passed the Lords see *ibid.*, pp. 435–454. On the details of amendments introduced by the Lords see *Journals of the House of Lords* (1830), Vol. 62, pp. 790, 804, 810, 852, 871.

[8] Lord Holland entered a protest on the *Journals of the House of Lords* (1830), Vol. 62, p. 871, which is an effective summary of the main arguments advanced by the reformers in favour of abolishing capital punishment for forgery. The protest was also signed by Lord Durham; the Duke of Richmond associated himself with points 3 and 5.

[9] In the period 1820–1829 sixty-four offenders were executed for forgery out of 733 sentenced to death; 'Summary Statements of the number of persons charged with criminal offences during the last seven years, etc' (1827), 235, *Parl. Papers* (Accounts and Papers, 1826–27), Vol. 19, p. 183; *ditto* 1825–1831, (1832), 375, *Parl. Papers* (Accounts and Papers, 1831–1832), Vol. 33, p. 1; and

	Sentenced to Death.	Executed.
1830	19	—
1831	34	—
1832	27	—

The contrast between law and practice could not have been more striking. For as one Member aptly said during the debate on Peel's Bill in the House of Commons [10]:—

> 'They could not punish forgery with death, and it was vain for them to flatter themselves that they could. They might bring in a paper called a bill; they might read it three times; they might send it up to the Lords, who might agree to it, and read it three times also; it might receive the Royal assent; or might be sent to the King's printer and be placed among the rest of the Statutes—and then they might say that they had made a law which would punish forgery by death. But if they said so, they deceived themselves,—for they would only have added another to the number of those pages in our Statute book which were the scorn of criminals, and the disgust of sober men—mere abortions of laws, which were dead before they were born.'

§ 4. RISING TIDE OF OPINION IN FAVOUR OF FURTHER CHANGES

'. . . The recent Acts passed with the professed intention to amend and improve the Criminal Laws, have not remedied the evil of which an enlightened community have the greatest reason to complain . . .' This sentence from the petition of London Jurors which the Duke of Sussex presented in the House of Lords on September 6, 1831 [11] well reflected the attitude of large sections of the community.[12] Among the signatories of the petition were seven foremen of the seven successive grand juries for the County of Middlesex who had sat at the Old Bailey during 1830, and over 1,100 merchants, all of whom had either served, or were liable to serve, as

ditto 1832 (1832), 282, *ibid.*, p. 133. See also 'A Return of the Number of Persons convicted of Forgery on the Bank of England 1791–1829' (1830), 442, *Parl. Papers* (Accounts and Papers, 1830), Vol. 23, p. 183.

[10] Colin Macauley, *Parl. Deb.* (1830), N.S., Vol. 25, cols. 58–59.

[11] See *Parl. Deb.* (1831), 3rd Ser., Vol. 6, H.L., Sept. 6, 'Petition of the Grand Jurors', cols. 1172–1183. For the text of this petition see below, Appendix 4, pp. 731–732.

[12] The Duke of Sussex took a great interest in penal matters and gave his support to the 'Society for the Diffusion of Information on the Subject of Capital Punishments' founded in 1829 and led by William Allen (chairman); on this Society, see above, pp. 348–350.

jurors. The annual trade returns of only ninety-one of them were estimated at 10,000,000 pounds sterling. The Duke of Sussex rightly held it to be 'one of the most important petitions that have ever been laid before the House'. The petition emphasised that 'where the practice condemns the law, the law ought to be altered' and urged the Legislature to undertake a revision which would draw 'a distinction between the simple invasion of the rights of property, and crimes of violence and blood'.[13]

About a year later Edward Gibbon Wakefield published a tract called *Facts relating to the Punishment of Death in the Metropolis*, which did much to impress upon the public the urgency of this matter.[14] Particularly important is the part in which he records the observations he made at Newgate concerning the effect of capital punishment on prisoners, the attitude of offenders sentenced to death and his observations on the working of the royal prerogative of mercy.[15] Wakefield's pamphlet was widely read and reviewed. In 1832 it was followed by a less passionate but learned and well-documented book by H. W. Woolrych, urging the far-reaching reform of the criminal law,[16] a pamphlet by T. Wrightson, a

[13] This expression is somewhat vague. It is not clear for instance whether the jurors held that arson should or should not be punished by death. The *Law Magazine* assumed that the expression implied that the death penalty should be repealed for arson and took strong objection to it on this ground; (Jan. 1832), Vol. 7, 'Secondary Punishments', p. 1 at p. 5. The periodical thought the death penalty should be abolished for non-violent offences but be retained for all crimes of violence except manslaughter and infanticide; *ibid.*, note 2 at pp. 3–4. A very advanced attitude towards reforms was taken by the *Jurist*; see Vol. 3, 'Facts relating to the Punishment of Death in the Metropolis' (April, 1832), pp. 122–130; 'The Reformation of Criminals' (July, 1832), pp. 188–198; 'On the Punishment of Death' (Feb., 1833), pp. 44–65.

[14] In 1826 Wakefield was sentenced to three years' imprisonment for inducing Ellen Turner, the daughter of a wealthy Cheshire manufacturer, to marry him and go with him to the colonies. For this case see P. Burke, *Celebrated Trials connected with the Upper Classes of Society* (1851), pp. 376–418. He published his tract in 1831, two years after his release from prison; a second edition appeared in 1832. *D. N. B.* aptly describes it as 'a book remarkable alike for its insight and for its extraordinary power of portrayal'. Wakefield also published two other tracts: *The Hangman and the Judge* (1833) and *Swing Unmasked, or the Cause of Rural Incendiarism* (1831). He is best remembered as an outstanding colonial statesman.

[15] His analysis of statistics relating to the incidence of acquittals for capital offences is somewhat overstrained and not fully corroborated by data.

[16] *History and Results of the Present Capital Punishments in England* (1832).

former Member of the House of Commons, based on a careful statistical analysis,[17] and an anonymous publication in which the glaring defects in the administration of the criminal law were again exposed.[18] Mention should also be made of the activities of the 'Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders'. Founded in 1818 under the patronage of the Duke of Gloucester the society owed much to its chairman, Samuel Hoare, and to Fowell Buxton.[19] In its very first report the society laid stress on the defects of criminal law, particularly in respect to young offenders,[20] and urged the revision of capital statutes. Subsequently it initiated a number of inquiries into the origins of juvenile delinquency and the prison systems in England and abroad. In its *Seventh Report* the society praises the reforms of Sir Robert Peel, but adds: 'Great, however, as have recently been the amendments in the criminal law, there remains yet much to be effected to cultivate its spirit and refine its character'.[21] And in its *Eighth Report*, published in 1832, emphasis is again laid on the need for evolving rational methods of dealing with first offenders, instead of relying on the severity of the law.

The two influential London newspapers which most consistently pressed for a further revision of criminal law were the *Morning Chronicle*, and more particularly the *Morning Herald*.[22] A great number of the articles on criminal matters which appeared in the *Morning Herald* were contributed by J. Sydney Taylor, one of the most outspoken critics of Peel's

[17] *On the Punishment of Death* (2nd ed. 1833); a 3rd. ed. was issued in 1837.

[18] *Old Bailey Experience, Criminal Jurisprudence and the Actual Working of our Penal Code of Laws. Also, an Essay on Prison Discipline* (1833); particularly interesting are chapters 2, 4 and 5. The author also suggests the setting up of a Court of Appeal.

[19] See on this above, p. 534.

[20] 'The reluctance to prosecute', states the Report, 'where the punishment is very severe, prevails more when the offender is in childhood, than when of more advanced age; the law draws no distinction, but the humanity of individuals, the fear of inflicting punishment disproportionate to the crime, deters them from recourse to justice, and the consequence is impunity. . . . Impunity to early offenders is productive of infinite injury; crime and punishment should be inseparably connected in their view'; *Report of the Committee of the Society for the Improvement of Prison Discipline* (1818), p. 16.

[21] (1827), p. 6.

[22] A number of articles on the reform of criminal law which appeared in this paper were later published under the title *The Punishment of Death* (1836–1837), 2 Vols. This publication was sponsored by the 'Society for the

reforms. As late as January 30, 1837, he wrote in the *Morning Herald*: 'But Sir R. Peel's improvements were almost entirely confined to the *consolidation* and *arrangement* of certain criminal statutes, and the pruning away of certain technical incumbrances and impediments to justice. Where there was a mitigation of the severity of the law, it was done with that extreme degree of caution from which little practical benefit followed'.[23]

Among the leading periodicals of the period the *Quarterly Review* held that no amendments beyond those introduced by Peel were advisable,[24] but at that time the *Quarterly Review* was losing influence. The *Edinburgh Review*, though criticising Peel for refusing to abolish capital punishment for forgery,[25] expressed the hope that he would extend the scope of his reforms. A few months later the same periodical strongly attacked Peel and asserted that a reform of criminal law, which had become imperative, would be carried through

Diffusion of Information on the Subject of Capital Punishments' as a tribute to the *Morning Herald* which 'materially contributed to promote the recent amelioration of the penal code' and 'in furtherance of the great object of rendering the criminal law more efficient, by obtaining for it the support of reason, and of enlightened public opinion'.

[23] J. Sydney Taylor, born in Dublin, settled down in London in 1816. He was called to the bar in 1822 and joined the Aylesbury Sessions and Norfolk Circuit in 1824. He became a successful barrister, defending in a number of well-known criminal trials of the period; in 1840 he defended Edward Oxford who twice fired at Queen Victoria. He was an advanced liberal. After the passing of the Reform Bill he was offered a seat in Parliament which he declined. He was the editor of the *Morning Herald* for little more than one year (about 1818) but continued to contribute articles to this paper until 1840. A selection from his writings, including a number of extracts from his articles on criminal matters were collected in a book published after his death as a posthumous tribute by a committee of which the Duke of Buckingham and Chandos was the chairman; see *Selections from the Writings of the late J. Sydney Taylor with a brief Sketch of his Life* (1843). He was an active member of the 'Society for the Diffusion of Information on the Subject of Capital Punishments'; see on this above, note 22 at p. 350.

He published two valuable tracts: *Anti-Draco; or Reasons for abolishing the Punishment of Death in Cases of Forgery* (1830), a closely reasoned condemnation of Peel's Forgery Bill; and *A Comparative View of the Punishments Annexed to Crimes in the United States of America and in England* (1831).

[24] 'Punishment of Death', *Quarterly Review* (March, 1832), Vol. 47, pp. 170–216. The periodical acknowledges that 'the alterations thus made (it refers to Peel's amendments) have been little more than an assimilation of the law to the gradual habit of mitigation which had influenced the executive of the law for so many years, and long before the laws themselves were altered'.

[25] According to the *Review*, 'Men's minds are set against it'; 'Reasons for abolishing Capital Punishment for Forgery', *Edinburgh Review* (1830–31), Vol. 52, 398–410, at p. 404.

in spite of his opposition.[26] The views of Bentham and of some of his followers were even more extreme. In a violent pamphlet published in 1830 Bentham called for the abolition of capital punishment for all offences, including murder.[27] The *Westminster Review*, though its attitude was more moderate, also pressed for a revision of law in respect to numerous offences, including some accompanied with violence.[28]

About the same time a number of public manifestations were organised with a view to preventing the execution of death sentences and appeals were made to jurors to disregard their oaths and return verdicts of acquittal even against the strongest evidence.[29]

[26] ' At all events, there is progress enough making to move Sir Robert Peel from the silly pedestal which flattery and imbecility subscribed to raise for him, and which he was weak enough to mount as the great law reformer of his age '; ' Rossi on Criminal Law ', *Edinburgh Review* (Sept., 1831), Vol. 54, pp. 183–238, on p. 185. This article was written by Lord Brougham; see Professor A. Aspinall, *Lord Brougham and the Whig Party* (1939), Appendix A (Brougham's Contributions to the *Edinburgh Review*, 1802–1846), p. 260.

The growing dissatisfaction with the pace of Peel's reform of criminal law is well reflected in a series of articles in the *Morning Chronicle*. On October 3, 1826, the paper warmly praised the Home Secretary for having initiated reforms which ' will secure him a reputation when the little intrigues of Cabinets are forgotten. . . . We do not find fault with the circumspection with which he proceeds . . . on the contrary, we approve of that deliberate mode of proceeding '. Two years later, on January 31, 1828, the same paper wrote that Peel's reforms, while testifying to his good intentions, ' . . . have been of little benefit in any case, and in some have done more harm than good '. On April 9, 1830, the paper expressed the view that the public ' would rejoice to see the punishment of death abolished in all cases, excepting murder, burglaries accompanied with terror, and robberies with personal violence ', and regretted Peel's attitude to the proposed revision of the forgery law.

[27] ' On Death Punishment ', *Works* (Bowring, 1843), Vol. 1, pp. 525–532.

[28] ' Punishment of Death ', *Westminster Review* (July, 1832), Vol. 17, pp. 52–62. The *Westminster Review* was founded by Bentham and was the organ of the Utilitarians.

[29] In a ' Note to the Article on the capital punishment of Forgery ' the *Edinburgh Review* (1830–1831), Vol. 52, pp. 545–546, emphasises that it was not giving its support ' to the mischievous attempts of a most mistaken zeal, or what may be called a perverted humanity, to interfere with the ordinary course of criminal justice in particular cases of capital punishment '. A similar attitude was taken by Lord Brougham both in the already quoted article in the *Edinburgh Review* (1831), Vol. 54, p. 230, where he called this agitation an ' insurrectionary movement ', and in the House of Lords when he spoke during a debate on the presentation of the London Jurors' Petition by the Duke of Sussex; see *Parl. Deb.* (1831), 3rd. Ser., Vol. 6, col. 1177.

These views were, however, attacked by a number of newspapers and periodicals of the period. Thus the *Morning Chronicle* of September 7, 1831, wrote: ' . . . If jurymen had acted on the principle recommended by his Lordship, all we can say is, that blood would still be poured out like water

§ 5. BEYOND PEEL

Abolition of capital punishment for coinage offences

On March 30, 1832, Lord Auckland,[30] President of the Board of Trade and Master of the Mint in Earl Grey's new administration,[31] presented in the House of Lords a Bill 'for consolidating and amending the Laws against Offences relating to the Coin'.[32] The Bill proposed not only the consolidation, but also a drastic reform of the law, for it abolished the death

in this country, for the higher ranks cling to sanguinary punishments so long as juries would convict. But is it so clear that a man who as a juror, is instrumental to the execution of a sanguinary law—or law which outrages all the best feelings of our nature, is in no respect himself guilty? In this case the man who, in obedience to a decree of the inquisition, subjects the victim to horrors at which humanity shudders, is guiltless. In most countries, the laws have been the means for working oppression, and the oppression has been only mitigated by the repugnance of virtuous and humane men, to give effect to them. To this repugnance we are chiefly indebted for the ameliorations which have taken place in society. We suspect they were under a safer guidance than the casuistry of the noble and learned lord'. The *Morning Herald* of Sept. 10, 1831, asked ironically: 'Is it possible that the air of the House of Lords can have so improved the acuteness of his faculties as to enable him to perceive blemishes in that petition of which he was incapable of perceiving some months ago?' The *Courier* of Sept. 7, 1831, wrote: 'After the Reform Bill, no subject can be of such importance—such interest—as the amelioration of a sanguinary and disgraceful Criminal Code'.

In a note on 'Capital Punishments' the *Spectator* (May 28, 1831), Vol. 4, No. 152, pp. 517–518, thus comments on the execution of two men, one of whom had been convicted of sheep-stealing and the other for stealing in a dwelling-house: 'The execution of these two men for crimes unaccompanied by the slightest violence, has very naturally attracted the notice of a large and respectable class of the community, to whom the sanguinary character of our code has long been a subject of regret. It indeed appears singular, on a first view of the subject, that in free England, as it usually is called, the number of crimes punishable with death should be greater than in any other European state—that we who boast so highly of our civilisation should display in our practice greater barbarism than the least enlightened of our neighbours. . . . In England, "law grinds the poor"—and why? The remainder of the line supplies the ready answer—"rich men make the law!" There is the secret of our bloody code—of the perverse ingenuity by which its abominations have so long been defended—of the dogged obstinacy with which all attempts to wash them away has been withstood! "Whoso stealeth a sheep, let him die the death" says the statute: could so monstrous a law have been enacted had our legislators been chosen by the people of England? But our lawmakers hitherto have been our landlords'.

[30] Son of Eden, first Lord Auckland, who had evolved a comprehensive plan of criminal law reform in his book *Principles of Penal Law*: see above, pp. 301–313.

[31] Formed in November, 1830. Viscount Melbourne was Home Secretary and Brougham—Lord Chancellor.

[32] *Journals of the House of Lords* (1831–1832), Vol. 64, p. 137. It appears that this measure was commenced by J. C. Herries who was Master of the Mint in Wellington's government.

penalty for all coinage offences.[33] It passed both Houses of Parliament without opposition or debate.[34] In the period 1820–1830 seventy-three offenders were sentenced to death under the old law, ten of whom were put to death. The last execution for these offences took place in 1829.[35]

Successive revisions of Peel's Acts

The first move to revise one of Peel's Acts [36] was made in 1832. On March 27, William Ewart brought in a Bill to repeal capital punishment (i) for horse-, sheep-, and cattle-stealing, and (ii) for stealing in dwelling-houses to the value of five pounds. The Bill was carried against Peel's opposition and in face of a somewhat hesitant attitude on the part of the Government.[37] The change proposed by it was very material, for out of 9,316 death sentences passed in the period 1825–1831, more

[33] On this branch of the law see Appendix 1, pp. 652–654.

[34] *Journals of the House of Lords* (1831–32), Vol. 64, pp. 149, 152, 158, 201 and 229.

For a lucid survey of this branch of law under the new statute—2 & 3 Will. 4, c. 34, 'An Act for consolidating and amending the Laws against Offences relating to the Coin' (1832)—see H. Roscoe, *Digest relating to Offences against the Coin* (1832).

[35] 'The summary statement of the number of persons charged with criminal offences' (1827), 235, *Parl. Papers* (Accounts and Papers, 1826–1827), Vol. 19, p. 183; 'Statements of the Number of Criminal Offenders Committed for Trial, 1832' (1833), 135, *ibid.* (1833), Vol. 29, p. 1.

[36] 7 & 8 Geo. 4, c. 29, consolidating the law of larceny.

[37] *Parl. Deb.* (1832), 3rd Ser., Vol. 11, H.C., March 27, 'Abolition of Capital Punishment', cols. 948–955; *ibid.*, Vol. 13, H.C., May 30, cols. 195–209. See also 'A Bill for abolishing the Punishment of Death in certain cases and substituting a lesser punishment in lieu thereof' (1832), 347, *Parl. Papers* (Public Bills, 1831–1832), Vol. 2, pp. 749–52. For the debates in the House of Lords see below, note 43 at p. 603.

William Ewart (1798–1869) was educated at Eton and Christ Church, Oxford. He was called to the bar at the Middle Temple in 1827 and entered Parliament in the following year. He was an advanced Liberal and sponsored many enlightened measures such as an annual statement on education to be made by a Minister of the Crown, the examination of candidates for the civil service, the army, and the diplomatic service, the establishment of free public libraries, and the unification of weights and measures. From 1832 he took an active part in the movement for the reform of criminal law. In 1840 he proposed the abolition of capital punishment and in 1864 moved for the appointment of an important committee on this subject. He published two tracts on criminal matters: *Capital Punishment, speech in favour of an inquiry by a select committee into the expediency of maintaining Capital Punishment* (1856), and *Debate in the House of Commons on May 3, 1864, upon Mr. Ewart's Motion for a Select Committee to inquire into the expediency of maintaining the Punishment of Death* (1864).

than one-third (3,178) related to the four offences comprised in the Bill.[38] The number of executions for these offences, although naturally much lower, was yet considerable, amounting to more than 15 per cent. of all executions (70 out of 410).[39]

Peel's views on this subject remained unchanged.[40] During the relatively short debate on Ewart's Bill he intervened three times,[41] asserting that the proposed abolition of the death penalty, particularly for horse-stealing and larceny in dwelling-houses above five pounds, was 'a most dangerous experiment'. He was in principle opposed to any further revision of criminal law, for as he put it, 'as civilisation increased, the facility for the commission of crime increased more rapidly than the faculty for the protection of it'; the

[38] 1,039 for sheep-stealing; 971 for horse-stealing; 174 for cattle-stealing; and 994 for larceny in dwelling-houses; 'Summary Statement of the number of Persons charged with criminal offences, 1825–1831' (1832), 375, *Parl. Papers* (Accounts and Papers, 1831–1832), Vol. 33, p. 1 *et seq.*

The figure relating to larceny in dwelling-houses is somewhat vitiated by the relevant returns only distinguishing between burglary and larceny in dwelling-houses. Thus it is not clear whether the data relating to breaking and entering any dwelling-house and stealing therein any property and those relating to stealing to any value in a dwelling-house any person therein being put to fear, were included under the heading of burglary or under that of larceny in dwelling-houses above the value of five pounds; it is also possible that they were split between the two.

[39] In cases when the death penalty was not inflicted the punishment was still very rigorous, particularly for horse- and sheep-stealing. Out of 125 sentenced to death for horse-stealing in 1831, 80 were transported for life and 14 for fourteen years; out of 162 sentenced to death for sheep-stealing, 98 were transported for life and 20 for fourteen years; 'A Return of the Number of Persons convicted of the Crime of Sheep-Stealing, and of Horse-Stealing during the Years 1826, 1827, 1828, 1829, 1830, and 1831' (1832), 134, *Parl. Papers* (Accounts and Papers, 1831–1832), Vol. 33, p. 579.

The punishment for these offences varied greatly according to the presiding judge, a point made during the debate by John Campbell (afterwards Lord Campbell, the Lord Chancellor), who quoted as an instance Justice Heath, known for almost invariably punishing horse-stealing by death; *Parl. Deb.* (1832), 3rd Ser., Vol. 13, col. 203. An interesting insight into the extent to which the punishment for horse-, sheep-, and cattle-stealing depended on particular judges is provided by the following two returns: 'England and Wales. A Return of the Names of the Persons convicted in the Years 1823, 1824, and 1825, of Stealing Horses and before whom, and in which Circuit or Sessions, and whoever left for Execution, or Reprieved, and a Statement of the manner in which the Persons reprieved have been disposed of' (1826), 111, *Parl. Papers* (Accounts and Papers, 1826), Vol. 24, p. 515; and *ditto* relating to sheep-stealing (1826), 112, *ibid.*, p. 525.

[40] 7 & 8 Geo. 4, c. 29, retained capital punishment for all these offences; see above, p. 580.

[41] *Parl. Deb.* (1832), 3rd Ser., Vol. 11, cols. 952–953; *ibid.*, Vol. 13, cols. 195–197 and 198–200.

Legislature ought therefore most seriously to consider whether the repeal of capital punishment for further offences would not weaken 'the present protection of property'.

At first the Government seemed to follow Peel but later gave its support to the Bill, which passed the House of Commons. The penalties for the four offences were to be either transportation for life or for not less than seven years, or imprisonment not exceeding four years with or without hard labour and solitary confinement, at the discretion of the court. In the House of Lords the Bill met with strong opposition from Lord Tenterden, then Lord Chief Justice, and from Lord Wynford [42] and might have been lost.[43] But its sponsors [44] retrieved the position by agreeing to an amendment strongly pressed for by Lord Wynford, by which the death penalty was replaced by one punishment only—transportation for life.[45] In this form the Bill became law,[46] but the illogical amendment, depriving the courts of their discretionary power, soon

[42] William Draper Best became Chief Justice of the Common Pleas in 1824. He retired from the bench in 1829, was at the same time raised to the peerage as Baron Wynford and appointed a deputy speaker of the House of Lords.

[43] *Parl. Deb.* (1832), 3rd Ser., Vol. 13, H.L., 'Punishment of Death', cols. 982–1000 at cols. 985–987; and *ibid.*, Vol. 14, cols. 167–169.

[44] A particularly effective speech was made by Lord Suffield (Edward Harbord, third Baron Suffield), who also presented a number of petitions in favour of criminal law reform; *Journals of the House of Lords* (1831–1832), Vol. 64, pp. 322–323. He was instrumental in bringing about a relaxation of the Game Laws and the abolition of spring-guns. Greatly interested in penal matters, he was the author of an interesting tract, *Remarks respecting the Norfolk County Gaol, with some General Observations on Prison Discipline* (1822). Much information on Lord Suffield's work in support of penal reform is to be found in R. M. Bacon's *A Memoir of the Life of Edward, Third Baron Suffield* (privately printed, 1838).

[45] See 'Punishment of Death Abolition Bill, Amendments made by the Lords', *Parl. Papers* (Public Bills, 1831–1832), Vol. 2, pp. 753–755; see also *Journals of the House of Lords* (1831–1832), Vol. 64, pp. 323, 338–339, 341, 360, 365–366, 367, 370. The House of Lords gave the following reasons for its decision: "Because they deem it fit and proper that when the law is altered by taking away the punishment of Death for the Offences mentioned in the said Bill, the Punishment of Transportation for Life should be substituted by Law, and that if in any particular Case a further Remission of Punishment should appear to be proper, such Remission should emanate from the Clemency of the Crown, instead of being left to the Discretion of the Judge who happens to try the Offender'. On the suggestion of Lord Wynford a clause had also been inserted in the Bill making the conditions of transportation for these offenders more stringent. On Lord Wynford's views on transportation for life see above, note 38 at pp. 578–579.

[46] 2 & 3 Will. 4, c. 62 (1832), 'An Act for abolishing the Punishment of Death in certain Cases, and substituting a lesser Punishment in lieu thereof'.

gave rise to strong objections on the part of the judges and the new Act was later redrafted accordingly.[47]

The second of Peel's Acts to be repealed barely two years after it had been enacted was 11 Geo. 4 & 1 Will 4, c. 66, consolidating the law of forgery.[48] The relevant Bill, abolishing capital punishment for all kinds of forgery was brought in by Sir Thomas Denman, then Attorney-General.[49] The debate on this occasion was attended by only forty Members and evoked but little interest. Even Sir Edward Sugden [50] who led the opposition against the Bill acknowledged that ' the feelings of public mind ' were decidedly against the punishment of death.[51] In the House of Lords, Lord Wynford intimated that he would not object to the principle of the Bill ' being of opinion, that the experiment ought, in the present state of public feelings, at least to be tried, to ascertain whether the crime of forgery could be adequately checked by any punishment short of death '.[52] But at his suggestion the House of Lords reintroduced capital punishment for two kinds of forgery, namely forgery of powers of attorney for the transfer of government stock or the receipt of dividends therein and forgery of wills. By another amendment the only penalty to take the place of capital punishment was again to be

[47] Below, note 60 at p. 606.

[48] See on this Act, above, pp. 590–595.

[49] See *Parl. Deb.* (1832), 3rd Ser., Vol. 14, cols. 969–983. See also Sir Joseph Arnould, *Memoirs of Thomas, First Lord Denman* (1873), Vol. 1, p. 381.

[50] Sir Edward Burtenshaw Sugden (afterwards Lord St. Leonards) was Solicitor-General in 1829. He was twice Lord Chancellor of Ireland in Peel's first and second administrations; in 1834 for a few months only and from 1841 to 1846. In 1852 he became Lord Chancellor of England. His *bon mot* about Brougham is often quoted: ' If ', he said, ' the lord chancellor only knew a little law, he would know a little of everything '.

[51] *Parl. Deb.* (1832), 3rd Ser., Vol. 14, cols. 984 and 985. During the debate Dr. Johnson's authority was quoted by both sides. Denman and one of his supporters referred to Johnson's article in the *Rambler*, while one of his opponents, Sir Charles Wetherell, quoted a letter which Johnson had written to the Prime Minister in connection with the case of Dr. Dodd which he interpreted in the sense that Johnson was in favour of commuting Dodd's sentence mainly because his execution would have been a disgrace for the clergy. For Johnson's article and his intervention in favour of Dodd see above, pp. 336–338, and 456–472.

The *Times* in a leader of August 1, 1832, states that ' the experiment of a milder punishment has been so long demanded by a numerous and respectable class of persons, that the Government could hardly refuse to accede to the appeal '.

[52] *Parl. Deb.* (1832), 3rd Ser., Vol. 14, col. 1133. For the debate in the House of Lords, see *ibid.*, cols. 1133–1135, 1302–1303, 1345–1354, and 1358–1361.

transportation for life.[53] The House of Commons having reluctantly agreed to these amendments,[54] the Bill went through.[55]

The third revision of Peel's Acts was brought about in 1833. It affected section 12 of 7 & 8 Geo. 4, c. 29, which imposed capital punishment for larceny in dwelling-houses to the value of five pounds, house-breaking attended by larceny to any value, and larceny in dwelling-houses to any value, any person therein being put in fear. It has been mentioned that capital punishment for the first of these offences had been repealed in 1832. Now it was proposed to abolish it for the remaining two. The Bill to that effect was brought in by Lennard,[56] but the clause relating to larceny in dwelling-houses anyone therein being put in fear met with strong opposition [57] and had to be withdrawn. Thus amended the Bill passed both Houses, though not without opposition on the part of both the Duke of Wellington and Lord Wynford. This change in the law was very material, for of 9,727 offenders sentenced to death in the period 1826–1832, 2,914 were so sentenced for breaking into a dwelling-house with larceny.[58] By the new Act—3 & 4 Will. 4, c. 44—this offence was to be punished by transportation for not less than seven years to which imprisonment for from one to four years could be added. The Act also repealed the capital punishment appointed under 7 & 8 Geo. 4, c. 29, for accessories before the fact and principals in the second degree to all capital offences against property.[59] Henceforth they were liable to be transported for not less than seven years and

[53] *Journals of the House of Lords* (1831–32), Vol. 64, p. 458.

[54] *Parl. Deb.* (1832), Vol. 14, cols. 1393–1399. It would appear from a statement by Viscount Althorp, then Chancellor of the Exchequer, that the governors of the Bank of England favoured the retention of capital punishment for forgeries of powers of attorney; *ibid.*, cols. 1394 and 1395.

[55] 2 & 3 Will. 4, c. 123, 'An Act for Abolishing the Punishment of Death in certain cases of Forgery' (1832).

[56] On April 16, 1833; *Parl. Deb.* (1833), 3rd Ser., Vol. 17, H.C., 'Stealing in Dwelling Houses', cols. 156–178; *ibid.*, Vol. 18, cols. 613–622; *ibid.*, Vol. 19, H.L., cols. 1039–1041; *ibid.*, Vol. 20, cols. 277–283.

[57] On the ground that this offence was attended with violence.

[58] 'Statements of the Number of Criminal Offenders Committed for Trial' (1833), 135, *Parl. Papers* (Accounts and Papers, 1833), Vol. 29, p. 1. Figures relating to larceny in dwelling-houses, anyone therein being put in fear were in these returns included either under 'breaking into dwelling houses attended by larceny', or most probably under 'larceny in the dwelling house'.

[59] For the abolition of capital punishment in respect of accessories after the fact, see above, p. 580.

in addition could also be imprisoned for from one to four years.[60]

Thus one by one Peel's Acts were revised; as William Ewart said with much truth: 'The criminal law was, no doubt, admirably consolidated . . . , but it was an outline not well drawn, although exceedingly well filled up. What was the consequence? The whole of the edifice, erected with so much care and trouble, was tumbling to pieces, . . . and in three or four years it would become its own dilapidated monument'.[61] Nor could it be otherwise. When in 1826 Peel proclaimed his resolve to 'break the sleep of the centuries' he raised high hopes. A great number of obsolete and emergency statutes were expunged and the substance of some three hundred others relating to four-fifths of all offences was consolidated into four broad measures. But on the crucial issue of the severity of criminal law, and particularly the restriction of the death penalty, Peel was much behind the predominant opinion of the day. He abolished capital punishment for some minor offences against property unattended with violence,

[60] As already mentioned (above, pp. 603 and 604–605), on the suggestion of Lord Wynford transportation for life was the only punishment appointed by 2 & 3 Will. 4, c. 62 (horse-, cattle-, and sheep-stealing and larceny in dwelling-houses) and 2 & 3 Will. 4, c. 123 (forgery). As a Member of the House observed, the Legislature 'rushed from almost unlimited discretion to no discretion at all'; he quoted a case of a boy of ten who together with his father and on his order had stolen a sheep and who together with his father was sentenced to transportation for life; *Parl. Deb.* (1833), 3rd Ser., Vol. 17, cols. 177–178.

In the House of Lords, Lord Lyndhurst asked Viscount Melbourne, then Home Secretary, to put at the disposal of the House a return giving the number of convictions to transportation for life ordered under 2 & 3 Will. 4, c. 123; *ibid.*, Vol. 17, col. 319. He quoted a number of cases in which he was forced by that statute to inflict the same punishment for greatly differing offences. When some time later the Duke of Sussex presented to the House of Lords a petition in favour of 'a thorough and efficient Reform of the criminal law', Lord Lyndhurst informed the House that from the return he had asked for it appeared that only ten out of three hundred offenders convicted under 2 & 3 Will. 4, c. 123, to transportation for life had had their sentences commuted by the Home Office; he called it 'an anomaly in the law which ought not to be suffered'; *ibid.*, col. 1014.

Dissatisfaction with this rigid and unjust system became so strong that when Lennard's Bill reached the House of Lords a clause was inserted into it, repealing the relevant provisions of 2 & 3 Will. 4, c. 62, and 2 & 3 Will 4, c. 123, and appointing for these offences the same, much more elastic, system of punishment that was provided for breaking and stealing in a dwelling-house. *Journals of the House of Lords* (1833), Vol. 65, pp. 548 and 549, and s. 3 of 3 & 4 Will. 4, c. 44.

[61] *Parl. Deb.* (1833), 3rd Ser., Vol. 17, col. 171.

while in the words of Lord St. Leonards, ' the Legislature and the country were travelling fast towards the abolition of all capital punishments '. The principle that no offence against property should be punished by death now held the field, and indeed in the course of a few ensuing years it was extended to a large group of such offences.[62]

The rapidity with which the surge of new ideas demolished Peel's legislation was remarkable enough, but what does emerge as a major feature in the history of criminal jurisprudence is the abandonment of the idea that crime could only be kept in check by the threat of death even though capital punishment should in practice rarely be inflicted. Thus the greatest obstacle to the reform of criminal law was removed and the way was now clear for the creation of a penal system better adapted to the needs of the time.

[62] See below, Appendix 5, pp. 733–734.

APPENDICES

APPENDICES

APPENDIX 1

CAPITAL STATUTES OF THE EIGHTEENTH CENTURY

I

§ 1. HIGH TREASON

Offences against the safety of the State may be roughly divided into two classes: high treasons and other capital offences against the safety of the State. High treasons may further be sub-divided into three sections: (1) offences under 25 Edw. 3, st. 5, c. 2, and 36 Geo. 3, c. 7; (2) offences against the protestant succession; (3) offences against the protestant establishment.

Offences under 25 Edw. 3, st. 5, c. 2, and 36 Geo. 3, c. 7

High treason, writes Blackstone, is 'the highest civil crime, which (considered as a member of the community) any man can possibly commit . . . ,' a crime which 'ought therefore to be the most precisely ascertained'. None the less, which offences ought to be included in this class long remained an unresolved question. According to Blackstone, 'there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences in the crime and punishment of treason which never were suspected to be such'.[1]

This uncertainty was partly eliminated by the enactment of 25 Edw. 3, st. 5, c. 2 (1350). Thenceforth the law of treason embraced the following crimes[2]: to compass or imagine the death of the king, queen, or that of their eldest son and heir; to violate the king's consort, or the king's eldest unmarried daughter, or the wife of the king's eldest son and heir; to levy war against the king in his realm, to adhere to the king's enemies in his realm, giving aid and comfort to them in the realm, or elsewhere; to counterfeit the king's great or privy seal, or his money; to bring into the realm

[1] 4 Comm. 75. See also Reeves, *History of the English Law* (3rd ed., 1814), Vol. 2, pp. 450–451, and Vol. 3, pp. 116–117.

[2] 'Whatever may have been the reasons which led to the passing of the Statute of Treason, the statute has proved not only the foundation, but the principal part of the law of high treason since 1352, and its interpretation and application to particular cases have been associated with some of the most stirring periods in our history'; Stephen, *H. C. L.*, Vol. 2, p. 248. According to East, 25 Edw. 3, st. 5, c. 2, is the principal Act relating to this matter. It set 'the standard of high treason' because 'it reduced and settled all treasons which were before very indefinite, and often stretched by arbitrary constructions, to certain specific heads therein declared'; 1 P.C. 55, § 6.

false money counterfeit to the money of England, such as the money called *Lushburgh,* or other, like the money of England, knowing it to be false; to trade, or make payment in deceit of the king and his people; to kill the chancellor, treasurer, or the king's justices of the one bench or the other, justices of assize, or any other justices assigned to hear and determine, being in their places, doing their offices.[3] The statute thus speaks of seven kinds of high treason, but since its provisions were widely framed, the number of acts which could be held to amount to high treason was actually much greater.[4]

Though 25 Edw. 3, st. 5, c. 2 was welcomed as 'a new *Magna Charta,* and a new pillar in our free constitution',[5] the law of treason remained fluid and uncertain for a long time after its enactment. Many irrational offshoots which had again engrafted themselves[6] were eliminated by 1 Hen. 4, c. 10,[7] but in the course of the ensuing years, between 1399 and 1547—and more particularly during the reign of Henry VIII—the framework of the law of treason again became disjointed.[8] The erratic and arbitrary developments were swept aside by 1 Edw. 6, c. 12, and 1 Mar. Sess. 1, c. 1, which again brought the law of treason within the compass of 25 Edw. 3, st. 5, c. 2.[9] None the less it would be wrong to assume that by the end of the eighteenth century the law of treason was strictly circumscribed by that statute.[10] To the seven offences specified by the statute of Edward, many others were added

[3] By 5 Eliz. c. 18, and 1 W. & M. c. 21, this provision of 25 Edw. 3, st. 5, c. 2, was extended to the Lord Keeper and Lord Commissioners of the Great Seal.

[4] It should also be noted that this list does not comprise any of the offences specified in the annual Acts for punishing mutiny and desertion.

[5] Reeves, *History of the English Law* (3rd ed., 1814), Vol. 2, p. 453.

[6] Thus the killing of an ambassador, for instance, was declared to be high treason; see also 21 Ric. 2, c. 3, by which the intent to kill or depose the King, without any overt act to demonstrate it, was made high treason.

[7] It is interesting to note that this statute recited 'that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason; and therefore it was accorded, that in no time to come any treason be judged otherwise than was ordained by the statute of King Edward the Third'.

[8] Referring to what he calls 'the bloody reign of Henry the Eighth' Blackstone notes that in the course of it 'the spirit of inventing new and strange treasons was revived' and enumerates some twenty-three widely differing newly made offences; 4 Comm. 86-87.

[9] The preamble to 1 Mar. Sess. 1, c. 1, is significant in that it reveals the spirit of these changes. It recited 'that the State of every King . . . consisteth more assured by the Love and Favour of the Subjects toward their Sovereign . . . than in Dread and Fear of Laws made with rigorous Pains; . . . Laws made for the Preservation of the Commonweal, without extreme Punishment or great Penalty, are more often for the most part obeyed and kept, than Laws and Statutes made with great and extreme Punishments, and in special, such Laws . . . , so made, whereby not only the ignorant and rude unlearned People, but also learned and expert People, minding Honesty, are often . . . trapped and snared, yea, many Times for Words only, without other Fact or Deed done or perpetrated'. Section 2 of the Act then recited: 'The Queen . . . calling to Remembrance that many, as well honourable and noble Persons, as other of good Reputation . . . have of late (for Words only, without other Opinion, Fact or Deed) suffered shameful Death . . . is contented . . . that the Severity of such like extreme, dangerous and painful Laws, shall be abolished, . . .'.

[10] This survey relates exclusively to England but it may be noted that the act of union with Scotland made what was high treason or suspicion of treason in England also high treason or suspicion in Scotland; see 7 Anne, c. 21. In respect to Ireland, which had the same general rules as Great Britain, the eighth article of the union stipulated that all laws in force at the time of the union in either of the two countries shall remain in force, unless afterwards repealed.

by broadening constructions put mainly on the provisions relating to the offences of levying war and of compassing the King's death.[11]

All these developments and ramifications were incorporated in 36 Geo. 3, c. 7, a broadly framed Act passed in 1795[12] and entitled 'An Act for the safety and preservation of His Majesty's Person and Government against treasonable and seditious Practices and Attempts'. The main provision of this Act was that:

> 'If any Person or Persons . . . during the natural Life of our most Gracious Sovereign Lord the King . . . and until the End of the next Session of Parliament after a Demize of the Crown, shall, within the Realm or without, compass, imagine, invent, devise, or intend Death or Destruction, or any bodily Harm tending to Death or Destruction, Maim or Wounding, Imprisonment or Restraint, of the Person of the same our Sovereign Lord the King, his Heirs and Successors, or to deprive or depose him or them from the Style, Honour, or Kingly Name of the Imperial Crown of this Realm, or of any other of his Majesty's Dominions or Countries; or to levy War against his Majesty, his Heir and Successors within this Realm, in order, by Force or Constraint, to compel him or them to change his or their Measures or Counsels, or in order to put any Force or Constraint upon, or to intimidate, or overawe, both Houses, or either House of Parliament; or to move or stir any Foreigner or Stranger with Force to invade this Realm, or any other his Majesty's Dominions or Countries, under the Obeisance of his Majesty, his Heirs and Successors; and such Compassings, Imaginations, Inventions, Devices, or Intentions, or any of them, shall express, utter, or declare by publishing any Printing or Writing, or by any overt Act or Deed; being legally convicted thereof, upon the Oaths of two lawful and credible Witnesses, upon Trial, or otherwise convicted or attainted by due Course of Law, then every such Person or Persons, so as aforesaid offending, shall be deemed, declared, and adjudged to be a Traitor and Traitors, and shall suffer Pains of Death, and also lose and forfeit as in cases of High Treason.'[13]

In addition to these two major statutes governing the law of treason, mention should also be made of 2 & 3 Anne, c. 20, s. 34, and of 33 Geo. 3, c. 27 (1793). The statute of Anne provided that if any officer or soldier out of England or upon the sea, were to correspond with any rebel or enemy, or give them advice or intelligence, by letters, messages, signs, or otherwise, or to treat or enter into any correspondence with them without authority so to

[11] By 1 & 2 Ph. & M. c. 10, s. 8, misprision of treason (to conceal or keep secret any treason) was punished by loss of the profits of lands during life, forfeiture of goods and life imprisonment; Hale 1 P.C. 374; Blackstone 4 Comm. 120.

[12] In the case of *Watson* (1817), Lord Ellenborough stated that this Act 'may be said not so much introduce any new treasons as declare to be substantive treasons those acts which had been, by successive constructions of the statute of Edward, determined to be the strongest and most pregnant overt acts of the several treasons specified in that statute'; 32 St. Tr. 1, 579. Similarly, Abbott, C.J. (afterwards Lord Tenterden), stated in *R.* v. *Thistlewood* (1820), that 'by this Statute, the compassing or intending to commit these acts that is, to depose his majesty, to restrain his person, or to levy war against him . . . is made substantive treason, and thereby the law is rendered more clear and plain'; 33 St. Tr. 681, 684.

[13] S. 2 of 23 Eliz. c. 1, concerning the Protestant establishment, enacted that 'all Persons whatsoever, which have or shall have, or shall pretend to have Power, or shall by any Ways or Means put in Practice to absolve, perswade, or withdraw any . . . Subject . . . from natural obediance to her Majesty . . .' shall 'suffer and forfeit as in Case of High Treason'; . . . and so shall the 'Procurers and Counsellors thereunto'; on this statute, see below, p. 616.

do he should be guilty of high treason.[14] The statute of George 3 was an emergency measure. It enacted that it would be high treason to sell, supply or deliver to or for the use of the French Convention, or the armies in their employ during the war, any arms, ammunitions, naval or military stores, bank-notes or bullion, or any provisions without a licence from the Privy Council, as it would be to buy or to contract or agree to buy any land, tenement, or other real property situated in France or being within its dominions in Europe, or to land or advance any money or bills thereon. Also, that persons causing or procuring such loans or aiding and assisting in any of the offences specified by this Act would be deemed guilty of high treason.

Offences against the protestant succession

Four main capital statutes dealt with these offences[15]: (a) 1 Anne, st. 2, c. 17, s. 3 (1701), which declared that any person who endeavoured to deprive or hinder any person who was next in succession to the Crown according to the Act of Settlement from succeeding to the Crown, and who maliciously, advisedly and directly attempted to do so by any overt act or deed, as well as abettors, procurers and comforters of any such person, should be guilty of high treason. (b) 6 Anne, c. 7, s. 1 (1707), which further extended the Act of 1701 by declaring that if any person should maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person had any right or title to the Crown otherwise than according to the Act of Settlement, or that the Kings of this realm, with the authority of Parliament, were not able to make laws and statutes to bind the Crown and the descent thereof—such person should also be guilty of high treason.[16] (c) 13 & 14 Will. 3, c. 3 (1700), by which it was high treason to hold any correspondence in person, by letters, messages or otherwise with the pretender or with any persons employed by him, or to remit for the use of the pretender any sums of money. (d) 17 Geo. 2, c. 39 (1744), which extended this statute to the eldest or any other son or sons of the pretender, or to any or either of them.[17]

Offences against the protestant establishment

The relevant statutes were enacted for political rather than religious reasons. 'The reason', writes Blackstone, 'of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious account'.[18] This is clearly stated in Queen Elizabeth's well-known proclamation that 'these seedsmen of treason bring bulls from the pope, full of promises and threats: but these proceedings have been punished and restrained by the execution of the laws against such traitors . . . they have been punished for mere treason; and not for any

[14] By the annual Acts on mutiny and desertion offenders found guilty of these offences were to suffer death or such other punishment as the court martial should impose. It was open to doubt whether 2 & 3 Anne, c. 20, had not been abrogated; Hawkins 1 P.C. 113, s. 111.

[15] All these statutes were directly connected with the Bill of Rights—1 W. & M. sess. 2, c. 2 (1689), and the Act of Settlement—12 & 13 Will. 3, c. 2.

[16] Under this statute a printer named John Matthews was executed in 1719 for printing and publishing a pamphlet entitled *Ex ore tuo te judico, Vox Populi Vox Dei;* 15 St. Tr. 1323.

[17] This statute provided further that any of the Pretender's sons attempting to land in Great Britain, Ireland, or in any of the Dominions belonging to Great Britain should be guilty of high treason.

[18] 4 Comm. 87.

points of religion'.[19] M. D. Petre rightly distinguishes between two forms of religious persecution. First, 'there is the persecution which directly attacks the conscience and spiritual liberty and autonomy of those concerned, which attempts to violate the privacy of the soul and to penetrate to the *forum internum*. This is the form of persecution which refuses a man the exercise of his religion, such exercise being, in his mind, of moral obligation and spiritual necessity, and which furthermore, demands of him declarations in regard to doctrine, or conformity in regard to worship, which are directly opposed to his belief and contrary to his religious profession'. The second form consists 'in depriving people, who profess certain doctrines, of rights and privileges which are accorded to their fellow citizens'; it differs from the first in that 'the prosecuted do, in such case, at least retain their own spiritual rights and liberty, and they can follow the dictates of conscience, though paying for the privilege by the renunciation of worldly rights'.[20] By English laws catholics were subjected to both forms of persecution. These laws were both numerous and elaborate,[21] and provided penalties ranging from fines and imprisonment to banishment and death.[22] They related to a great many offences of varying gravity, the most dangerous of which were declared high treason.

Thus 1 Eliz. c. 1, s. 30 (1558) enacted that all persons who (having been twice previously convicted of a like offence) should by writing or teaching maintain the spiritual authority or jurisdiction of any foreign prince or prelate, or advisedly execute anything for the advancement or maintenance of such pretended authority or jurisdiction, as well as abettors, aiders, procurers or counsellors to such acts, should be guilty of high treason. This Act was partially superseded by 5 Eliz. c. 1, ss. 2, 10, 11 (1562). The preamble to this statute refers to the dangers of the 'Power of the See of *Rome*, unjustly claimed and usurped within this Realm . . . and now requiring more sharp Restraint and Correction of Laws'; the Act then declares that persons convicted more than once of defending, by writing or teaching, the authority or jurisdiction of the Bishop of Rome within the realm of England or its dependencies, should be guilty of high treason. This statute too

[19] Ch. Butler, *Historical Memoirs of the English, Irish and Scottish Catholics, etc.* (3rd ed., 1822), Vol. 2, pp. 26–27. This concept was, however, contested by the catholics; see, for instance, Cardinal Allen's observations, *ibid.*, pp. 45–46.

[20] M. D. Petre, *The Ninth Lord Petre or Pioneers of Roman Catholic Emancipation* (1928), pp. 86–87.

[21] A lucid though incomplete survey of these provisions is given by Petre, *ibid.*, pp. 87–91; for an exhaustive survey see Hawkins, 1 P.C. 47–63 and 107–110.

[22] It should be noted, however, that these statutes were hardly ever enforced; as Petre puts it, 'the country, at large, was better than its laws, and Catholics did many things which could have been turned against them by those who chose'; and she acknowledges 'the spirit of fair play and toleration which is so characteristic of the English temperament'; *The ninth Lord Petre* (1928), pp. 91 and 88. These laws were made inoperative not only because prosecutions were very rarely initiated under them but also because many of the penalties provided by them—even the most serious ones—could be avoided by making a declaration on oath prescribed by Parliament. For the period now under investigation see, for instance, the declaration embodied in 31 Geo. 3, c. 32. It is significant that in Appendix No. 6, p. 119, to their 'Second Report on Criminal Law' (1836), 343 *Parl. Papers* (Reports, 1836), Vol. 36, p. 183, the Commissioners did not include in their list of high treasons the Acts dealing with the offences against the protestant establishment; these Acts, they explained, 'though strictly speaking in force, being in effect obsolete, it has not been thought necessary to include in this list'.

extended to abettors, procurers, aiders and counsellors.[23] By 13 Eliz. c. 2, ss. 2 and 3 (1570), it was high treason to obtain use, or put in use, or publish within the Queen's dominions any bull of absolution or reconciliation from the Bishop of Rome, or to pretend or promise to reconcile or absolve any person, or to receive such absolution or reconciliation.[24] 23 Eliz. c. 1 (1581), after reciting that since the passing of the Act of 1570, 'divers evil-affected Persons have practised, . . . by other Means than by Bulls, or Instruments written or printed, to withdraw divers . . . Subjects from their natural Obedience to her Majesty, to obey the said usurped Authority of Rome', stipulated in section 2 that persons who practised any pretended authority to withdraw others from their natural obedience to the Queen, or who for that purpose withdrew them from the established religion to the Romish religion, or who moved them to promise obedience to the See of Rome, as also the persons so withdrawn or those who so promised—were all guilty of high treason.[25]

In 1585 yet another statute was passed (27 Eliz. c. 2, s. 4) with the express purpose of preventing the establishment of jesuistic seminaries whose adepts came to England from abroad and propagated the doctrines of the Roman Catholic church. This statute enacted in section 3 that any ecclesiastic, born in the Queen's dominions and ordained or professed by Popish authority, who should remain in England or in any of the Queen's dominions after the expiration of forty days, except in the special cases mentioned in the Act—should be guilty of high treason. Section 5 of the same Act provided that any subject brought up in a jesuistic college or seminary who was not an ecclesiastic and who failed to return to England from such a seminary within six months after the proclamation, and then failed to submit himself to the laws of the country and take the oaths within two days after his return, would be guilty of the same crime.[26] Furthermore, section 4 provided that whoever wittingly and willingly received, relieved, comforted, aided or maintained any jesuit, seminary or other popish priest who was at liberty or out of hold, knowing

[23] A broad interpretation of this provision included the following within the Act: (a) any one who knowing the effect of a book written beyond the sea, brings it over and secretly sells it; (b) who, by report hearing the contents of such a book, commends it to a friend with intent to pervert him; (d) who having read the book, afterwards in discussion considers it to be good; 3 Dyer 281b–282a, §§ 22, 23, 24, and 25. By this Act only the second offence was high treason, but in one case at least a very broad construction was put on this provision. It was held that if a person convicted and condemned for an offence under the statute in question is afterwards asked by the judge whether he is still of the same opinion and answers in the affirmative, such person, having advisedly maintained the Pope's power for a second time, is guilty of high treason; Sav. 46, c. 99. Two judges dissented.

[24] It seems that this Act was superseded by 3 Jac. 1, c. 4, below, p. 617.

[25] It was held that the bare pretending to such a power, without any further endeavour to persuade persons from their allegiance, or the endeavour so to persuade without pretending to such power was within the Act; *Campion's Case* (1580), Sav. 3; East 1 P.C. 91, § 33. But it should also be noted that by 3 Jac. 1, c. 4, these provisions did not extend to any person 'reconciled to the Pope or See of Rome (who) . . . shall return into this Realm, and thereupon within six Days next after such Return . . . submit himself to his Majesty and his Laws, and take the Oath'.

[26] In *R.* v. *Ocullean* (1680), Raym. 377, it was determined that a person in Popish orders who was apprehended after his ship, which had set sail for Ireland, had been driven by a storm to England, was not guilty of high treason within this statute, for his intention of going to Ireland was prevented, *nil efficit conatus, nisi sortitur effectu* and he was forced into England by the act of God, and against his will.

him to be such a person, should be deprived of benefit of clergy and punished by death. 35 Eliz. c. 1, s. 3 (1593), and 35 Eliz. c. 2, s. 10 (1593) imposed the same penalty on Popish recusants who refused to abjure or depart within the stipulated time, or who returned without a licence.

Mention should also be made of 3 Jac. 1, c. 4, ss. 22, 23 (1605). This statute re-enacted 23 Eliz. c. 1, s. 2, by declaring it high treason to put in practice, absolve or withdraw any of the King's subjects from their natural obedience and reconcile them to the See of Rome, or to move them to promise obedience to the See of Rome, or to any other prince or State (s. 22); and also to be willingly so absolved, or reconciled, or to promise such obedience (s. 23).[27] The statute covered all those who knowingly procured, counselled, aided or maintained any person committing any of these offences. According to the preamble, this Act was passed following the discovery of a Roman Catholic plot against the Protestant Establishment.

Even at the time of their enactment, many of these statutes were considered by enlightened contemporary Protestants to be too severe.[28] They arose from emergencies peculiar to the period but although they continued to form a part of the criminal law, extensive relief was given to Roman Catholics by several statutes, particularly by 31 Geo. 3, c. 32, s. 4 (1791).[29] As the Commissioners remark in their *Sixth Report on Criminal Law* 'the general policy of the Legislature appears to have been, on the one hand, to accept the conscientious obligation incurred by Roman Catholics on taking the oaths as a sufficient security for the State; and, on the other hand, to insist that the ancient penal statute shall remain in force, as constituting a kind of compulsion to take the oaths—so that, at all events, the State should be provided with the security either of the oaths, or of the penal laws'.[30]

§ 2. OTHER OFFENCES AGAINST THE STATE

In this group have been included all the numerous capital offences against the safety of the State which did not amount to high treason. Thus desertion from the King's armies, whether by land or sea, was made a felony—in certain cases without benefit of clergy—by several statutes, particularly 18 Hen. 6, c. 19; 7 Hen. 7, c. 1; 3 Hen. 8, c. 5; and 5 Eliz. c. 5. In addition, 2 & 3 Edw. 6, c. 2, later renewed by 4 & 5 Ph. & M. c. 3 (1557), deprived deserters in time of war of benefit of clergy, a punishment which 9 Geo. 2, c. 30 (1736) extended to any subject of Great Britain who 'shall enlist or enter himself, or . . . shall procure any Subject . . . to enlist or enter himself, or hire or retain any Person being a Subject . . . with an intend to cause such Person to enlist or enter himself, or procure any . . . Subject . . . to go beyond the Seas, or embark, with Intent and in order to be enlisted to serve any foreign

[27] This section did not extend to any person reconciled to the See of Rome who should return to England and should, within six days after such return, before the Bishop of the Diocese or two Justices of the Peace, submit himself to the laws of the country and take the oaths of allegiance and supremacy; see s. 24 of 3 Jac. 1, c. 4.

[28] See, for instance, Hallam, *Constitutional History* (8th ed., 1855), Vol. 1, pp. 116–117.

[29] It seems, for instance, that the offence of receiving or taking absolution or reconciliation to the See of Rome (3 Jac. 1, c. 4, s. 23) was repealed in favour of person making declaration prescribed by s. 4 of 31 Geo. 3, c. 32. See also 18 Geo. 3, c. 60.

[30] (1841), 316, *Parl. Papers* (Reports, 1841), Vol. 10, p. 36.

Prince, State or Potentate, as a Soldier', without the King's consent.[31] 29 Geo. 2, c. 17 appointed the same punishment for taking or accepting any military commission, or otherwise entering the military service of the French king as a commissioned or non-commissioned officer, without the King's licence. By 38 Geo. 3, c. 79, ss. 1, 4, 5 (1798), it was a capital offence to go or to embark to go to France or to any place occupied by French armies during the war; to correspond with such persons; or with members of the French government. In addition, many acts consisting in seducing, or attempting to seduce others from their allegiance and obedience to the Crown were also made non-clergyable felonies.[32] A section of 23 Eliz. c. 1 has already been quoted,[33] but more directly relevant was 37 Geo. 3, c. 70 (1797).[34] Originally conceived as an emergency measure following the mutiny at the Nore in 1797, this Act was continually prolonged[35] and ultimately made permanent by 57 Geo. 3, c. 7 (1817). Remaining in communication with the crews of ships declared to be in a state of mutiny was made a capital, non-clergyable offence by 37 Geo. 3, c. 71 (1797).

This group of offences against the safety of the State, not amounting to high treason should also include offences usually put under the heading 'injuring the King's armour'. The following are the main capital Acts relating to this matter: (a) 31 Eliz. c. 4 (1589), concerning any person in charge or custody of any armour, ordnance, munition, etc., or of any victuals provided for soldiers, mariners, etc., who should embezzle, purloin, or convey away any of the goods to the value of 20s. (at one or several different times). (b) 22 Car. 2, c. 5 (1670), which referring to the above quoted 31 Eliz. c. 4 stated that since offenders were emboldened to commit these depredations by being admitted to their clergy, they should henceforth be deprived of this benefit. This Act did not extend to accessories.[36] (c) 22 Geo. 2, c. 33, s. 25 (1749), which extended capital punishment to every person in the fleet who should unlawfully burn or set fire to any magazine, store of powder, ship, boat, ketch, hoy, vessel, or tackle or furniture thereunto belonging and not at that time appertaining to an enemy, private or rebel. (d) 12 Geo. 3, c. 24 (1772), which provided it for burning or destroying any of the King's ships (including those in the process of building), stores dock-yards, arsenals, victualling offices, and materials there placed for the building of ships or magazines, or

[31] These provisions were enacted by 29 Geo. 2, c. 17, s. 4, passed to clarify certain doubts that had arisen in connection with 9 Geo. 2, c. 30.

[32] By 56 Geo. 3, c. 22 (1816), also persons rescuing, attempting to rescue, or aiding and assisting in the escape of Napoleon Buonaparte were to be punished by death.

[33] See above, p. 616.

[34] This Act, which was very widely framed, related to maliciously and advisedly endeavouring to seduce any person or persons serving in His Majesty's forces by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever.

[35] See, for instance, 39 & 40 Geo. 3, c. 16 (1800).

[36] It should be added that the same statute gave power to the judge, after sentence, to transport the offender. This is not the only instance of the law providing an alternative punishment to the death penalty within the same statute. Another instance is noted below, note 11 at pp. 633–634. It would appear that officers who had a bare charge of taking care of the stores in the king's warehouses, or a mere authority to order them to be delivered out to several workmen or others properly authorised to receive them, were guilty of a felony at Common Law in stealing them, to any amount, from such places of deposit; East, 2 P.C. 622, § 53.

for aiding or assisting in such an offence.[37] (e) 9 Anne, c. 16 (1710), a statute in a class apart which, however, related to an offence directed primarily against the safety of the State. It enacted that any person who shall unlawfully attempt to kill, or shall unlawfully assault, strike, or wound any privy councillor in the execution of his office, in council, or in any committee of council, shall on conviction be declared a felon and suffer death without benefit of clergy.[38] (f) 20 Geo. 2, c. 46 (1747)—'An Act to prevent the Return of such Rebels and Traitors concerned in the late Rebellion, as have been or shall be pardoned on Condition of Transportation; and also to hinder their going into the Enemies' Country'. Under this statute rebels who returned from transportation without licence, or went voluntarily to France or Spain, as well as those who aided such rebels or were in correspondence with them, were to suffer the same punishment.

§ 3. OFFENCES AGAINST PUBLIC ORDER

The riotous offences

These offences were very numerous and often very similar, and therefore difficult both to define and to classify. Important decisions and authoritative opinions can be quoted by which some riots were included within the law of treason,[39] while the distinction laid down by certain leading commentators between riots, routs and unlawful assemblies[40] was not always approved of by the courts.[41]

[37] For destroying ships to the prejudice of insurance companies see below, p. 652; for burning ships see below, p. 655; for wilfully destroying ships otherwise than by setting on fire, see below, pp. 656–657.

[38] According to East, 1 P.C. 89, § 29, the immediate reason for passing this Act was the stabbing of Harley by Anthony Guiscard during the latter's examination before the privy council.

[39] This was done primarily by putting a broad construction on that clause of the Statute of Treason—25 Edw. 3, st. 5, c. 2—which related to levying war.

[40] This division was adopted by Hawkins, 2 P.C. 52. He gives the following definition of a riot, *ibid.*, s. 1: 'A Riot seems to be a tumultuous disturbance of the peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful'. This definition was criticised by the 'Fifth Report of Her Majesty's Commissioners on Criminal Law' (1840), 242, *Parl. Papers* (Reports, 1840), Vol. 20, p. 1: 'It appears to us that the division of the subject matter of these offences into three distinct degrees, as riots, routs, and unlawful assemblies, is unnecessary and inconvenient. To constitute a *riot*, there must be a joint design which must be *executed*, or at least some act must be done in part execution of it; the character of a *rout* is complete as soon as some act has been done *moving towards the execution* of the joint design; and it is an *unlawful assembly* where three or more persons meet together for any unlawful purpose, or *intending to execute* any purpose with force, and with such circumstances as tend to excite alarm, but do no act moving towards its execution. There is, no doubt, an obvious distinction between these three degrees of criminality; but the point of the offence in all is the unlawful assembly. The difference between a part execution of a design and an act moving towards such execution is extremely subtle, and might often lead to difficulties in practice; and it seems to be a simpler and more intelligible principle of arrangement to consider the unlawful assembly as the groundwork of the offence and the part execution of the joint design or the motion towards it as aggravations'; p. 92.

[41] So, for instance, in *R.* v. *Soley and Others* (1707), 11 Mod. 115, 116, Holt, C.J., contradicted Hawkins' definition by saying: 'The books are obscure in the

The most important capital statute relating to these offences was 1 Geo. 1, st. 2, c. 5 (1714), known as the Riot Act.[42] According to the preamble, the Act was passed because 'of late many rebellious Riots and Tumults have been in divers Parts of this Kingdom, to the Disturbance of the publick Peace, and the endangering of his Majesty's Person and Government, and the same are yet continued and fomented by Persons disaffected to his Majesty, presuming so to do, for that the Punishments provided by the Laws now in being are not adequate to such heinous Offences; and by such Rioters his Majesty and his Administration have been most maliciously and falsely traduced with an Intent to raise Divisions, and to alienate the Affections of the People from his Majesty: . . .'[43] The statute made the following acts capital offences without benefit of clergy: riotiously to assemble (twelve persons or more), and not to disperse for an hour after the proclamation (*s.* 1)[44]; to oppose the making of such a proclamation and not to disperse within an hour after the making of the proclamation had been opposed (*s.* 5); unlawfully to assemble to the disturbance of the public peace and when so assembled unlawfully and with force to demolish or pull down, or begin to demolish or pull down, any church, or chapel, or any building for religious worship, certified and registered (according to 1 W. & M. Sess. 1, c. 18), or any dwelling-house, barn, stable, or outhouse (s. 4). The Act extended to principals in the second degree.

In the interesting case of *Royce*[45] it was determined that if a person were present at a riot and by shouting and other expressions excited the rioters in beginning to demolish and to pull down a dwelling-house, he was a principal in the second degree and by 1 Geo. 1, st. 2, c. 5 should be deprived of his clergy; for although he himself had taken no part in pulling down the houses and had not personally committed any other acts, his participation in the offence amounted to aiding and abetting within the meaning of the statute. Since doubts had arisen as to whether section 4 of 1 Geo. 1, st. 2, c. 5 also covered riotous acts against mills, 9 Geo. 3, c. 29 (1769) was passed which enacted in section 1 that to pull down, demolish or to begin to pull down or to demolish any mill which had been or was being erected, or any of the works thereto belonging, would be punished by death.[46]

Destroying banks, flood-gates and bridges

Another group of capital statutes related to the offences of destroying river banks, flood-gates and turnpikes. Thus by 8 Geo. 2, c. 20 (1735), revived by

definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an *unlawful assembly*; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, in *terrorum populi*, though no act is done, it is a riot. If *three* come out of an ale-house, and go armed, it is a riot '.

[42] Some of the essential provisions of 1 Geo. 1, st. 2, c. 5, re-enacted 1 Eliz. c. 16, which in its turn re-enacted 1 M. sess. 2, c. 12—an Act against unlawful and rebellious assemblies.

[43] This statute was severely criticised on the ground of its arbitrariness in a pamphlet *Observations upon the Riot Act* (1781), attributed to Allan Ramsay.

[44] The purport of this section was that the non-clergyable offence was constituted by unlawfully, riotously, and tumultuously remaining or continuing together, although no specific act had been committed; see Hawkins' definition above, note 40 at p. 619.

[45] (1767), 4 Burr. 2073. This decision was strongly supported by Lord Mansfield.

[46] In 1795 an Act was passed (36 Geo. 3, c. 8), limited to a duration of three years, the purpose of which was to prevent the delivery of seditious lectures and

15 Geo. 2, c. 33, s. 1, continued by 20 Geo. 2, c. 47, and made permanent by 27 Geo. 2, c. 16 (1754), and by 7 Geo. 3, c. 40, s. 32 (1767)—which related to turnpikes only—the pulling down, plucking up, levelling or otherwise destroying of any lock, sluice, floodgate or other works on any navigable river, as well as destroying turnpikes was declared a capital offence without benefit of clergy.[47] These statutes had not been explicitly repealed, but some years later 4 Geo. 3, c. 12, s. 5 (1763) imposed the punishment of transportation for seven years for the destruction of flood-gates, locks, sluices, etc., while 13 Geo. 3, c. 84, s. 42 (1773) imposed the same punishment for the destruction of turnpikes. 6 Geo. 2, c. 37, s. 5 (1733), made permanent by 31 Geo. 2, c. 42 (1757), appointed capital punishment for unlawfully and maliciously breaking or cutting down the bank or banks of any river, or any sea-bank, whereby any lands might be overflowed, or damaged. By 27 Geo. 2, c. 19, s. 49 (1754), it was extended to maliciously cutting, breaking down, burning, demolishing, etc. any bank, mill, engine, flood-gate or sluice made for the purpose of benefiting the *Bedford* level.

As regards the protection of bridges, 9 Geo. 2, c. 29 (1736) enacted that if any person or persons should wilfully and maliciously blow up, pull down, or destroy Westminster Bridge, or any part thereof, or attempt so to do, or unlawfully and without authority remove or take away any works thereto belonging, or in any wise direct or procure the same to be done, whereby the said bridge or the works thereof might be damaged, or the lives of the passengers endangered, such offender or offenders should be adjudged guilty of felony, and suffer death without benefit of clergy. By 31 Geo. 2, c. 20, s. 6 (1757), the same punishment was appointed for the destruction of London Bridge.[48]

Other offences against public order

Three other capital statutes enacted for the protection of public order and security may appropriately be mentioned here. The first of these—39 Eliz., c. 17 (1597)—related to idle soldiers and mariners or persons pretending so to be, wandering about without a testimonial or pass from a justice of the peace[49] limiting the time of their leave, or exceeding that time for more than fourteen days (unless falling ill), and to persons forging such a testimonial, or having one with them knowing the same to be forged. Section 4 of this statute enacted that justices of assize, justices of gaol-delivery and justices of peace might hear, as well as determine these offences, and might also decide that an offender under the Act should be taken into service for a year by an honest freeholder selected by them.[50] But if an offender thus retained should

holding seditious meetings. By ss. 4, 6, 7 and 10 it declared it to be a capital non-clergyable offence (1) for twelve persons (or more) to assemble contrary to this Act and to refuse to disperse one hour after being required to do so by a justice of the peace; (2) to obstruct any magistrate to attend such meeting; or (3) to hinder him in reading out the proclamation requiring the meeting to disperse. For other statutes relating to the malicious destruction of property see below, pp. 652 and 654–657.

[47] For the offences of rescuing such offenders see below, p. 624.

[48] Statutes protecting other bridges made the same offence simple felony within benefit of clergy. See, for instance, 20 Geo 2, c. 22 (Walton Bridge); 23 Geo. 2, c. 37 (Hampton Court Bridge); 24 Geo. 2, c. 36 (Ribble Bridge); 12 Geo. 1, c. 36 (Fulham Bridge); 28 Geo. 2, c. 55 (Sandwich Bridge).

[49] For forgery of such testimonials see below, pp. 649 and 651.

[50] 'This sanguinary law though in practice deservedly antiquated, still remains a disgrace to our statute book; yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take

depart within the year without the licence, he should be 'indicted, tried and adjudged as a Felon, and not to have the Benefit of his Clergy'. The other two statutes were 1 & 2 Ph. & M. c. 4 (1554) and 5 Eliz. c. 20 (1562), which appointed capital punishment without benefit of clergy for Egyptians remaining one month in the kingdom, or for any person, being fourteen years old, who had been seen or found in the company of such Egyptians or who had disguised himself like them, and then remained one month in the kingdom. Hale mentions that a few years before the Restoration, thirteen gypsies were executed on these charges at the Suffolk assizes.[51]

§ 4. OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

Capital punishment without benefit of clergy was also appointed by some of the statutes intended to ensure the effectiveness of the administration of justice. 21 Jac. 1, c. 26 (1623) imposed it for acknowledging any fine, recovery, deed, statute, bail, or judgment, in the name of a person not privy or consenting thereto.[52] 26 Geo. 2, c. 33 (1753), known as the Marriage Act, may also be mentioned here, for although it related to forgery and allied offences it had a direct bearing on the administration of justice. It was widely framed and comprised the following offences, all of which carried the death penalty without benefit of clergy (s. 16): making a false entry in a marriage register, or in any matter or thing relating to any marriage; altering any such entry in such register when made; counterfeiting or forging such entry, or a marriage licence; causing, procuring, acting, or assisting in such a forgery; uttering the same as true, knowing it to be false; destroying or procuring the destruction of any register-book of marriages, or any part of such register-book, with intent to avoid any marriage, or to subject any person to any of the penalties of this Act.

Capital punishment could also be inflicted for the offence known as 'taking a reward to help to stolen goods'. This offence was closely connected with receiving stolen goods and as such could be classed as an offence against property. However, since it directly affected the administration of criminal justice it may perhaps appropriately be mentioned here. By section 4 of 4 Geo. 1, c. 11 (1717), it was enacted that any person who shall directly or indirectly take money or reward under pretence or upon account of helping any person or persons to recover any stolen goods or chattels '(unless such Person doth apprehend or cause to be apprehended, such Felon who stole the same, and cause such Felon to be brought to his Trial for the same, and give Evidence against him) shall be guilty of Felony, and suffer the Pains and Penalties of Felony, according to the Nature of the Felony committed in stealing such Goods, and in such and the same Manner as if such Offender had himself stole such Goods and Chattels'. Thus a person who took a reward for helping to recover goods stolen under circumstances which made that theft a non-clergyable felony, was liable to be punished by death.

Three statutes were passed to counteract the old-established practice of trying to avoid justice by sheltering or assembling in certain places, held to

him into his service, and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds'; Blackstone, 4 Comm. 165.

[51] Hale, 1 P.C. 671. Commenting upon it Blackstone writes that 'to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice'; 4 Comm. 166.

[52] Neither corruption of blood nor loss of dower were to follow.

be privileged[53] on the ground that they were ancient palaces of the Crown or the like.[54] These were 8 & 9 W. 3, c. 27, s. 15 (1697); 9 Geo. 1, c. 28 (1722); and 11 Geo. 1, c. 22 (1724). They enacted that any person or persons who opposed the execution of any process in such pretended privileged places, or who abused any officer in his endeavours to execute his duty so that he received bodily hurt—were to be guilty of a felony and transported for seven years. Section 3 of 9 Geo. 1, c. 28, also enacted that persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing his duty, were to be guilty of a felony without benefit of clergy.

Four other offences under this heading were: (1) The escape, or the liberation of a prisoner, accomplished—without force—by himself or by others; this escape could be either negligent or voluntary. (2) Prison breaking, or escape effected by the prisoner himself with force. (3) The rescue, or the liberation of a prisoner by others employing force. (4) Returning, or being at large, after sentence of transportation.[55]

Negligent escape was considered as a less serious offence than voluntary escape. It was punished by a fine, which could be doubled for a second offence. It would seem also that if a gaoler was found guilty of many negligent escapes the court could deprive him of his office.

Voluntary escape was deemed a much more serious offence. It amounted to the same offence, and was punishable in the same manner, as the original offence of which the prisoner had been found guilty and for which he was in custody.[56] It could therefore amount to treason, felony or trespass[57]; but it was always within benefit of clergy, even if the original offence, for which the party had been detained, was not.[58] An officer or gaoler helping in effecting an escape was to be punished according to the same principle, but only after

[53] See on this T. J. de Mazzinghi, *Sanctuaries* (1887), p. 14 *et seq.*

[54] *White Friars* and its environment, the *Savoy*, and the *Mint* in *Southwark* were held to be such places.

[55] Russell, *On Crimes* (1819), Vol. 1, pp. 529 and 566. While the Legislature was most anxious to ensure a proper execution of criminal justice in all its stages, it yet watched ' with a jealous eye ' over the conduct of officers; East, 1 P.C. 331, § 92. Thus Hale, 1 P.C. 601, and *ibid.*, note (a), acknowledges that it is lawful for gaolers ' to hamper them (prisoners) with irons to prevent their escape ', but he also notes that ' this liberty can only be intended, where the officer has just reason to fear an escape, as where the prisoner is unruly or makes any attempt to that purpose, but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildeness and humanity of the laws of *England*, by which gaolers are forbid to put their prisoners to any pain or torment '. Furthermore, he quotes the *Mirror of Justices* to the effect that ' it is an abuse that prisoners should be charged with irons, or put to any pain before they be attainted of felony '; see also Coke, 2 Inst., Pt. 1, 381, where he says ' that by the common law it might not be done '. 14 Edw. 3, c. 10, may also be quoted. It was enacted—as Hawkins puts it—' to prevent abuses by the extensive power which the law is obliged to repose in gaolers '—1 P.C. 396—and laid it down that if a prisoner were to die in consequence of harsh treatment by the gaoler, the gaoler would be guilty of felonious homicide. Heavy negligence leading to death might justify an indictment for murder; East, 1 P.C. 331, § 92.

[56] Whether he was actually committed to gaol or was under arrest.

[57] But Russell agrees with Hawkins that no escape amounted to a capital offence unless the escaping party had been under sentence of death *at the time of the escape*; it was not so if his offence became capital afterwards, as, for instance, by the death of a party wounded at the time of the escape; Russell, *On Crimes* (1819), Vol. 1, 541.

[58] Hale 1 P.C. 599.

the escaping offender had been sentenced or had been attainted upon verdict, confession, or outlawry, of the crime for which he had been committed or arrested. According to Blackstone the reason[59] for this procedure was to avoid the possibility of punishing the officer or gaoler for treason or felony and then finding that the escaped prisoner was not guilty of his original charge.[60]

Prisonbreaking was a felony within benefit of clergy.[61] As the law then stood, if a person committed for high treason were to break prison and escape alone, he became guilty of a felony; but if other offenders, also committed for high treason, were to escape with him, and his intention had been to ensure both his own and their escape, he became guilty of high treason, for there are no accessories in high treason. Thus breaking prison with intent to procure a traitor's escape constituted an act of treason.

The punishment for rescue was assessed in accordance with the same principle as that for escape. The rescue of a person detained for treason constituted treason. The rescuer of a person in custody for felony, or suspected of felony was guilty of the same crime, but could not be deprived of benefit of clergy even if the rescued person had been detained for a non-clergyable offence.[62] If the rescued party had been detained for a misdemeanour, the rescuer too was to be punished as for a misdemeanour. Rescue was, however, made a non-clergyable offence by a number of statutes referring specifically to certain classes of offences. Thus by 25 Geo. 2, c. 37, s. 9 (1752) the death penalty without benefit of clergy was imposed for rescuing, or attempting to rescue, by force 'any Person out of Prison who shall be committed for, or found guilty of Murder', or for rescuing or attempting to rescue 'any Person convicted of Murder going to Execution, or during Execution'. Further, by 6 Geo. 1, c. 23, s. 5 (1719) persons rescuing offenders from the custody of those who had contracted for their transportation or persons aiding and assisting such offenders in making their escape were also guilty of a felony without benefit of clergy.

Some statutes contained similar provisions with respect to the offences to which they referred. It has been noted already that under the Waltham Black Act (9 Geo. 1, c. 22), rescuing persons in custody for any of the offences under this statute, or aiding them to escape, was made a non-clergyable offence.[63] Similarly 27 Geo. 2, c. 15 (1754) imposed the same punishment for forcibly rescuing any person found guilty of sending threatening letters.[64] 19 Geo. 2, c. 34 (1746), which related to smuggling, embodied a similar provision, as did 8 Geo. 2, c. 20 (1735) with respect to the rescue of offenders detained in custody for having maliciously, by day or by night, pulled down, thrown down, or otherwise destroyed, any turnpike gate, or any lock, sluice, flood-gate or other works on a navigable river erected or to be erected by authority of Parliament.

Returning from transportation, or being at large in England, before the expiration of the term for which the offender had been sentenced, or had

[59] 4 Comm. 130.

[60] But before the conviction of the principal party the officer could be punished by a fine and imprisonment for a misdemeanour.

[61] The felony of breach of prison, writes Hale, 1 P.C. 612, is 'a felony within clergy, tho' the principal felony for which the party was convicted were out of clergy, as robbery or murder'.

[62] Hale 1 P.C. 607.

[63] Above, p. 75.

[64] For other capital provisions of this Act see below, p. 641.

consented to be transported, was made a non-clergyable offence by a series of statutes,[65] which were, however, hardly ever acted upon.

§ 5. OFFENCES AGAINST PUBLIC HEALTH

The concept of the State taking systematic action to protect public health was—at the end of the eighteenth century—still in its infancy.[66] Among the few and inadequate provisions to this effect were certain capital statutes designed to prevent the spread of plague and to enforce the observance of quarantine. Thus 1 Jac. 1, c. 31, s. 7 (1604) enacted that any infected person, having upon him infectious uncured sores, who disobeyed the order to remain in his house should be deemed guilty of a capital felony.[67] Under 26 Geo. 2, c. 6, s. 2 (1753), the same punishment was imposed for disobeying the order that no vessel infected by plague might enter any port, till the person in charge of the ship had received orders from the King or his Privy Council commanding him to prevent his ship's company from leaving the ship or from having any intercourse with other ships or persons. By 26 Geo. 2, c. 6, s. 3, the punishment of death without benefit of clergy was also extended to: (*a*) ships' masters who conceal the fact that their vessel has come from any infected place, or has infection on board; (*b*) persons who refuse to conform with their obligation to remain in quarantine and escape or attempt to escape from the lazaret in which they have been placed (s. 8); (*c*) any sound person not infected with the plague who enters a lazaret where other infected persons are in quarantine, leaves the lazaret without a licence and when asked to remain in quarantine, refuses to do so and escapes (s. 10); (*d*) any superintendent or watchman of the quarantine acting contrary to his duty in respect

[65] See 4 Geo. 1, c. 11, s. 2 (1717); s. 6 of the same Act (transported for unlawful export of wool); 6 Geo. 1, c. 23, s. 6 (1719), and 9 Geo. 2, c. 35, ss. 10 and 28 (1736), transported for wounding a custom-house officer; 6 Geo. 1, c. 23, s. 6 (1719), and 16 Geo. 2, c. 31, s. 5 (1743), transported for assisting prisoners to escape; 8 Geo. 1, c. 18, s. 6 (1721), and 9 Geo. 2, c. 35, s. 10 (1736), transported for smuggling, or assisting to smuggle goods; 2 Geo. 2, c. 25, s. 2 (1729), transported for perjury (this statute imposed death penalty without benefit of clergy also for escaping from, or breaking prison); 7 Geo. 2, c. 21, s. 2 (1734), transported for assault with intent to commit a robbery (this statute imposed the same penalty also for escaping from, or breaking, prison); 10 Geo. 2, c. 32, s. 7 (1737), transported for stealing deer (second offence); 11 Geo. 2, c. 22, s. 2 (1738), transported for destroying granaries (second offence); 16 Geo. 2, c. 15 (1743); 18 Geo. 2, c. 27, s. 3 (1745), transported for stealing linen, etc., from bleaching ground; 25 Geo. 2, c. 10, s. 1 (1752), transported for entering mines of Black Lead with intent to steal; 8 Geo. 3, c. 15 (1768); 35 Geo. 3, c. 67, s. 2 (1795), transported for bigamy; 36 Geo. 3, c. 7, s. 3 (1796), transported for inciting to hatred or contempt of the King or the Government (second offence); 38 Geo. 3, c. 50, s. 24 (1798), transported under the Alien Act; 39 & 40 Geo. 3, c. 89, s. 6 (1800), transported for embezzling from naval stores; 56 Geo. 3, c. 27, ss. 7, 8, 16; 5 Geo. 4, c. 84, s. 22. For similar provisions relating to aliens see 43 Geo. 3, c. 155, s. 39; 55 Geo. 3, c. 54, s. 36.

[66] 'The "Sanitary Idea" may be defined generally as the doctrine that much disease is preventable, that individual effort, however much aided by voluntary co-operation and private benevolence, is an inadequate agency for prevention, and needs to be supplemented by the combined action of the community working through the organisation of the State'; G. Slater, *Poverty and the State* (1930), p. 100. This concept only began to gain ground in the nineteenth century.

[67] Persons who had no sore wounds on their body were liable to be punished as vagabonds under 39 Eliz. c. 4, and to be bound to good behaviour for one year.

to the performance of quarantine, and any person or officer, authorised to give a certificate that a ship has duly performed her quarantine who knowingly gives a false certificate to this effect (s. 17); and finally (*e*) any person concealing or clandestinely conveying letters or goods from any ship under quarantine, or from any lazaret (s. 18). These provisions were incorporated in 39 & 40 Geo. 3, c. 80, ss. 11, 16, 21, 23, 27, 28, 34 (1800) reducing into one all previous Acts relating to quarantine,[68] which was later replaced by 45 Geo. 3, c. 10, containing similar provisions.[69]

§ 6. OFFENCES AGAINST PUBLIC REVENUE

Public revenue offences fall into two groups: (*a*) offences accompanied by violence, effected or implied, and (*b*) offences unaccompanied by violence. Each group of offences was dealt with by a number of statutes, of which only those imposing the death penalty without benefit of clergy will be considered here.

Smuggling

Smuggling which was at that time carried on on a large scale by well-organised gangs was naturally regarded as a serious menace to the State. It consisted, writes Hawkins,[70] 'in bringing on shore, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited'. The leading statute dealing with these offences was 19 Geo. 2, c. 34 (1746),[71] the preamble to which throws a vivid light on the great boldness with which smuggling was then carried on, and indicates the danger to public security which it presented.[72] By section 1 of this statute the following offences were declared felonies without benefit of clergy: to assemble armed, to the number of three or more, in order to assist in landing or carrying away prohibited, uncustomed or re-landed goods; to rescue such goods after seizure[73]; to rescue persons apprehended for felonious offences against the revenue laws; to prevent the taking of such persons[74]; to pass, masked or disguised with prohibited, uncustomed or re-landed goods[75]; to maim or wound officers, going on board ships within the

[68] 7 Geo. 1, c. 3; 8 Geo. 1, c. 8; 1 Geo. 2, c. 13; 6 Geo. 2, c. 34; and 26 Geo. 2, c. 6.

[69] For forgery of certificates attesting that goods liable to quarantine were opened and aired according to Orders in Council, see below, p. 649.

[70] 1 P.C. 487.

[71] On this Act see also above, p. 624.

[72] It recited: 'Whereas divers dissolute Persons have associated themselves, and entered into Confederacies to support one another, and have appeared in great Gangs in several Parts of this Kingdom, carrying Fire-arms or other offensive Weapons; and when so assembled, have been aiding and assisting in running, landing, or carrying away prohibited and uncustomed Goods, . . . or in rescuing the same after Seizure, or in obstructing the Officers of the Revenue in the Execution of their Office, . . . : And whereas several Officers of the Customs and Excise, and their Assistants, have been wounded, maimed, and some of them killed when in the Execution of their Office, . . .'.

[73] It would seem that this clause was repealed by 19 Geo. 3, c. 69, ss. 10 and 12, which made a similar offence a misdemeanour.

[74] To constitute an offence under these clauses it had to be proved that not less than three persons had assembled for the purpose of committing any of these offences, but it was not necessary for all the persons so assembled to have been armed with offensive weapons. Aiding and assisting in the commission of these offences was also within the Act.

[75] This clause was not connected with the previous one, and thus even one person —if disguised—would be within the Act.

limits of any port; to shoot at, or dangerously wound officers when on board such ships in the execution of their duty [76]; to refuse to surrender to an order in Council or to escape after such surrender; whereupon the party so offending was declared to be, *ipso facto,* attainted.[77] This basic Act was subsequently supplemented by 24 Geo. 3, c. 47 (1784), which in section 11 declared it to be a felony without benefit of clergy to shoot at or upon any shipboat or vessel, belonging to his Majesty, or the customs or excise, within four leagues of the coast, or to shoot at or wound any officer of the navy, customs or excise, either going on shipboard, while on board, or returning, or in the execution of any other part of his duty. Offenders not surrendering after a proclamation had been signed by the Privy Council, or escaping after a surrender, were to be similarly punished.[78] In 1812 capital statutes relating to offences against the revenue law were amended and reduced into one Act by 52 Geo. 3, c. 143. This Act somewhat relaxed the severity of the law on this subject, but retained the death penalty for all the more serious kinds of the offence.[79]

Other offences against public revenue

As regards offences against public revenue unaccompanied by violence or threat of violence and based on forgery,[80] capital punishment without benefit of clergy was enacted by many statutes which were later embodied in the general Acts of 27 Geo. 3, c. 13 (1787), and 37 Geo. 3, c. 90. Some of the more important earlier Acts imposing this punishment: 10 Anne, c. 19, s. 97 (1711), 13 Geo. 3, c. 56, s. 5 (1773), 14 Geo. 3, c. 72, s. 8 (1774) and 25 Geo. 3, c. 72, ss. 17, 24 (1785), all relating to forging or counterfeiting the duty stamp or seals for printed or painted calicoes, linens, silks, paper, etc.; s. 10 of the already quoted 14 Geo. 3, c. 72 relating to knowingly selling printed or painted etc. British cottons with counterfeit stamps; 4 Geo. 3, c. 37, s. 26 (1763) and 7 Geo. 3, c. 43, s. 18 (1767) relating to forging the stamp for marking cambric, or the impression thereof, for importing foreign cambric with a forged stamp, or for knowingly selling with a forged stamp; 9 Anne, c. 11, s. 44 (1710), 5 Geo. 1, c. 2, s. 9 (1718) and 38 Geo. 3, c. 54, s. 10 (1798), knowingly forging and counterfeiting the duty stamp for marking leather or parchment, or knowingly selling leather with a forged or counterfeit stamp; s. 9 of the last named Act, relating to forging debentures; 23 Geo. 3, c. 70, s. 9 (1783)—

[76] By 12 Geo. 2, c. 21, s. 26 (1739), absolute capital punishment was appointed for opposing custom's officers in the execution of their duty in seizing any wool which was to be illegally exported.

[77] This was declared by s. 2. 19 Geo. 2, c. 34, was continued by 26 Geo. 2, c. 32; 32 Geo. 2, c. 10; 4 Geo. 3, c. 12; 11 Geo. 3, c. 51; 18 Geo. 3, c. 45; 28 Geo. 3, c. 23; 36 Geo. 3, c. 40, s. 13; and made perpetual by 43 Geo. 3, c. 157 (1803). 50 Geo. 3, c. 62 (1810), contained a number of similar capital provisions; see in particular section 9.

[78] See also other statutes relating to forgery, below, pp. 642–650.

[79] In 1825 another consolidation was effected by 6 Geo. 4, c. 108. The law on this subject was again made more lenient but the death penalty was upheld for a number of offences such as three or more persons armed with firearms assembled to assist in the illegal exportation of goods or in rescuing such goods; persons shooting at any boat belonging to the navy (sections 56 and 57).

[80] By 9 Geo. 2, c. 35, s. 7 (1736), and 18 Geo. 2, c. 28, s. 7 (1745), the Acts for indemnifying persons who have been guilty of offences against revenue laws, the death penalty without benefit of clergy was appointed for various smuggling offences specified by the Acts, if committed by persons who had previously claimed and received the benefit of these Acts. On the returning from transportation of offenders transported for smuggling, see above, p. 624.

making or having in custody (without legal leave) any mould to make paper for permits, with the words "Excise Office" visible in the substance, or artfully causing such words to appear in the substance of any paper, or engraving plates to print permits in imitation of those used by the commissioners, not being duly authorised; 26 Geo. 3, c. 51, s. 14 (1786)—forging or counterfeiting the duty stamp for starch made and papered in Great Britain; and 26 Geo. 3, c. 78, s. 13 (1786)—counterfeiting or forging the duty stamp for printed, painted or stained paper.

Apart from these, 27 Geo. 3, c. 31, s. 13 (1787) imposed the same punishment for forging or counterfeiting the duty stamp for French printed, painted or stained calicoes, linens or stuffs; and by s. 14 of the same Act, for knowingly selling French printed, painted or stained calicoes, linens or stuffs with counterfeit stamps.[81] Finally by 38 Geo. 3, c. 54, s. 9 (1798) the death penalty was imposed for forging or making use of forged debentures relating to the duties of excise; and by 38 Geo. 3, c. 60, s. 118 (1798) for forging contracts, assignments or receipts under the Act for redeeming the land tax.

II

§ 7. PETTY TREASON AND MURDER

Since the death penalty was appointed at that time for so many offences of varying gravity it is not surprising that all the more serious crimes against the person were also made capital. Petty treason and murder should be mentioned first. 25 Edw. 3, st. 5, c. 2 (1350) defined petty treason, which was an aggravated form of murder,[82] as consisting in one of the following three acts: homicide of a master by his servant[83]; of a husband by his wife; and of an ecclesiastical superior by his inferior. These acts were deemed different from other forms of murder and included within the statute relating primarily to high treason, because it was thought that both high treason and petty treason have one fundamental feature in common—the violation of the confidence which the king presupposes in his subjects, the husband in his wife, and the master in his servant.[84]

The benefit of clergy was explicitly taken away from petty treason by

[81] For a full list of statutes relating to forgery of stamps denoting duty see below, 'Forgery of stamps', pp. 646–647.

[82] The difference between petty treason and murder consisted mainly in that the rules of procedure to be followed in the former were modelled on those adopted for high treason, and in that the penalty of death was to be carried out in a different manner than in the case of murder. Petty treason could be reduced to murder or manslaughter; murder, to manslaughter.

[83] The term 'master' included the mistress or the master's wife. It was also deemed petty treason for a servant to kill his master after having left him, upon malice conceived when he had been in his service; and for a son to kill his father, or master, to whom he was bound apprentice, or by whom he was maintained, or to whom he rendered any necessary service, though he received no wages: East, 1 P.C. 336, § 98.

[84] '. . . For treason', writes Blackstone, 'is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord'; 4 Comm. 75.

12 Hen. 7, c. 7 (1496), which also enacted that any lay person who murders his lord, master, or *sovereign immediate,* shall suffer death.[85] The punishment of murder[86] had been made the object of 23 Hen. 8, c. 1 (1531) and 25 Hen. 8, c. 3 (1533), but the matter was definitely settled by 1 Edw. 6, c. 12, ss. 10 and 13 (1547). It excluded from benefit of clergy any person 'attainted or convicted of Murder of Malice prepensed, or of Poisoning of Malice prepensed; or being indicted or appealed (thereof), and thereupon found guilty by Verdict of twelve Men, or shall confess the same upon . . . Arraignment, or will not answer directly, according to Laws . . . , or shall stand wilfully, or of Malice, mute'. As a rule the law of murder knew no distinction between the various ways in which a person may be killed, and the specific mention in 1 Edw. 6, c. 12 of murder by poisoning is to be explained by the following interesting circumstances. During the reign of Henry 8, the Bishop of Rochester's cook put some poison into a vessel of yeast, thereby causing the death of several persons. So great was the indignation occasioned by this crime that in 1530 an Act was passed (22 Hen. 8, c. 9) which declared poisoning to be high treason to be punished by boiling to death.[87] 22 Hen. 8, c. 9 was later repealed by 1 Edw. 6, c. 12.[88] By 4 & 5 Ph. & M. c. 4 (1557) and 3 W. & M. c. 9, s. 2 (1691) the death penalty without benefit of clergy was extended to all accessories before the fact in murder and petty treason, as well as to those who being arraigned, challenged above the number of twenty.

Another offence which should be mentioned here is the murder of a bastard child by its mother, implied from the fact that she has concealed its birth. Since it was particularly difficult in such cases to prove that the child had been born alive, 21 Jac. 1, c. 27 (1623), made perpetual by 16 Car. 1, c. 4, enacted 'That if any Woman . . . be delivered of any Issue of her Body, Male or Female, which being born alive, should by the Laws of this Realm be a Bastard, and that she endeavour privately, either by drowning or secret burrying thereof, or any other Way, either by herself, or the procuring of others, so to conceal the Death thereof, as that it may not come to Light whether it were born alive or not, but be concealed, (she) shall suffer Death as in Case of Murder, . . . except such Mother can make Proof by one Witness at the least, that the Child . . . was born dead'.[89]

[85] Barrington considers that the word murder in the preamble to this statute related exclusively to petty treason, and was inclined to think that those criminals who may have been executed between the passing of 12 Hen. 7, c. 7, and of 23 Hen. 8, c. 1, which expressly took away benefit of clergy from murderers, 'did not suffer according to law'; *Observations on the more ancient statutes, etc.* (3rd ed., 1769), p. 412.

[86] The following definition of murder then adopted may be quoted: '*Murder*, in the sense in which it is now understood, is the voluntarily killing any person (which extends not to infants in *ventre sa mere*) under the king's peace, of malice prepense or aforethought either express or implied by law'; East, 1 P.C. 214, § 2.

[87] Reeves, *History of the English Law* (3rd ed., 1814), Vol. 4, p. 282.

[88] According to Coke the terrible punishment provided by 22 Hen. 8, c. 9, was put into operation in the case of Margaret Davy, a young woman, and in some other cases in Smithfield, in the thirty-third year of Henry VIII's reign. 'But', Coke adds, 'this act was too severe to live long, and therefore was repealed by 1 E. 6, cap. 12, and 1 Mar. cap. 1'; 3 Inst. 48. On this statute see also above, note 24, pp. 238–239.

[89] On this statute see above, pp. 430–436.

§ 8. STABBING, MAIMING AND SHOOTING AT ANY PERSON

As distinguished from murder, manslaughter[90] was a felony within benefit of clergy,[91] punishable by burning in the hand and forfeiture of goods and chattels; the courts could also impose the alternative punishment of a fine, which they might supplement with a maximum of a year's imprisonment. An exception from this general rule was 1 Jac. 1, c. 8 (1604) which made it a capital, non-clergyable offence to 'stab or thrust any Person or Persons that hath not then any Weapon drawn, or that hath not then first stricken the Party which shall so stab or thrust, so as the Person or Persons so stabbed or thrust shall thereof die within . . . six Months then next following, although it cannot be proved that the same was done of Malice forethought'.[92] 1 Jac. 1, c. 8, commonly known as the Stabbing Act, was originally an emergency measure but was continued by 3 Car. 1, c. 4 and 16 Car. 1, c. 4. This curious statute was enacted in view of the frequent quarrels involving stabbings with short daggers which occurred between the Scots and English at the accession of James 1.[93] Another reason for its passing was the widespread tendency of the juries to reduce murder to manslaughter, whenever any verbal provocation had taken place.[94]

Another non-clergyable offence in this group was that known as mayhem or maims.[95] This offence had not been capital at Common Law, but the old system[96] was altered by 22 & 23 Car. 2, c. 1 (1670), known as the Coventry

[90] '*Manslaughter* which is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient'; East, 1 *P.C.* 218, § 4.

[91] The distinction between murder and manslaughter is of comparatively modern origin. At first the law knew only one degree of criminal homicide; as Pollock and Maitland put it, 'it does not yet know the line that will divide "murder" from "manslaughter"'; *History of English Law* (2nd ed., 1911), Vol. 2, p. 485. For a remarkable instance of such differentiation, see ibid., note 5 on pp. 485–486.

[92] It was stipulated that the Act shall not extend to cases of self-defence, or misfortune, nor to any person who shall commit manslaughter in preserving the peace, or chastising or correcting his child or servant.

[93] *R. v. Keite (1696), 1 Ld.Raym. 138, 139. Commenting on this Act, Foster* says that it was made 'at a critical time, and, as tradition hath it, upon a very special occasion. It is supposed to have been principally intended to put an effectual stop to outrages then frequently committed by persons of inflammable spirits and deep resentiment; who, wearing short daggers under their cloaths, were too well prepared to do quick and effectual execution upon provocations extremely slight'; *Crown Law* (3rd ed., 1792), pp. 297–298.

[94] Hale, 1 P.C. 456. On this Act see also below, p. 695.

[95] East gives the following definition of mayhem or maims based on the leading authorities of the period: 'A Maim at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary: but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or foretooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem the act must be done maliciously; though it matters not how sudden the occasion'; 1 P.C. 393, § 1.

[96] By 5 Hen. 4, c. 5 (1403), for instance, a violent attack against a person consisting in beating, wounding, or robbing, and then cutting out his tongue, or putting out his eyes, was declared to be a felony if done of malice prepense, but benefit of clergy was allowed.

Act. Passed by an angry Parliament as the result of an assault on Sir John Coventry, a Member of the House, whereby he was grievously injured on the nose, apparently in revenge for some remarks he had uttered in Parliament, the Act stipulated (s. 7) that 'if any Person . . . on Purpose and of Malice fore-thought, and by lying in wait, shall unlawfully cut out or disable the Tongue, put out an Eye, slit the Nose, cut off a Nose or Lip, or cut off or disable any Limb or Member of any Subject of his Majesty, with Intention in so doing to maim or disfigure in any the Manners before mentioned such his Majesty's Subject; that then and in every such Case the Person or Persons so offending, their Counsellors, Aiders and Abettors, (knowing of, and privy to the Offence as aforesaid) shall . . . suffer Death as in Cases of Felony without Benefit of Clergy'.[97]

Reference should also be made to the already examined Waltham Black Act (9 Geo. 1, c. 22)[98] and to 26 Geo. 2, c. 19 (1753). The former made wilfully and maliciously shooting at any person in any dwelling-house or other place a felony without benefit of clergy, whether or not it resulted in killing or maiming. Aiders and abettors to this offence were also deprived of their clergy.[99] 26 Geo. 2, c. 19 was primarily designed to ensure the protection of ships in distress, but as one of its provisions related to offences threatening the physical integrity of certain persons, it may be included in this paragraph. Section 1 of this Act made it a non-clergyable felony to beat or wound, with intent to kill or destroy, or otherwise wilfully to obstruct the escape of any person endeavouring to save his or her life from a ship or vessel or from the wreck thereof. Mention should also be made of 43 Geo. 3, c. 58 (1803), called Lord Ellenborough's Act, which appointed the death penalty in a considerable number of cases, such as administering poison or any other noxious and destructive substance with intent to cause a miscarriage (s. 1)[1] shooting at, or attempting to shoot, stabbing or cutting any person, with intent to murder, maim, disfigure, disable or to do grievous bodily harm and to resist lawful apprehension.

§ 9. RAPE, FORCIBLE ABDUCTION AND OTHER SEXUAL OFFENCES

All the more serious crimes under this heading were dealt with by capital statutes. Thus by 18 Eliz. c. 7 (1576), any person who feloniously committed *rape and was found guilty by verdict, or was outlawed, or confessed the same* upon arraignment, was to suffer death.[2] 3 W. & M. c. 9, s. 3 (1691) also deprived of their clergy those who stood mute or would not answer directly to the indictment, or challenged peremptorily above twenty of the jury, or were thereupon outlawed. These statutes were applicable to principals both in the first and second degrees, *i.e.*, to those present, *aiding and assisting;* accessories before and after the rape could *still claim* benefit of clergy. The second offence was the unlawful carnal knowledge of female children. S. 4

[97] On this crime see D. Hume, *History of England* (1826), Vol. 7, pp. 413–414.
[98] Above, pp. 49–79.
[99] See on this point Hawkins, 1 P.C. 631, s. 13.

[1] Lord Ellenborough's statute repealed 21 Jac. 1, c. 27, relating to murder of bastard children; see above, note 39 at p. 506.

[2] At first rape was a felony punishable by death; later it was reduced to a great misdemeanour and the offender was punished with the loss of eyes and castration. Subsequently, by Stat. of West. 1, c. 13, it was further reduced to a trespass, punishable by imprisonment of up to two years and a fine at the King's will. It was then felt that this lenient penalty encouraged the commission of the crime and by Stat. of West. 2, c. 34, it was again declared to be a felony.

of 18 Eliz. c. 7 enacted that any person who unlawfully and carnally knew and abused any woman-child under the age of ten should be deprived of his clergy and suffer death. In a strictly legal sense this act was not considered rape, for while rape implied carnal knowledge against the will of the victim, the consent or non-consent of the child under ten years of age was immaterial.[3]

By 25 Hen. 8, c. 6 (1533), 2 & 3 Edw. 6, c. 29 (1548), revived and confirmed by 5 Eliz. c. 17 (1562), the same punishment was appointed for sodomy and the crime against nature.[4] If the victim was under fourteen years of age, it was not felony in him but only in the aggressor; if both were of the age of discretion (above fourteen years of age)—it was felony in both. The position of principals in the second degree and of accessories before and after the fact was the same as in the case of rape.

The offence of forcible abduction and marriage, otherwise known as stealing an heiress, was made a non-clergyable felony by 3 Hen. 7, c. 2 (1486), which referred to any person who, against her will, took away any woman, whether maid, widow, or wife, who had substance either in goods or lands, or was an heir apparent, and afterwards married her, or consented to her marriage to another, or defiled her. The procurers, abettors and those who knowingly received such a woman were also to be punished as principal felons.[5] By 39 Eliz. c. 9 (1597), benefit of clergy was also taken away from all principals, procurers, or accessories before the fact. This was not a purely sexual offence—the predominant motives being economic—and therefore it could perhaps be included in the class of offences against property.[6] Nevertheless, its commission undoubtedly often coincided with forcible defilement.

III

§ 10. SIMPLE GRAND LARCENY AND ALLIED OFFENCES

As the law then stood, simple grand larceny was a theft unaccompanied by any aggravating circumstances; the adjective 'grand' denoted that the value of the stolen goods exceeded twelve pence[7]; if it was twelve pence or under, the offence was called petty larceny and did not carry the death penalty.

[3] Hale, 1 P.C. 631, was inclined to think that if the child was over ten and under twelve, the act still amounted to rape, even though the child consented. This opinion was not upheld, however; see Blackstone, 4 Comm. 212. Even Hale did not consistently abide by it; compare 1 P.C. 631 with *Pleas of the Crown or a Methodical Summary* (1682), p. 118. The doctrine that prevailed may be summed up as follows: if the child was over ten, there was no felonious rape unless the act was committed against her will and consent; it remained rape even if the child later consented. The deflowering of a child over ten and under twelve with her own consent amounted to a misdemeanour only, since 18 Eliz. c. 7, did not refer to it and was concerned only with the rape of children with their consent when such children were under ten years of age.

[4] By 22 Geo. 2, c. 33, s. 2, § 29 (1749), any person in his Majesty's fleet who committed either of these offences, as well as his aiders or abettors, were to be tried by a court martial and sentenced to death.

[5] On this Act see also above, pp. 436–441.

[6] The importance of the economic element may well be seen from the preamble to 3 Hen. 7, c. 2, quoted above, p. 436, and from the form in which the indictment was to be framed; *ibid.*, pp. 440–441.

[7] Larceny consisted in the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner; East, 2 P.C. 553, § 2.

First it was punishable by whipping; under 4 Geo. 1, c. 11 (1717), by transportation for seven years and by later Acts, by imprisonment or fine. Grand larceny was a capital offence but in certain cases the offender could claim benefit of clergy. In such cases he was to be burnt in the hand and might be sentenced by the judge to not more than one year's imprisonment. This was enacted by 18 Eliz. c. 7, ss. 2, 3 (1576), but since burning in the hand had been found ineffective, 10 & 11 Will. 3, c. 23, s. 6 (1699) replaced it by burning in the most visible part of the left cheek, nearest to the nose. This harsh provision was abolished by 5 Anne, c. 6, s. 1 (1706) and the punishment appointed by the statute of Elizabeth reintroduced, with the difference that the detention in a house of correction might thenceforth be imposed for between six months and two years. By 4 Geo. 1, c. 11 the offender found guilty of petty larceny, or of clergyable grand larceny, could be transported without being previously burned in the hand. By 19 Geo. 3, c. 74, s. 27, transportation could be replaced by hard labour in the hulks, and by s. 3 of the same Act, a fine or a whipping could be inflicted *in lieu* of burning.

In addition to these more lenient provisions, there existed a great number of statutes which excluded from benefit of clergy offenders guilty of certain kinds of grand larceny. Thus 1 Edw. 6, c. 12, s. 10 (1547) [8] and 2 & 3 Edw. 6, c. 33 (1548) took away benefit of clergy from principals in the offence of stealing horses, geldings, or mares, and 31 Eliz. c. 12, s. 5 (1589) from accessories before and after the fact.[9] 14 Geo. 2, c. 6, s. 1 (1741) and 15 Geo. 2, c. 34 (1742) contained similar provisions regarding persons who feloniously drove away, or otherwise stole one or more sheep, cows, oxen, steers, bullocks, heifers, calves or lambs or killed them with intent to steal the whole or any part of the carcass. It extended also to aiders and assisters. By 22 Car. 2, c. 5, s. 3 (1670), absolute death penalty was appointed for felonious cutting and taking, stealing, or carrying away of any cloth or other woollen material from the rack or tenter in the night-time. This statute also applied to those who refused to answer, stood mute, challenged above twenty, or were outlawed upon such an indictment, but not to accessories. Similar provisions were embodied in 18 Geo. 2, c. 27 (1745), which related to the stealing by day or night of linen, fustians, calicoes, or cotton goods, from the place of manufacture,[10] and was framed so as to apply to aiders, assisters, procurers, buyers and receivers as well,[11] and in 4 Geo. 3, c. 37 (1763) relating to the stealing of linen yarn or implements used in the manufacture of linen.

The other capital statutes which should be mentioned here are: (a) 24 Geo. 2, c. 45 (1751), which related to the theft of goods valued at 40s. or

[8] This statute repealed 37 Hen. 8, c. 8 (1545), which contained similar provisions.

[9] This Act only covered persons who qualified as accessories at the time of its enactment, *i.e.*, accessories at Common Law. It was consequently held that the Act was not applicable to anyone who knowingly received a stolen horse, although he was made an accessory after the fact by 3 W. & M. c. 9; Foster, *Crown Law*, p. 373.

[10] This Act was passed in order to dispel certain doubts which had arisen in the construction of an earlier statute—4 Geo. 2, c. 16 (1731)—dealing with the same offences.

[11] The important point here is that the last two statutes provided alternative punishments to be applied at the discretion of the judges. 22 Car. 2, c. 5, s. 2, permitted the alternative penalty of transportation for seven, and 18 Geo. 2, c. 27, s. 2, for fourteen, years. But there was the following interesting difference in the method of their application: under the first statute transportation could only be ordered after sentence of death had been awarded. In such cases the court was to grant a reprieve for the staying of execution, with the

over in any ship, barge, etc., upon any navigable river, or in any port of entry or discharge, or in any wreck belonging to such river or port, or upon any wharf or quay adjacent to such river or port. The statute covered persons present, aiding, and assisting in committing any such offences, as well as those who, being convicted or attainted thereof, or being indicted, should stand mute, not answer directly, etc., or peremptorily challenge above twenty. (b) 12 Anne, st. 2, c. 18, s. 5—made perpetual by 4 Geo. 1, c. 12 (1717)—which related to the theft of any pump belonging to a ship in distress, and included aiders or abettors. (c) 26 Geo. 2, c. 19, s. 1 (1753), which extended the same punishment to persons stealing, plundering, or taking away any goods, merchandise, or other effects from or belonging to any ship, wrecked, lost, stranded or cast on shore in any part of his majesty's dominions, or any of the furniture, tackle, apparel, provision, or part of such ship—whether any one were on board or not.[12] (d) 7 Geo. 3, c. 50, s. 2 (1767), which related to the theft of any mail from any bag of letters sent by the post or of any letter or packet conveyed by the post or out of any post-office or any place used for the receipt or delivery of letters.[13] (e) 31 Eliz. c. 4, and (f) 22 Car. 2, c. 5, have already been mentioned in relation to offences against the safety of the State,[14] but their capital provisions also extended to larceny in military and naval stores by any person in charge of such places to the value of twenty shillings at one or several different times. (g) Finally, 18 Car. 2, c. 3 (1666), continued by 6 Geo. 2, c. 37, s. 9 (1733), and made perpetual by 31 Geo. 2, c. 42 (1757), which took away benefit of clergy 'from great, known, and notorious Thieves and Spoil-takers' in the counties of Northumberland and Cumberland on conviction for theft committed in these counties. This statute provided the alternative punishment of transportation for life, to be pronounced at the discretion of the court.[15]

§ 11. BURGLARY AND ALLIED OFFENCES [16]

Larceny in dwelling-houses belonged to the group known as simple compound larceny, the formative elements of which were the same as those of simple

proviso that should the offender exercise his right to refuse to be transported, he was then to be executed. Under the second statute it was left to the discretion of the court to order transportation instead of giving judgment of death.

The provision of an alternative punishment by a capital statute being very uncommon in the eighteenth century, it may be useful to quote here the relevant section 2 of 18 Geo. 2, c. 27:

> 'That in case the Judge or Court, by and before whom any such Offender or Offenders shall be tried and convicted, shall think it reasonable, upon the Circumstances of the Case, that such Offender or Offenders, or any of them, instead of suffering Death, shall be transported . . . ; shall and may be lawful to and for such Judge or Court . . . , instead of giving Judgment of Death against such Offender or Offenders, as in the Cases of Felony, without Benefit of Clergy . . . to order such Offender or Offenders . . . to be transported . . . for the Space of fourteen Years'.

[12] On this Act see also above, p. 631. Other offences relating to ships are dealt with below, pp. 652, 655 and 656–657.

[13] 7 Geo. 3, c. 50, s. 2, re-enacted the provisions of 5 Geo. 3, c. 25, s. 18 (1765). For statutes dealing with other offences relating to post-office see below, p. 640.

[14] Above, p. 618.

[15] By 2 Geo. 2, c. 25, s. 3 (1729), and 31 Geo. 2, c. 22, s. 78 (1757), the stealing of exchequer orders, bills of exchange, bonds, warrants, etc., was declared felony with or without benefit of clergy as if the money secured by such exchequer orders, etc., had been stolen.

[16] For the analysis of the progressive extention of the scope of capital laws relating to larceny in dwelling-houses, etc., see above, pp. 41–49.

larceny, but with the additional aggravating circumstance of having been committed in a dwelling-house or from the person of another.

The most serious offence in the first of these two groups, *i.e.*, larceny in a dwelling-house, was burglary.[17] At Common Law burglary was a felony within benefit of clergy, but this was altered by 1 Edw. 6, c. 12, s. 10 (1547), and more explicitly by 18 Eliz. c. 7, s. 1 (1576), which made it a capital non-clergyable offence. By section 2 of 3 W. & M. c. 9 (1691), clergy was also taken away from offenders who 'stand mute, or do not directly answer or challenge peremptorily above twenty'; and by section 1, from any person who counsels, hires, or commands any other to commit burglary, being thereof convicted or attainted, or being indicted thereof and standing mute, not directly answering, or challenging above twenty; the question of accessories was dealt with by 5 Anne, c. 31, s. 5 (1706), which excluded from benefit of clergy any person who knowingly receives, harbours, or conceals any burglars, etc. Burglary was defined as a breaking and entering the dwelling-house (otherwise called the mansion-house) of another in the night with intent to commit a felony within the same, whether such felonious intent was actually executed or not.[18] But by 12 Anne, st. 1, c. 7, s. 3 (1713), it was enacted that it also amounted to burglary to enter a dwelling-house with intent to commit a felony without breaking the same, and then to break out at night. Obviously in practice the scope of these laws depended primarily on the judicial interpretation of the terms 'dwelling-house', 'entering' and 'breaking', which were the basic constitutive elements of this offence.

Apart from burglary a number of other larcenies in houses, shops and warehouses were also declared capital, non-clergyable offences.[19] By 4 Geo. 3, c. 37, s. 16 (1763), capital punishment was appointed for breaking into any house, shop, cellar, vault, or other place or building, or by force entering any house, etc., with intent to steal any linen, yarn, or any linen cloth, etc., or implements used there for producing these goods.

Blackstone observes that the multiplicity of statutes dealing with larcenies in dwelling-houses 'is apt to create some confusion'.[20] The first group is that of larcenies above the value of twelve pence. 23 Hen. 8, c. 1, s. 3 (1531), and the already quoted 1 Edw. 6, c. 12, s. 10,[21] dealt with such larcenies when committed in a church or chapel, with or without violence or breaking the same.[22] 5 & 6 Edw. 6, c. 9, s. 4 (1552), was concerned with house-breaking by day, when the owner or occupier, or his wife, children, or servants were in the house. Aiders and abettors were included, even if they did not actually enter the house, while accessories before the fact were deprived of their clergy by

[17] Blackstone, and other writers such as Hawkins, include burglary with arson under one heading: 'offences against the habitation'. This classification is not very satisfactory. Burglary is a typical offence against property and it may be doubted whether it is justifiable to put it in a separate group.

As regards arson, although it is often directed against the habitation, this does not constitute its main feature. It would seem to be more justifiable to include arson in the class of malicious injuries to property.

[18] Coke, 3 Inst. 63; Hale, 1 P.C. 549; East, 2 P.C. 484, § 1.

[19] A rare exception was the larceny of the stock or utensils of the plate-glass company from any of their houses which by 13 Geo. 3, c. 38, s. 29 (1773) was to be punished by transportation for seven years.

[20] 4 Comm. 241.

[21] See also 5 & 6 Edw. 6, c. 9.

[22] 1 Edw. 6, c. 12, excluded from benefit of clergy all except those challenging above twenty. 3 W. & M. c. 9 later remedied this omission. It would seem, however, that accessories to the offence of sacrilege were not always deprived of their clergy; East, 2 P.C. 630, § 67.

4 & 5 Ph. & M. c. 4 (1557), and 3 & 4 W. & M. c. 9.[23] By section 5 of 5 & 6 Edw. 6, c. 9, similar provisions were extended to larceny in a booth or tent in a market or fair, whether by day or night, by violence or breaking, when the owner or some of his family were therein, either asleep or not.[24] 1 Edw. 6, c. 12, s. 10, dealt further with daylight robberies in dwelling-houses (implying a breaking into), any person being therein and being put in fear,[25] and 3 W. & M. c. 9, with larcenies in dwelling-houses by day or by night, without breaking in, any person being therein and being put in fear. Both these statutes extended to accessories before the fact.

The second group is that of larcenies to the value of five shillings or more. 39 Eliz. c. 15, ss. 1 and 2 (1597), was concerned with breaking into any dwelling-house in the daytime, although nobody was in. It was extended to aiders, abettors, and accessories before the fact by section 1 of 3 & 4 W. & M. c. 9, which also dealt with breaking by day into any dwelling-house, shop or warehouse belonging to it, or used in connection with it, whether or not any person was in.[26] 10 & 11 Will. 3, c. 23 (1699), related to privately stealing goods, wares, or merchandise in any shop, warehouse, coach-house, or stable, by day or by night, without breaking in, whether or not anybody was in. It also covered those who assisted, hired or commanded the offence to be committed.[27]

The third group is that of larcenies to the value of forty shillings committed without breaking in, in a dwelling-house or an out-house, whether anyone was in or not. By 12 Anne, st. 1, c. 7, s. 1 (1713), such larcenies were declared capital, non-clergyable offences, unless committed against their masters by apprentices under the age of fifteen (section 2). The Act also extended to aiders and assisters.[28]

§ 12. LARCENY FROM THE PERSON

This class comprised two offences. 8 Eliz. c. 4, s. 2 (1565), deprived of benefit of clergy any person convicted of feloniously taking any money, goods, or chattels from the person of any other, *privily without his knowledge*, in any

[23] This Act is not mentioned by Blackstone, but it seems that it should be included in this group.

[24] This Act extended to principals only. Accessories before the fact were not deprived of their clergy unless the act amounted to *a robbery from the person*, in which case they were excluded under 3 W. & M. c. 9; the above-mentioned Act of Philip and Mary referred specifically to robberies in a dwelling-house.

[25] This statute was related to 23 Hen. 8, c. 1, s. 3, and 25 Hen. 8, c. 3, s. 2.

[26] Blackstone omits this statute and states that 39 Eliz. c. 15 referred to 'any dwelling-house, or any out-house, *shop, or warehouse thereunto belonging*' (our italics). This is not exact since this Act applied to dwelling-houses and outhouses only. The scope of the law was extended by 3 & 4 W. & M. c. 9, s. 1, which mentioned shops and warehouses, but not outhouses.

[27] This statute did not specifically refer to accessories before the fact, but Foster, *Crown Law*, p. 126, agrees with Coke that the word *commandment* is to be understood as denoting 'all those who incite, procure, set on, or stir up any other to do the fact'; and that in the word *aid* 'are comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act, and not present when the act is done'.

[28] At Common Law only the theft of goods which were valuable in themselves amounted to felony. Thus the larceny of bonds, bills, notes and other securities was not a felony because they did not constitute a property in the possession of the person from whom they had been taken. This law was

place whatsoever (known as larceny *clam et secrete* from the person) and found guilty by verdict, or who confessed the same upon his arraignment, or would not answer directly to the same, or stood mute, or challenged peremptorily above twenty, or was outlawed upon indictment or appeal. It would seem that this Act only extended to the larceny of goods valued at more than twelve pence, for otherwise the offence would be petty larceny and would not be punishable by death.[29] It did not exclude from their clergy either accessories before or after the fact, or those who were present, aiding and abetting.

The second offence in this class—robbery—consisted in the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. 23 Hen. 8, c. 1 s. 3 (1531), excluded from benefit of clergy offenders found guilty of robbing any person or persons in or near the highways, and those 'found guilty of any Abetment, Procurement, Helping, Maintaining, or Counselling of or to any such Felony'. A similar provision was contained in 1 Edw. 6, c. 12, s. 10 (1547). Since both these Acts specified the *locus operandi*, their operation was restricted accordingly. This restrictive clause was omitted in the subsequent statute of 3 & 4 W. & M. c. 9, s. 1, which is to be regarded as the fundamental law on the subject. The Act related to every person or persons 'that shall . . . rob any other Person, . . . or shall comfort, aid, abet, assist, counsel, hire, or command, any Person or Persons to commit the said Offence', but not to accessories after the fact. The scope of the law of robbery—like that of burglary—largely depended on the construction put upon it by the courts, especially on the elements of violence and fear.

§ 18. LARCENY BY SERVANTS[30]; LARCENY AND EMBEZZLEMENT BY PERSONS EMPLOYED IN THE POST OFFICE; EMBEZZLEMENT BY SERVANTS, CLERKS AND OTHER AGENTS

With respect to larceny by servants, the already-quoted 12 Anne, st. 1, c. 7, s. 1 (1713) enacted that whoever 'shall . . . feloniously steal any Money, Goods or Chattels . . . to the value of forty Shillings or more, being in any Dwelling-house or Out-house thereunto belonging, . . . or shall aid or assist . . . to commit any such Offence, . . . shall be absolutely debarred of and from the Benefit of Clergy'. Though this Act could be held to cover any larceny in a dwelling-house or outhouse belonging to it, to the value of forty shillings or more,[31] it was mainly intended to protect employers against what the contemporary authors on criminal law called 'offences by menial servants'.[32] The fundamental law on this subject was 21 Hen. 8, c. 7 (1529), the preamble to which recited that 'divers, as well Noblemen, as others the King's Subjects, have upon Confidence and Trust delivered unto their Servants their Caskets, and other Jewels, Money, Goods, and Chattels, safely to be kept to the Use of their said

altered by 2 Geo. 2, c. 25, s. 3, made perpetual by 9 Geo. 2, c. 18, which in s. 3 declared the stealing of such and similar papers to be a felony 'of the same Nature, and in the same Degree, and with or without the Benefit of Clergy, in the same Manner as it would have been, if the Offender had stolen or taken by Robbery any other Goods of like Value with the Money due on such Orders, Tallies, Bills, Bonds . . . , and remaining unsatisfied . . .'.

[29] Hale, 1 P.C. 531.

[30] See also above, p. 48.

[31] See above, p. 635.

[32] Hawkins, 1 P.C. 328.

Masters or Mistresses, and after such Delivery the said Servants have withdrawn themselves, and gone away from their said Masters or Mistresses, with the said Caskets . . . , or Part thereof, to the Intent to steal the same, and defraud their said Masters or Mistresses thereof, and sometimes being with their said Masters or Mistresses have converted the said Jewels to their own Use, which Misbehaviour so done was doubtful in the Common Law, whether it were Felony or not; and by Reason thereof, the foresaid Servants have been in great Boldness to commit such or like Offences'. The Act further declared that any one found guilty of the larceny of goods or money valued at forty shillings or more was to be punished 'as other Felons be punished for Felonies committed, by the Course of the Common Law'. This offence was declared to be outside benefit of clergy by 27 Hen. 8, c. 17 (1535), which was made perpetual by 28 Hen. 8, c. 2 (1536) and later confirmed by section 18 of 1 Edw. 6, c. 12 (1547). Both these Acts were repealed by 1 Mar. sess. 1, c. 1, s. 5 (1553). Some years later 21 Hen. 8, c. 7, was revived by 5 Eliz. c. 10 (1562), but since 27 Hen. 8, c. 17, remained abrogated, servants found guilty of this offence could claim benefit of clergy until they were again explicitly deprived of it by the already-quoted 12 Anne, st. 1, c. 7, though the latter only covered offences committed in a dwelling-house or outhouse.[33]

The question of the liability of servants or other employees who feloniously appropriated goods belonging to their masters but entrusted to their care was

[33] The following are the most important constructions put upon 21 Hen. 8, c. 7:

(a) It was determined that the Act only applied to persons who were servants of the owner of the goods both at the time when these goods were delivered and when they were stolen. Thus if a person had delivered goods to another and had *afterwards* taken him into his service, and if the person so taken into service later appropriated these goods, he could not be held liable under the Act, because the goods were not originally delivered to him under the special trust of a servant.

(b) Only such goods were within the statute which were delivered to a servant to keep for the use of his master, and were to be returned to him later. Thus a servant who appropriated the rents received by him for his master, or who, being instructed to sell goods, or to receive money due on a bond, departed with that money, was held to be outside the statute.

(c) The goods taken had to be the actual property of the master at the time. It was held, for instance, that if a servant to whom money or corn were delivered by his master melted down that money into a piece of plate or turned the corn into malt without his master's command and then ran away, he could not be liable under the statute, because the property had changed so much that it could not be identified. His offence would be within statute if he were to change his master's money from silver to gold or make a suit of clothes or a pair of shoes from the material or leather delivered to him and then run away. Both Hawkins and East considered, however, that the difference between these two offences was not big enough to justify the first-mentioned negative decision.

(d) The statute did not apply to wilfully wasting or consuming the goods.

See, on these rules, Hawkins, 1 P.C. 329–330; East, 2 P.C. 562–564; Russell, *On Crimes* (1819), Vol. 2, pp. 1214–1216.

21 Hen. 8, c. 7, was regarded as a declaratory law, laying down a principle previously recognised by the Common Law. As Gould, J., stated in *R.* v. *Wilkins* (1789), 1 Leach 520, 523, 'various opinions formerly prevailed whether servants, having the custody of their master's goods, were guilty of felony by fraudulently embezzling them, and converting them to their own use; but the statute 21 Hen. 8, c. 7, which makes this offence felony, does not say that it was not felony before by the common law, but only recites that the matter had been doubted; and this Act of Parliament did not, in my judgment, mean to weaken, but to assist the common law. Ever since this Act, therefore, the opinion of those who before the Act held that servants embezzling their master's property was felony, has been confirmed'.

continually raising complicated issues.[34] 21 Hen. 8, c. 7, is important mainly because it gave statutory recognition to the judicial decision that goods belonging to a master and obtained by his servant through the master's delivery or permission remained in that master's possession. Or, as Professor Jerome Hall puts it, 'property received from the master remained in his possession, the servant securing "mere charge or custody" of it'.[35]

Although the statutory recognition of this principle made the punishment of servants more severe, many most serious offences—particularly if committed by persons employed in banks—still remained outside the law. The reason for this was the continued validity of the doctrine that property once delivered to a servant for his master's use is no longer in the master's possession and that a servant who appropriates such goods is therefore not guilty of felony.[36] It was possible in such cases to initiate a civil action for breach of trust, but in a period when pocket-picking was a non-clergyable offence this course could not have been regarded as satisfactory. The lack of adequate protection against such crimes was strikingly brought to light by *Waite's Case*.[37] Thirteen East India bonds, the property of the Bank of England, were taken to the bank to be deposited there. They were, however, not deposited in their usual place, *i.e.*, a chest in the cellar of the bank, but were received by the prisoner, a cashier of the bank, and placed by him on his desk. The court held that the prisoner who had converted these bonds to his own use was not guilty of

[34] Thus, for instance, Holmes writes that the anomalous law according to which a servant had possession of any property he receives from another person for his master, was made more rational by the old cases. The distinction made in them was that while the servant is in the house or with his master, the latter retains possession, 'but if he delivers his horse to his servant to ride to market, or gives him a bag to carry to London, then the thing is out of the master's possession and in the servant's'; *Common Law* (1887), p. 226.

[35] *Theft, Law and Society* (Boston, 1935), p. 6. While the legal responsibility of servants under 21 Hen. 8, c. 7, remained unaltered, it would seem that the principle of punishment enunciated by it was changed by 4 Geo. 1, c. 11, s. 1 (1718), which enacted that the court could order the transportation for seven years of any person entitled to claim benefit of clergy who had been convicted of grand or petty larceny, or of any felonious stealing or taking of money, or goods and chattels, either from the person, or the house of any other, or in any other manner. It was held by some that this penalty appointed by 4 Geo. 1, c. 11, s. 1 (as well as by 6 Geo. 1, c. 23, s. 1), could not be attached to 21 Hen. 8, c. 7, for the former Act applied to larcenies only, and the latter to a breach of trust. This opinion was, however, not upheld by the leading authorities for the following two reasons: first, 21 Hen. 8, c. 7, was regarded as a declaratory law, acknowledging a Common Law principle; see statement of Gould, J., above, p. 638, note 33, and secondly, the words of 4 Geo. 1, c. 11, s. 1, which related inter alia to any felonious stealing or taking of money or goods, etc., from the person or house of any other, or in any other manner, were wide enough to comprehend the offence dealt with under 21 Hen. 8, c. 7; East, 2 P.C. 561–562.

[36] Commenting on 21 Hen. 8, c. 7, Hale writes: 'If I deliver my servant a bond to receive money, or deliver him goods to sell, and he receive the money upon the bond or goods, and go away with it, this is not felony at common law, because the money is deliverd to him, nor felony by this statute, because, tho the bond or goods were deliverd him by the master, yet the money was not so deliverd by the master. . . . And yet by the very payment of the money to the servant to the master's use, the master is by law said to be actually possessed of this money; and if taken away from the servant by a trespasser or robber, the master may have a general action of trespass, or action upon the statute of hue and cry'; 1 P.C. 668.

[37] *R.* v. *Waite* (1743), 1 Leach 28.

felony because 'the bonds were received by Waite (the prisoner), and were never put into the cellar as is usual: so that the possession was always in him, and the bank had no possession but what was the possession of Waite, till they were brought down and placed in the chest in the cellar as usual'; and Dennison, J., said that though 'this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution'.[38] While Waite was still under trial and prior to the decision of the court, 15 Geo. 2, c. 13 (1742) was passed, which enacted in section 12 that if any officer or servant of a company 'being entrusted with any Note, Bill, Dividend Warrant, Bond, Deed, or any Security, Money or other Effects, belonging to the said Company, or having any Bill, etc. . . . of any other Person or Persons, lodged or deposited with the said Company, or with him as an Officer or Servant of the said Company, shall secrete, imbezil, or run away with any such Note, etc. . . . , or any Part of them; every Officer or Servant so offending, and being thereof convicted in due Form of Law, shall be deemed guilty of Felony, and shall suffer Death as a Felon, without Benefit of Clergy'. A similar provision was later embodied in 24 Geo. 2, c. 11, s. 3 (1751) in respect to the officers and servants of the South Sea Company, as well as in 35 Geo. 3, c. 66, s. 6 (1795) and 37 Geo. 3, c. 46, s. 6 (1797) in respect to officers, etc., of the Bank of England who embezzled, etc., certain notes, bills, warrants for payment of annuities and dividend, etc. 7 Geo. 3, c. 50, s. 1 (1767),[39] which declared it a non-clergyable felony for persons employed in the Post Office to embezzle and steal letters or their contents, was based on the same principle.[40]

These provisions were later embodied in 42 Geo. 3, c. 81, ss. 1, 2 (1802), and ultimately in 52 Geo. 3, c. 143, ss. 2 to 4 (1812).

[38] *Ibid.* 35, note (a).

[39] 7 Geo. 3, c. 50, s. 1, re-enacted 5 Geo. 3, c. 25, s. 17, but was more widely framed.

[40] These four statutes referred specifically to persons employed by the Bank of England, the South Sea Company and the Post Office. Thus when in 1799 a clerk employed by another firm of bankers had secreted and converted to his own use a bank-note which he had received over the counter, the court held that the clerk's act amounted to a breach of trust only, and not to larceny, because the note had never been in the bankers' possession. This was a remarkable decision, particularly in view of the admitted fact that the prisoner had given his employers' security to account for what he received and against embezzlements; *R.* v. *Bazeley* (1792), 2 Leach 835.

It is significant of the spirit in which criminal justice was then administered that this remarkable decision was widely supported. Russell, for instance, describes it as being 'perfectly in unison with the due administration of criminal justice, in adopting the merciful construction of a doubtful point of law . . .'; *On Crimes* (1819), Vol. 2, p. 1228.

To make such evasions impossible, 39 Geo. 3, c. 85, was passed, which declared that servants or clerks receiving any money or other effects on their masters' account, and fraudulently embezzling or secreting any part thereof, should be deemed to have feloniously stolen the same. The punishment appointed for such offenders as well as for aiders, procurers and abettors was transportation for not more than fourteen years. This was a general Act but it did not abrogate the above-mentioned particular statutes. Thus when in *R.* v. *Aslett* Erskine argued for the defence that the capital punishment appointed by 15 Geo. 2, c. 13, had been abrogated by 39 Geo. 3, c. 85, his view was overruled; (1803), 2 Leach 958, 965, 970. This decision is approved by East, 2 P.C. 579, § 19.

§ 14. BLACKMAIL

To send letters threatening injury to life or property in order to extort money was a high misdemeanour at Common Law, punishable by a fine and imprisonment. As this punishment was considered inadequate by eighteenth century standards, several more severe statutes were passed, two of which imposed capital punishment. Thus by the Waltham Black Act (9 Geo. 1, c. 22), any person who knowingly sent letters either unsigned or signed with a fictitious name, demanding money, was guilty of a felony without benefit of clergy.[41] During the reign of George II this provision was made still more severe by 27 Geo. 2, c. 15 (1754). This Act, referring to 9 Geo. 1, c. 22, stated that letters had been sent to several persons containing a threat against their lives or properties but *without* demanding any money or other valuable effects; and that in the absence of such a demand the sending of these and similar letters was held to be outside the scope of the Waltham Black Act. To prevent future evasion of the law on these grounds 27 Geo. 2, c. 15, enacted that any person who knowingly sent any letter without a name or with a fictitious name, threatening to kill, or to burn any house, outhouse, barn, stack of corn or grain, hay or straw, would be guilty of felony without benefit of clergy, *although* no money or other valuable effects had been demanded in it.[42] Those who forcibly rescued any person in the lawful custody of an officer or other person for the said offence were likewise guilty of it. The administration of 9 Geo. 1, c. 22, and 27 Geo. 2, c. 15, gave rise to a number of interesting and debatable questions,[43] but several executions for offences under these statutes are none the less recorded.

Lastly, 43 Eliz. c. 13 (1601) should be mentioned. This Act, which was of a local character, stated that: 'Many of her Majesty's Subjects, dwelling . . . within the counties of *Cumberland, Northumberland, Westmorland,* and the Bishoprick of *Duresme,* have been taken, some forth of their own Houses, and some in travelling by the Highway, or otherwise, and carried . . . as Prisoners, and kept barbarously and cruelly until they have been redeemed by great Ransome: and . . . there have been many Incursions, Roads Robberies, and burning and spoiling of Towns, Villages, and Houses within the said Counties, so that divers . . . of her Majesty's Subjects, in the said Counties . . . have been enforced to pay a certain Rate of Money, Corn, Cattle or other Consideration, commonly called . . . *Black-mail,* . . . to the End thereby to be . . . freed, protected and kept in Safety from the Danger of such as do usually rob and steal in those Parts'. For all these offences, as well as for being privy, consenting, aiding, or assisting in their commission, the Act appointed capital punishment without benefit of clergy.

§ 15. OFFENCES BY BANKRUPTS

By 5 Geo. 2, c. 30, s. 1 (1732), continued by several statutes and made perpetual by 37 Geo. 3, c. 124 (1797), the death penalty without benefit of clergy was appointed for bankrupts who failed either to surrender themselves to the commissioners within forty-two days after a notice to this effect had been

[41] Above, pp. 73–75.
[42] For another capital provision of this Act see above, p. 624.
[43] On judicial decisions relating to Waltham Black Act see above, pp. 73–75. In respect to 27 Geo. 2, c. 15, see *R.* v. *Girdwood* (1776), 1 Leach 142; the case of *Jepson and Springett* (1798), East, 2 P.C. 1115, § 2; the case of *Heming* (1799), *ibid.*, p. 1116, and *R.* v. *John and Mary Hammond* (1787), 1 Leach 444.

issued, or to submit to being examined, or fully to disclose their estates and effects, or to deliver their estates or effects for the benefit of their creditors. The statute also covered bankrupts who removed, concealed or embezzled any part of their estates and effects to the value of twenty pounds, or any books of account, papers or writings relating thereto, with intent to defraud their creditors. The other Act to be noted is 28 Geo. 2, c. 13, s. 39 (1755), which related to fraudulent insolvency. After reciting 'that several Persons who are Prisoners for Debt choose rather to continue in Prison, and spend their Substance there, than discover and deliver up to their Creditors their Estates or Effects, in order to the Satisfaction of their just Debts', it enacted that a creditor might require the debtor to deliver a schedule of his estates and effects, and appointed the death penalty without benefit of clergy for those who failed to comply with this order.[44]

§ 16. FORGERY

As the law then stood, forgery was variously defined as the making of a false instrument with intent to deceive (Buller, J.)[45]; a false signature made with intent to deceive[46]; or the false making of an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud (Eyre, B.)[47]; the false making of a note or other instrument with intent to defraud (Grose, J., on behalf of the twelve judges)[48]; fraudulently writing or publishing a false deed or writing, to the prejudice of the right of another (Comyns, C.B.); the fraudulent making or alteration of a writing to the prejudice of another man's right (Hawkins)[49]; a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit (East)[50]; and a fraudulent making or alteration of a writing to the prejudice of another man's right (Blackstone).[51]

The legal connotation of forgery had not always been so broad and there was also a fundamental difference between the eighteenth century system of punishment and that of more remote periods. In the Middle Ages the scope of forgery had been very narrow.[52] By 25 Edw. 3, st. 5, c. 2 (1350), forgery of the King's seals was declared to be treason.[53] Aiders and consenters to the counterfeiting of the great or privy seal were within the statute, but receivers or aiders after the fact were probably not, particularly since 1 Mar. sess. 2, c. 6 (1553) expressly mentioned accessories before, but contained no reference to receivers.[54] But as Pollock and Maitland point out, 'when once the royal lawyers have brought the counterfeiting of the king's seal or the

[44] The same provisions were enacted by 1 Geo. 3, c. 17, s. 46. See also s. 17 of the Act of George II and s. 26 of that of George III, which relate to those who avail themselves of the benefits of these Acts by perjury.

[45] *R.* v. *Coogan* (1787), East, 2 P.C. 948–949, § 43; for this case see also 1 Leach 448, 449.

[46] *R.* v. *Taylor* (1779), East, 2 P.C. 853. East points out that 'in the word *deceive* must doubtless be intended to be included an intent to *defraud*'.

[47] *R.* v. *Jones and Palmer* (1785), East, *ibid.* 853; for this case see also 1 Leach 366.

[48] *R.* v. *Parkes and Brown* (1796), 2 Leach 775, 785.

[49] 1 P.C. 537.

[50] 2 P.C. 852, § 1.

[51] 4 Comm. 247.

[52] Holdsworth, *H. E. L.*, Vol. 4, p. 501.

[53] See also 1 Mar. sess. 2, c. 6. By 7 Anne, c. 21, s. 9 (1708), this offence was made treason in Scotland also.

[54] East, 1 P.C. 87, § 26.

king's money within the compass of high treason, they apparently think that they have done almost enough, though for a short while we hear that for a man to counterfeit his lord's seal is treason. . . . So far as we can see, however, forgery was dealt with but incidentally and in the course of civil actions, and was merely a cause for an imprisonment redeemable by fine. What is more, the offence that is thus hit is not exactly that which we call forgery; it is not "the making of a false document with intent to defraud"; rather it is the reliance on a false document in a court of law'.[55] By 1 Hen. 5, c. 3, passed in 1413, forgery became punishable by a fine.[56] During the sixteenth century a general jurisdiction was exercised by the Court of Star Chamber,[57] and according to Holdsworth, 'these cases which came before that court helped to call the attention of the legislature to the need for an improvement in the law'.[58]

5 *Eliz. c.* 14 (1562)

This Act broadened the legal concept of forgery and established a new system of punishment. The first section of the Act states that 'Forasmuch as the wicked, pernicious and dangerous Practice of making, forging and publishing false and untrue Charters, Evidences, Deeds, and Writings, hath of late Time been very much more practised, . . . in all Parts of this Realm, than in Times past, not only to the high Displeasure of God, but also to the great Injury, Wrong, Hurt, Damage, Disherison and utter undoing of divers of the Queen's Majesty's Subjects of this Realm, and to the great Subversion of Justice and Truth, which seemeth to have grown and happened chiefly by reason that the Pains and Punishments limited for such great and notable Offences, by the Laws and Statutes of this Realm, before this Time have been and yet are so small, mild and easy, that such evil People have not been nor yet are afraid to enterprise the practising and doing of such Offences'. The Act introduced a differentiation between first and second offenders. In respect to first offenders it distinguished two kinds of forgery and appointed a different punishment for each. Thus by section 2, (a) any person convicted of the forgery of any false deed, character, sealed writing, court roll or of the written will of any person with intent to defeat, recover or change the intent of any person in any real property; or of giving in evidence any such document, knowing it to be forged, was liable to pay double costs and damages, and was to 'be set upon the Pillory in some open Market-Town, or other open Place, and there to have both his Ears cut off, and also his Nostrils to be slit and cut, and seared with a hot Iron, so as they may remain for a perpetual Note or Mark of this Falsehood'; such person was further to be imprisoned for

[55] *History of English Law* (2nd ed. 1911), Vol. 2, p. 540.

[56] This statute recited that many persons had been deprived of their property by false deeds, and enacted that the party so grieved shall have his suit in that case, and recover his damages; and 'the Party convict shall make Fine and Ransom at the King's Pleasure'. According to Stephen, 'this method of treating a misdemeanour as a private wrong for which a public penalty was also to be imposed, is very characteristic of our ancient law, and many instances of it might be referred to. The statute can hardly be said to have altered the law, as forgery was always a misdemeanour. The effect of it rather was that when a forgery was brought to light in a civil action the result was a fine to the king as well as damages to the party'; *H. C. L.*, Vol. 3, p. 181.

[57] 'Infinite are the examples of punishments inflicted upon forgeries of all sorts before the statute of 5 Eliz.'; Hudson, *Treatise on the Court of Star Chamber*, p. 65; quoted by Holdsworth, *H. E. L.*, Vol. 4, p. 502, note 2.

[58] *H. E. L.*, Vol. 4, p. 502.

life and to forfeit to the Queen the issues and profits of his land for life. (b) By section 3 any person convicted of the forgery of real chattels or of any obligation, bill obligatory, acquittance, release or other discharge of any debt, account, action, suit, demand or other personal things was to pay double costs and damages, was to be set upon the pillory, there to have one of his ears cut off and afterwards to be imprisoned for one year. The same penalty was appointed for giving any such documents in evidence knowing them to be forged. In respect to offenders convicted for the second time, the Act made no distinction between the two kinds of forgery and appointed a uniform punishment, which was to be death, without benefit of clergy (section 7).[59]

Thus 5 Eliz. c. 14 was the first Act to make forgery a capital offence, at the same time substantially broadening its scope. Although virtually superseded by other statutes, particularly by 2 Geo. 2, c. 25 (1729), it remained formally in force until 1830 and set up a standard for future legislation. The majority of the subsequent capital statutes were passed during the reign of George III, though the tendency towards imposing this penalty had already begun to assert itself during the reign of George II.[60]

Forgery of deeds, bonds, testaments, bills of exchange, etc.

Perhaps the most important among the factors which led to the enactment of so many capital statutes relating to forgery was the great economic and commercial development of eighteenth century England. Concomitant with the growth of banks and the intensification of trade came new possibilities for committing offences against property generally, and more particularly for forgeries and embezzlement. Numerous statutes were passed to check this growing volume of criminality, each usually concerned with one particular kind of forgery or one particular type of offender. Thus step by step a whole new code evolved, composed of a great many often cumbersome statutes, most of them capital.[61] To survey this code must of necessity be a rather long and dry task.

[59] To bring the offender within this provision it was necessary to show a conviction by judgment of a first offence, committed before the second offence, and the record of the first offence had to be set out in the indictment for the second offence so as to prove that the former had been of the kind specified by the Act; Coke, 3 Inst. 172; Hale, 1 P.C. 686. The scope of 5 Eliz. c. 14 was subsequently extended by 2 & 3 Anne, c. 4; 5 Anne, c. 18; 7 Anne, c. 20; and 8 Geo. 2, c. 6. These Acts related to the forgery of any memorial, certificate, etc., of deeds, wills, etc., of land, etc., committed in the West and North Ridings of Yorkshire or in Middlesex.

[60] The ensuing survey includes only the more important statutes relating to these offences.

[61] Hawkins, 1 P.C. 537–538, gives the following classification of forgeries: forging franks; forging testimonial of justices; forging lottery tickets; forging post fines; forging marriage registers; forging stamps; forging the signature of the accountant-general; forging the seal of the South Sea Company; forging East India bonds; forging the name of a proprietor of stock; forging documents relating to the admiralty; forging the names of seamen; forging policies of insurance; forging exchequer bills; forging bank notes, etc.; forging instruments for payment of money, etc.; and orders for the delivery of goods.

East, 2 P.C. 865, divides all statutes concerning forgery into six broad classes, relating respectively to records; public funds and the stocks of public companies; notes and other securities of the Bank of England and of other public companies; stamps; official papers, securities and documents; private papers, securities and documents.

Russell, *On Crimes* (1819), Vol. 2, pp. 1517–1652, divides forgeries into the following seven groups: forging, avoiding, etc., records and judicial processes;

The following statutes were of a more general character: (a) 2 Geo. 2, c. 25, s. 1, made perpetual by 9 Geo. 2, c. 18, which appointed the death penalty without benefit of clergy for falsely making, forging or counterfeiting, or causing or procuring to be falsely made, forged or counterfeited, or willingly aiding or assisting in the false making, forging or counterfeiting of any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, or any acquittance or receipt whether for money or goods, with intent to defaud, or uttering or publishing as true any of these forged documents. (b) 31 Geo. 2, c. 22, s. 78 (1757) appointed the same punishment for similar forgeries committed with intent to defraud any corporation; as did (c) 7 Geo. 2, c. 22 (1734), for falsely making, altering, forging or counterfeiting, or causing or procuring to be falsely made, or uttering or publishing as true any acceptance of any bill of exchange, or the number of the principal sum of any accountable receipt for any note, bill or other security for the payment of money, or any warrant or order for the payment of money or the delivery of goods with intent to defraud any person whatsoever; and (d) 18 Geo. 3, c. 18 (1778) for similar forgeries when committed with intent to defraud any corporation.

Statutes relating to public funds and stocks of public companies

The main statute in this group is 8 Geo. 1, c. 22 (1721), which related to the frauds and abuses committed by forging and counterfeiting the writing of some of 'the Proprietors of the Shares of and in the Capital Stock and Funds of such Body or Bodies Politick or Corporate, as are established by Act or Acts of Parliament in that Behalf, or some of them, or by forging or counterfeiting the Hands of Persons entitled to the Dividends attending the said Shares, or some of them, or . . . the Hands of Persons entitled to Annuities, in respect whereof the Proprietors have transferrable Shares in a Capital Stock or Stocks established by Act or Acts of Parliament, in proportion to their respective Annuities; and divers Frauds and Abuses have been or may be committed by Persons falsely and deceitfully personating the true and real Proprietors of the said Shares in Stock, Annuities and Dividends, or some of them'. It then proceeded to enact capital punishment without benefit of clergy for (a) forging letters of attorney or any other authority or instrument to transfer stock or receive dividends; (b) forging the names of proprietors to such letters of attorney, etc., demanding stock, etc., by virtue of such letters; and (c) personating proprietors, or any persons entitled to any such stock, etc.

Doubts had arisen however as to whether this Act could also be made applicable to the similar offence of forging capital stocks and funds which had been, or might in future be, established by Parliament or by any corporation formed thereafter. This led to the passing of two other statutes—31 Geo. 2, c. 22 (1757) and 4 Geo. 3, c. 25 (1763)—which by sections 77 and 15 respectively extended the scope of 8 Geo. 1, c. 22, so as to cover these contingencies.

These statutes failed to repress forgeries committed in the course of transferring stock, annuities and other public funds of the Bank of England as well as falsifications of the Bank's public accounts. Consequently by 33 Geo. 3, c. 30 (1793) the following forgeries were also declared capital, non-clergyable

forgeries relating to public funds and the stocks of public companies; forging the securities of the Bank of England; forging the securities of other public companies; forging and transposing stamps; forging official papers, securities and documents; forging private papers, securities and documents.

offences: making transfers of stock at the Bank of England in the name of any person, not being the owner, and wilfully assisting in the making of such transfers (section 1); falsely making, or causing or procuring to be falsely made any transfers of stock, etc., at the Bank of England (section 2); making false entries in the books of the Bank or falsifying the accounts, as well as wilfully assisting in these offences (section 3). Closely related to this important statute were 9 Geo. 1, c. 12, s. 4 (1722), which made it a capital offence to forge orders, receipts, etc., concerning the payment of annuities payable at the Exchequer [62]; and 35 Geo. 3, c. 66, which together with 37 Geo. 3, c. 46 (1797) re-enacted the already-mentioned 8 Geo. 1, c. 22 and 33 Geo. 3, c. 30, and also covered the forging of receipts for subscriptions to loans and debentures, and the forging or uttering of any dividend warrant or warrant for the payment of any annuity.

Similarly, the Acts relating to the raising of different loans included provisions imposing the death penalty for forging certificates, debentures, receipts, etc., specified in such Acts (for instance 37 Geo. 3, c. 46, s. 3 and 35 Geo. 3, c. 93, s. 7 (1795)). This last Act related to a loan granted to the Emperor of Germany.[63] The same method was followed in respect to the forgery of any exchequer bill, capital provisions being inserted in the Acts, passed every year, which authorised the issue of such securities. 4 Geo. 3, c. 1, s. 43 (1763) and 33 Geo. 3, c. 29, s. 48 (1793) may be quoted as an example. Like all similar laws, they related both to persons found guilty of forging any exchequer bill and to those who tender such a document in payment, or who demand to have it exchanged for money. Again, the Lottery Acts usually contained similar provisions with respect to the forgery of any ticket, certificate, etc. Thus 16 Geo. 3, c. 34, s. 35 (1776) enacted capital punishment for forging or counterfeiting, as well as for assisting in forging or counterfeiting any such ticket, certificate, etc., for uttering, selling or disposing of any such false ticket, and for willingly aiding, abetting, assisting, hiring or commanding any person to commit these offences.

Forgery of stamps and marks

Rules requiring stamps and marks to be affixed to written instruments, plates or other articles in order to denote the payment of the duties imposed on them were enacted by many statutes,[64] and were later embodied in the general Acts of 27 Geo. 3, c. 13 (1787) and 37 Geo. 3, c. 90 (1797). Section 5 of the latter Act declared it to be a felony without benefit of clergy: (a) to counterfeit or forge any stamp denoting the duties specified by this or certain other Acts with intent to defraud the duties; (b) to cause or to procure the same; (c) to counterfeit or resemble the impression of such stamps effected with the same intent; (d) to utter or sell any vellum, parchment or paper, liable by virtue of this Act to any stamp duty, with such counterfeit stamp or mark thereupon, knowing the same to be counterfeit; (e) to use privately or fraudulently any stamp used or allowed to be used by this Act with intent to defraud such duties.[65]

[62] See also 9 Geo. 2, c. 34, s. 8 (1736).

[63] See also 38 Geo. 3, c. 16, s. 95 (1798)—'An Act for granting to His Majesty and Aid and Contribution for the Prosecution of the War'.

[64] Russell, *On Crimes* (1819), Vol. 2, p. 1553.

[65] Apart from those mentioned in the text, the leading capital statutes relating to forgery of stamps denoting duties were:—

(a) Prior to 37 Geo. 3, c. 90:—

5 W. & M. c. 21, s. 11; 9 & 10 W. 3, c. 25, s. 59; 9 Anne, c. 23, s. 34;

Apart from these general and exceedingly broad statutes there was also 31 Geo. 2, c. 32, s. 15 (1757), which appointed absolute capital punishment for the forgery of the assay marks or stamps required to be affixed to gold and silver manufactures indicating their standard value,[66] as well as for (a) forging or causing or procuring to be forged the stamp used by the Goldsmiths Company for making plate in accordance with 12 Geo. 2, c. 26, s. 8; (b) marking or causing to be marked a plate, etc., with a forged or counterfeit stamp; (c) transposing the stamp impressed from one vessel to another; (d) selling, exchanging, or exposing to sale or exporting plate with a forged counterfeit or transposed mark; (e) having in possession any such stamp knowing it to be forged. The same punishment was appointed by 24 Geo. 3, c. 53, s. 16 (1784) for counterfeiting, etc., any mark imposed by certain other companies of goldsmiths.[67]

Forgery on the Bank of England[68]

In addition to these general provisions there were many others referring to particular institutions or groups of persons. The largest group of statutes concerned with a particular institution was that dealing with forgeries on the Bank of England. They dealt with (1) the forgery of the common seal of the Bank of England; (2) the forgery of bank-notes, bank bills, etc.; (3) the counterfeiting of bank paper; and (4) forgeries and frauds committed in making transfers.[69]

Forgeries under (1) above were the subject of two statutes: 8 & 9 Will. 3, c. 20, s. 36 (1697) and 15 Geo. 2, c. 13, s. 11 (1742). Both declared it a felony without benefit of clergy, the first to forge or counterfeit the common seal of the 'Corporation of the Governor and Company, or of any sealed Bank Bill, made or given out in the Name of the said Governor and Company for the payment of any Sum or Money'; and the second to 'forge, counterfeit, or alter Bank Note, Bill, etc. . . . Bond or Obligation under the Common Seal of the said Company, or any Indorsement thereon', or to offer or dispose of, or put away any such forged, counterfeited or altered bond or obligation, or to demand the money therein contained, or to pretend to be due thereon or any

10 Anne, c. 19, ss. 115 & 163; 10 Anne, c. 26, s. 72; 5 Geo. 1, c. 2, s. 9; 6 Geo. 1, c. 21, s. 60; 29 Geo. 2, c. 12, s. 21; 29 Geo. 2, c. 13, s. 5; 30 Geo. 2, c. 19, s. 27; 32 Geo. 2, c. 35, s. 8; 2 Geo. 3, c. 36, s. 8; 5 Geo. 3, c. 35, s. 6; 5 Geo. 3, c. 46, s. 40; 5 Geo. 3, c. 47, s. 8; 7 Geo. 3, c. 44, s. 5; 14 Geo. 3, c. 72, s. 8; 16 Geo. 3, c. 34, s. 15; 17 Geo. 3, c. 50, s. 25; 20 Geo. 3, c. 28, s. 6; 23 Geo. 3, c. 49, s. 20; 23 Geo. 3, c. 58, s. 11; 25 Geo. 3, c. 50, s. 19, and 31 Geo. 3, c. 21, s. 5 (on certificates for killing game); 26 Geo. 3, c. 48, s. 9; 26 Geo. 3, c. 49, s. 24; 26 Geo. 3, c. 51, s. 14; 27 Geo. 3, c. 31, s. 13; 27 Geo. 3, c. 32, s. 14; 29 Geo. 3, c. 50, s. 13; 29 Geo. 3, c. 51, s. 8; 31 Geo. 3, c. 25, s. 29; 34 Geo. 3, c. 14, s. 14; 35 Geo. 3, c. 30, s. 4; 35 Geo. 3, c. 49, s. 31; 35 Geo. 3, c. 55, s. 17; 35 Geo. 3, c. 63, s. 23; 36 Geo. 3, c. 6, s. 13; 36 Geo. 3, c. 52, s. 40; 36 Geo. 3, c. 125, s. 19.

(b) Subsequent to 37 Geo. 3, c. 90:—
37 Geo. 3, c. 111, s. 5; 38 Geo. 3, c. 53, s. 18; and 38 Geo. 3, c. 54, s. 10, which provided that the death penalty imposed by 9 Anne, c. 11; 10 Anne, c. 26, and 5 Geo. 1, c. 2, was to apply also to persons who counterfeited stamps provided in pursuance of 27 Geo. 3, c. 13; 28 Geo. 3, c. 37, and 31 Geo. 3, c. 27.

[66] Under 12 Geo. 2, c. 26, s. 8, this offence was punishable by a fine, and in default of payment by imprisonment.

[67] This part of the survey is to be considered in conjunction with the statutes mentioned in § 6 (Offences against Public Revenue), above, pp. 627–628.

[68] Also above, pp. 645–646.

[69] Hawkins, 1 P.C. 556.

part thereof, 'of the said Company, or any their Officers or Servants, knowing such Bank Bill, etc. . . . Bond or obligation, or the Indorsement thereon, to be forged, counterfeited, or altered with intent to defraud the said Company or their Successors, or any other Person or Persons whatsoever'.

The main statute of group (2)—relating to the forgery of bank-notes, bank bills and dividend warrants—was the already-quoted 8 & 9 Will. 3, c. 20. Section 36 of this Act declared that forging or counterfeiting any bank-note of any sort whatever, signed for the governor and company of the Bank of England, or altering or erasing any indorsement of any bank bill or note of any sort should be punished by death without benefit of clergy. By 12 Geo. 1, c. 32, s. 9 (1725) the same punishment was appointed for forging the signature of the accountant to a certificate, and for receiving suitors' effects in a Bank of England or any East-India or South Sea bond, as it was by 15 Geo. 2, c. 13, s. 11, for counterfeiting or altering any bank-note, bank bill of exchange, dividend warrant or any bond or obligation under the common seal of the company or any indorsement thereon, or for offering, disposing of or putting away any such forged note. Mention should also be made of 35 Geo. 3, c. 66, ss. 3, 4, 5, 7, 8, 9 (1795) and 37 Geo. 3, c. 46, ss. 3–9 (1797), which related to certain annuities created by the Parliament of Ireland, and the Dividends thereon payable at the Bank of England.

Group (3), relating to the counterfeit of bank paper bearing the words 'Bank of England' visible in its substance, was covered by 13 Geo. 3, c. 79, s. 1 (1773), which also included all aiders and assisters in the making of such paper.

Forgeries in group (4)—those committed in making transfers—were the subject of 33 Geo. 3, c. 30, s. 1. This Act was of a general character, though it referred specifically to the Bank of England, and has already been noted in a previous paragraph.[70]

Apart from the offences included in these four basic groups, section 1 of the above-quoted 13 Geo. 3, c. 79, covered also the offence of making frames for forging notes of the Bank of England, and for knowingly having in possession moulds or instruments serving this purpose. This offence too was punished by death without benefit of clergy.

Forgery on other public companies

Similar provisions were passed for the punishment of forgeries committed on other public companies. Thus 9 Anne, c. 21, s. 57 (1710) and 6 Geo. 1, c. 4, s. 56 (1719) dealt with the forgery of the common seal of the South Sea Company, of their bonds or obligations, and with offering to disperse or pay away any such forged bonds, or demanding money contained therein. 12 Geo. 1, c. 32, s. 9 (1725) similarly protected the East India Company, while 6 Geo. 1, c. 11, s. 50 (1719) was concerned with the forgery of receipts or warrants of the South Sea Company. A number of other Acts, such as 6 Geo. 1, c. 18, s. 13 (1719); 39 Geo. 3, c. lxxxiii, s. 21 (1799) [71]; and 4 Geo. 3, c. 37, s. 15 (1763) related to similar offences committed against the London and Royal Exchange, the Globe Insurance Company and the English Linen Company.[72] These

[70] Above, pp. 645–646.

[71] Public local and personal Acts.

[72] Forgeries committed on some other companies were punished by less severe punishments; thus by 36 Geo. 3, c. 106, s. 26 and 13 Geo. 3, c. 38, s. 28 revived by 38 Geo. 3, c. xvii, s. 23, forgeries against the British Society for extending the Fisheries, etc., and the British Plate Glass Manufactory were punished by transportation for seven years.

particular statutes were rendered of less importance by the subsequent enactment of more general Acts relating to forgeries committed on any corporation whatsoever.

Other miscellaneous provisions

Lastly, twelve other statutes should be noted, all of which imposed the death penalty without benefit of clergy. They were: (1) 4 Geo. 2, c. 18 (1731), concerning forging or causing to be forged, assisting in forging, or erasing or altering with intent to defraud the Lords of the Admiralty of so-called Mediterranean passes which by virtue of treaties between England and other Powers gave British vessels a free passage. This Act also extended to uttering or publishing as true such counterfeited passes, knowing them to be forged. (2) 31 Geo. 2, c. 10, s. 24 (1757), concerning the forgery of any letter of attorney, bill, ticket, certificate, etc., entitling seamen to receive wages, pay, or other allowances of money or prize money due to them for services performed on board any ship,[73] and (3) 9 Geo. 3, c. 30, s. 6 (1769), concerning the uttering or publishing of the same. (4) 32 Geo. 3, c. 33, s. 23 (1792), concerning the forgery of wage-tickets for marines or seamen. (5) 32 Geo. 3, c. 34, s. 29 (1792), concerning forging, assisting in forging, uttering or publishing petitions for certificates to enable any person to obtain letters of administration to seamen or marines, etc., or any check, remittance bill, etc., or certificate to the deputy master in order to receive the wages of such seamen and marines. (6) 12 Geo. 1, c. 32, s. 9 (1725), concerning the forgery of the signature of the Accountant-General or of any other person acting on behalf of the Court of Chancery, with intent to receive the money or effects of the suitors lodged in the bank or directed to be put in Government or other securities. This Act also applied to those who assist in forging or who utter any such documents, knowing them to be forged. (7) 32 Geo. 2, c. 14, s. 9 (1758), concerning forging or causing to be forged the mark or signature of the receiver of prefines at the Alienation Office. (8) 39 & 40 Geo. 3, c. 80, s. 27 (1800), concerning forging, causing to be forged or uttering (knowing to be forged) any certificate attesting that goods liable to quarantine were opened and aired according to Orders in Council.[74] (9) 39 Eliz. c. 17, s. 3 (see also above, p. 621, and below, p. 651), concerning forging by soldiers or mariners of testimonials or passes issued them by Justices of the Peace. (10) 30 Geo. 3, c. 34, s. 11 (1790), concerning forging orders for the payment of compensation to American loyalists. (11) 35 Geo. 3, c. 28, s. 30 (1795), concerning forging orders, etc, made by seamen, etc., allotting part of their wages for the maintenance of their families. And (12) 29 Geo. 3, c. 41, s. 36 (1789), concerning forging, etc., a birth certificate of any person appointed a Nominee under the Act or personating proprietors entitled to certain annuities created by the Act.

The above survey of the main capital statutes on forgery[75] clearly shows that there was no exaggeration in Blackstone's statement that 'through the number of these general and special provisions, there is now hardly a case

[73] See also 35 Geo. 3, c. 94, s. 34 (1795), relating to wages of officers of the Navy.
[74] For other capital provisions relating to quarantine see above, pp. 625–626.
[75] Certain other kinds of forgery, such as forging marriage registers or justices' testimonials, as well as some forgeries directed against public revenue, have been included under offences against the administration of justice or offences against public revenue; above, pp. 622 and 627–628.

possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime'.[76]

§ 17. FALSELY PERSONATING ANOTHER WITH INTENT TO DEFRAUD

As Hammond rightly emphasises,[77] there are several offences closely connected with forgery and yet distinct from it. Thus such offences as having in possession, importing or uttering forgeries, growing as they do 'out of that crime, may, without any impropriety and frequently with great advantage, be treated on the same occasion with it'. Further offences connected with the tools of forgeries are described by Hammond as 'preliminary to the crime itself'. Others to be named here are erasing and abusing genuine instruments; personating another to get possession of his property or taking a false oath for a similar purpose; and fraudulently receiving and offering to receive any goods or money, which 'though not necessarily maintaining any of these relations or

[76] 4 Comm. 250. The main capital statutes relating to forgery enacted during the first quarter of the 19th century are as follows: 42 Geo. 3, c. 116, s. 194—forging contracts in respect to land-tax redemption, to which may be added 50 Geo. 3, c. 65, s. 18—forging drafts, etc., of Commissioners of Land Revenue; 52 Geo. 3, c. 143, s. 6—forgery of certificates for redemption or sale of Land Tax; 54 Geo. 3, c. 70, s. 38—of transfers, etc., under Acts for improving the Land Revenue of the Crown; 45 Geo. 3, c. 89, s. 1—of deeds, wills, securities, etc., or uttering the same to defraud any person or corporation; 41 Geo. 3, c. 39—altering and extending the same; 46 Geo. 3, c. 45, s. 9; c. 75, s. 8; c. 76, s. 9; c. 83, s. 9; c. 142, s. 14; c. 150, s. 10—relating to forgery of drafts, etc., of public officers; 47 Geo. 3, sess. 1, c. 55, s. 8; 49 Geo. 3, c. 92, s. 5, and 48 Geo. 3, c. 142, s. 27—counterfeiting certificates and registers of funds; 52 Geo. 3, c. 143, s. 5—against Alienation Office; 52 Geo. 3, c. 143, s. 10—forgery of debentures for return of money from Customs and Excise; 53 Geo. 3, c. 41, ss. 26, 27, and 54 Geo. 3, c. 13, s. 5—forgery of certificates or debentures under the Annuity Act, of receipts for contributions for purchase of debentures and of bills of credit; 6 Geo. 4, c. 106, s. 27—forgery of handwriting of receiver-general or controller-general of customs, or of any person duly authorised to act for them; 52 Geo. 3, c. 143, s. 9—illegally making or assisting in the illegal making of paper frames; 54 Geo. 3, c. 151, s. 16—forging the name, etc., or of Bill of Exchange by Agent General; 1 Geo. 4, c. 35, s. 27—forgery of handwriting, etc., of the Accountant-General, etc., of the Court of Exchequer to a certificate to receive suitor's effects in the bank, etc., as well as fraudulently claiming payments; 5 Geo. 4, c. 53, s. 22—counterfeiting certificates, etc., of transfers of English or Irish stock; 46 Geo. 3, c. 98, s. 8—forging certification of order of Council in respect to quarantine.

Various statutes relating to falsely personating another contained provisions punishing with death forgery or altering of certificates; see 46 Geo. 3, c. 98, s. 8; 45 Geo. 3, c. 72, s. 121; 54 Geo. 3, c. 110, s. 6; 55 Geo. 3, c. 60, s. 32; 56 Geo. 3, c. 101, s. 5; 57 Geo. 3, c. 20, s. 10; 57 Geo. 3, c. 127, s. 4, and 59 Geo. 3, c. 56, s. 18.

The law concerning the protection of stamps, dies, gold and silver was even more confusing; capital provisions were embodied in the following statutes: 41 Geo. 3, c. 10, s. 8; 41 Geo. 3, c. 86, s. 16; 43 Geo. 3, c. 126, s. 11; 43 Geo. 3, c. 127, s. 8; 42 Geo. 3, c. 14, s. 6; 42 Geo. 3, c. 56, s. 22; 44 Geo. 3, c. 98, s. 9; 45 Geo. 3, c. 28, s. 8; 46 Geo. 3, c. 112, s. 2 (repealed by 47 Geo. 3, st. 2, c. 12); 48 Geo. 3, c. 149, s. 7; 50 Geo. 3, c. 35, s. 6; 52 Geo. 3, c. 143, ss. 7, 8; 55 Geo. 3, c. 184, s. 7; 55 Geo. 3, c. 185, s. 6; 55 Geo. 3, c. 185, s. 7; 6 Geo. 4, c. 119, s. 6.

A number of statutes punished by death forgery of Exchequer Bills; see 48 Geo. 3, c. 1, s. 9; 51 Geo. 3, c. 15, s. 71; 57 Geo. 3, c. 34, s. 63; 3 Geo. 4, c. 86, s. 54. For forgery of certificates, etc., under Loan and Revenue Acts see 51 Geo. 3, c. 61, s. 5; 3 Geo. 4, c. 113, s. 23 (under superannuation Act); 3 Geo. 4, c. 51, s. 15 (forging, etc., receipts or certificates for Annuity); 44 Geo. 3, c. 93, s. 11—another statute for forging Lottery Tickets.

[77] A. Hammond, *The Criminal Code: Forgery* (1826), pp. 3–4.

analogies, have, by the statute law, been denounced on the same occasion with forgery'. It has been shown in the preceding paragraph that numerous forgeries and allied offences, irrespective of their gravity, were often the subject of the same statute or even of the same section, and carried the same extreme penalty. For instance, the forgery of a document and the possession of such a document were both included in the same statute,[78] as were the forgery of a stamp and its fraudulent use.[79] Other statutes imposed the same penalty for forging a stamp and having it in possession,[80] and committing a forgery on the Bank of England and making or being in possession of frames used for this purpose.[81] It has been shown also that almost all these statutes referred both to the principal perpetrators and to assisters or utterers.

The offence of falsely personating another with intent to defraud had been a cheat or misdemeanour at Common Law. By 8 Geo. 1, c. 22, s. 1 (1721)—an important statute of general import[82]—it was made a felony without benefit of clergy. The relevant part of this Act runs as follows: '. . . or shall falsely and deceitfully personate any true and real Proprietors of the said Shares in Stock, Annuities and Dividends, or any of them, or any Part thereof, and thereby transferring or endeavouring to transfer the Stock, or receiving or endeavouring to receive the Money of such true and lawful Proprietor, as if such Offender were the true and lawful Owner thereof . . .'.

The same punishment was appointed by two other statutes: (1) By 31 Geo. 2, c. 10, s. 24, which related to the forgery of any letter of attorney, bill, ticket, etc., in order to receive seamen's wages,[83] and also contained a provision in respect to personating, which it described as willingly and knowingly to personate or falsely assume the name or character of any officer, seaman or other person entitled or supposed to be entitled to any wages, pay, etc. And (2) by 3 Geo. 3, c. 16, s. 6 (1762), concerned with personating an out-pensioner in order to receive any money from the commissioner or governors of Greenwich Hospital due or supposed to be due on such out-pension.[84] The offence of falsely personating was very broadly conceived and it was not necessary to prove that the offender had actually received the property; the fact that he had endeavoured to receive it was sufficient. Thus in the case of *Parr*, tried under 31 Geo. 2, c. 22, s. 77, Gould, J., stated on behalf of all the judges that the very object of the Legislature had been to prevent the completion of the mischief, if possible by prohibiting even the endeavour to obtain the property of others. The very statement of the facts therefore showed that the prisoners, by personating the proprietor and by obtaining and indorsing the warrant as such, had thereby made an endeavour towards receiving the dividend.[85] A number of similar statutes were passed during the first quarter of the nineteenth century. They were: 43 Geo. 3, c. 119, s. 17—personating Greenwich

[78] 39 Eliz. c. 17, s. 3, above, pp. 621–622.
[79] 37 Geo. 3, c. 90, s. 5, above, p. 646.
[80] 31 Geo. 2, c. 32, s. 15, above, p. 647.
[81] 13 Geo. 3, c. 79, above, p. 648.
[82] Above, p. 645.
[83] Above, p. 649.
[84] Falsely personating another was also included in 21 Jac. 1, c. 26; above, p. 622 (offences against the administration of justice).
[85] The facts were that Parr was apprehended a few minutes after he had received a warrant which entitled the bearer to receive £58 10s., the legal property of another. He had not made any application at the pay-office and taken no step whatever towards cashing it—circumstances which according to his counsel showed that he had not completed the offence; *R.* v. *Parr* (1787), 1 Leach 434, 437–438.

pensioners; 46 Geo. 3, c. 69, s. 8—personating soldiers entitled to pensions; 49 Geo. 3, c. 64, s. 3—personating nominees of Life Annuities; 55 Geo. 3, c. 60, s. 32—personating petty officers of seamen or marines, taking a false oath to obtain probate of will, or knowingly receiving wages by false pretences; 57 Geo. 3, c. 127, s. 4 (a consolidating statute) and 59 Geo. 3, c. 56, s. 18—falsely assuming the name or character of others entitled to pay or prize money in order to receive the same, or taking a false oath to obtain probate or letters of administration in order to receive pay or prize money.[86]

§ 18. DESTROYING SHIPS TO THE PREJUDICE OF INSURANCE COMPANIES

This obviously acquisitive offence of a predominantly fraudulent nature was made a non-clergyable felony by 4 Geo. 1, c. 12 (1717). The Act was superseded a few years later by 11 Geo. 1, c. 29, ss. 5, 6 (1724), which enacted that if any owner or captain, master, officer or mariner belonging to any ship or vessel wilfully cast away, burned or otherwise destroyed the ship or vessel of which he was the owner or to which he belonged, or directed or procured the same to be done with intent or design to prejudice any person or persons that 'shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any owner or owners of such ship or vessel; the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged a felon or felons, and shall suffer as in cases of felony, without benefit of clergy'. This was a very serious offence, but none the less 11 Geo. 1, c. 29 was most mercifully interpreted.[87]

In 1803 both 4 Geo. 1, c. 12 and 11 Geo. 1, c. 29 were repealed by 43 Geo. 3, c. 113, which enacted that the offence of casting away, burning or destroying shall be constituted also if committed by a person not belonging to the ship. The Act made no difference between the offences committed ashore and on the high seas; this related to principals and accessories equally.

§ 19. COINAGE OFFENCES

Coinage offences, like forgeries, were the subject of numerous statutes, mostly imposing capital punishment. The first such statute was 25 Edw. 3, st. 5, c. 2 (1350) which made it high treason to 'counterfeit the King's Money', and also to 'bring false Money into this Realm, counterfeit to the Money of *England*, as the Money called *Lushburg*, or other like to the said Money of *England*, knowing the Money to be false, to merchandise or make Payment, in Deceit of our said Lord the King and of his People'. This standard of punishment had from then on been upheld and a considerable number of statutes passed appointing the death penalty for various kinds of coinage offences, some of which were declared to be high treason and others felonies without benefit of clergy. They may be grouped as follows: (a) counterfeiting; (b) impairing; (c) importing counterfeit money into the realm; (d) making, mending, or having in possession instruments used for coining; (e) receiving, paying, putting-off, uttering counterfeit coin. While some of the

[86] Many of these statutes contained provisions relating to counterfeiting or uttering such certificates; see above, note 76, at p. 650.

[87] Appendix 2, below, pp. 686–688. For wilful destruction of ships see also below, pp. 656–657.

offences in each of these classes were punishable by lesser penalties, the majority carried the death penalty, but it is often impossible to say why one or the other course had been followed by the Legislature.

Capital punishment without benefit of clergy was appointed by the following statutes: (a) 25 Edw. 3, st. 5, c. 2, quoted already, which was supplemented by a number of other equally severe Acts. Of these, 8 & 9 Will. 3, c. 26, s. 3 (1697), made perpetual by 7 Anne, c. 25, s. 1 (1708), declared it high treason to mark the edges of any of the current or diminished coin of the kingdom, or to counterfeit the coin of the kingdom with letters or grainings or other marks or figures like those on the edges of money coined in the Mint. It extended to counsellors, procurers, aiders, and abettors. 15 Geo. 2, c. 28, s. 1 (1742), declared it to be high treason to make shillings and sixpences to resemble guineas or half-guineas and to make half-pennies or farthings to resemble shillings or sixpences. The Act extended to counsellors, aiders, abettors, and procurers, but no corruption of blood was to follow (s. 4). By s. 4 of 8 & 9 W. 3, c. 26 the acts preparatory to counterfeiting, gilding or silvering coins or blanks, or gilding silver blanks, were also declared to amount to high treason, but no corruption of blood was to follow. An equally severe Act was passed in respect to foreign gold, silver or copper coins. This was 4 Hen. 7, c. 18 (1487) repealed by 1 M. Sess. 1, c. 1, s. 3 (1553) but revived by 1 Mar. Sess. 2, c. 6, which made it high treason to counterfeit foreign coin which was or should be 'allowed to be current in this Realm'. The Act also applied to counsellors, procurers, aiders and abettors. Finally, s. 6 of 8 & 9 W. 3, c. 26 made it a capital felony—without corruption of blood—to blanch copper for sale, mix blanched copped with silver or knowingly buy, sell or offer to sell blanched copper alone or mixed with silver, to do the same in respect to any malleable composition, mixture of metals or minerals which were heavier than silver and looked and wore like standard gold, but were manifestly worse than the standard.

(b) The offence of impairing coin was declared capital by two statutes. The first[88]—5 Eliz. c. 11, s. 2 (1562)—related to the clipping, working, rounding or filing of any of the coin of the realm done for 'wicked Lucre or Gain's Sake', and extended to counsellors, consentors and aiders. All offenders under this Act were declared to be guilty of treason, and apart from being liable to be executed, they also forfeited their goods and chattels and all their lands and tenements during their lives (section 3); there was, however, no corruption of blood or forfeiture of dower (section 4). 5 Eliz. c. 11 was supplemented by 18 Eliz. c. 1 (1572). This was a more general measure, for it made it high treason for principals, as well as for counsellors, consentors and aiders to impair, diminish, falsify or lighten any coin allowed to circulate by royal proclamation, whether it was of the realm, the dominions or foreign. (c) To make, mend or have in possession any instrument for coining was declared high treason by section 1 of the already quoted 8 & 9 W. 3, c. 26. This broadly framed statute included within its provisions even such preparatory acts as beginning or proceeding to make or mend, or to assist in the making or mending of any edger or edging tool, instrument or engine used for marking money round the edges with letters, grainings and other marks resembling those on the edges of money coined in the Royal Mint. By section 2 of the same Act it was high treason to convey out of the Royal Mint any instrument or part of it employed in the coining of money. The Act extended to

[88] 3 Hen. 5, c. 6, which related to this subject, was repealed by 1 Mar. Sess. 1, c. 1.

counsellors, procurers, aiders and abettors, as well as to those who knowingly received, hid or concealed.

(d) By section 2 of the already quoted 15 Geo. 2, c. 28 to utter counterfeit coin or to tend it in payment was declared a non-clergyable felony if: (a) the uttered coin was a counterfeit of gold or silver coins of the realm, and (b) it was the delinquent's third conviction for this offence or (by section 3) his second as a *common utterer* of false money. By *common utterer* the statute meant a person who after having once uttered false money repeated the offence on the same day or within the space of ten days, or a person who at the time of such uttering had about him or in his custody one or more pieces of counterfeit money besides what had been uttered or tendered in payment.

The uttering for a third time of foreign counterfeit coin was made a non-clergyable felony by 37 Geo. 3, c. 126, s. 4 (1797).

§ 20. MALICIOUS INJURIES TO PROPERTY

Arson

The most serious offence of this class is arson which—with one exception [89]—was punished by death without benefit of clergy. 23 Hen. 8, c. 1, s. 3 (1531), enacted this punishment for wilfully burning any dwelling-house or barn containing any grain or corn, or for abetting, procuring, helping, maintaining or counselling of or to any such offence. Persons in holy orders could still claim their benefit of clergy. This Act was extended by 25 Hen. 8, c. 3, s. 2 (1533) to offenders standing mute, challenging above twenty or not answering directly. The law was made even more severe by 4 & 5 Ph. & M., c. 4 (1557), which extended these provisions to accessories before the fact in respect to the offence of burning any dwelling-house or any part thereof, or any barn then containing any corn or grain. This Act was held to repeal the more liberal provisions of 1 Edw. 6, c. 12, s. 10 (1547), which had restored the right to claim benefit of clergy to offenders tried under the already quoted 23 Hen. 8, c. 1, s. 3. Since the Act of Philip and Mary deprived accessories before the fact of their benefit, its provisions were interpreted as *a fortiori* implying that principals also had no right to it.[90] The position in this respect was clarified by the Waltham Black Act (9 Geo. 1, c. 22, s. 1) which appointed absolute capital punishment for setting fire to any house, barn or out-house, to any hovel, cock, mow or stack of corn, straw, hay or wood.[91] When this measure was enacted, another statute—22 & 23 Car. 2, c. 7 (1670)—was still in force. It related to the burning or destroying at night only of any ricks or stacks of corn, hay or grain, barns or other houses or buildings or kilns (section 2). Despite the fact that arson effected at night is a much more serious offence than if committed during the day—an offence which the Waltham Black Act punished by death—section 4 of 22 & 23 Car. 2, c. 7 empowered the courts—with the offender's consent—to pass a sentence of transportation for seven years instead of a sentence of death. 22 & 23 Car. 2, c. 7 was exceptional, however, for the general tendency was not to vest the courts with any discretionary power regarding the punishment. Moreover, as regards provisions relating to arson, this Act could be held to have been abrogated by the broader provisions of the Waltham Black Act.

[89] Above, note 26 at p. 9.
[90] Hale, 2 P.C. 347; Foster, *Crown Law*, p. 330 *et seq.*; see particularly pp. 335–336.
[91] Above, pp. 68–69.

Of the other capital statutes, 10 Geo. 2, c. 32, s. 6 (1737)[92] related to setting on fire or causing to be set on fire 'any mine, pit, or delph of coal or cannel-coal', and 9 Geo. 3, c. 29, s. 2 to setting on fire mills. The subject of another important statute—12 Geo. 3, c. 24 (1772)—was setting on fire or otherwise destroying ships of war, on float or in process of building, arsenals, magazines, dock yards, victualling offices or any of the buildings erected therein or belonging thereto (section 1). The Act also applied to aiders, procurers and abettors in the commission of these felonies. By 33 Geo. 3, c. 67, s. 5 (1793) its scope was further extended to any ship or vessel whatsoever.[93] By 43 Geo. 3, c. 58 (1803) capital punishment was also imposed for setting on fire one's own house, an act which until then could have been committed with impunity.[94] Section 1 of the new statute made it a non-clergyable felony wilfully to set on fire—with intent to injure or defraud—*any* house, barn, granary, hop-oast, malthouse, stable, coach-house, out-house, mill, warehouse, or shop.[95] By 52 Geo. 3, c. 130, s. 1 (1812) the same punishment was provided for burning or setting on fire any building, engine or erection used or employed in the carrying on, or conducting of any trade or manufacture.[96]

Two statutes of a local character which should be mentioned here were: (a) 43 Eliz. c. 13, s. 2 (1601), which related to wilfully and maliciously burning, causing to be burned, or aiding, procuring or consenting to the burning of any barn or stack of corn or grain in Cumberland, Northumberland, Westmorland, or Durham; it applied to those who stood mute or challenged above twenty.[97] And (b) 39 Geo. 3, c. lxix (1799), a public Act to ensure the better regulation of the port of London, which made it a non-clergyable felony to set fire to any of the works or to any vessel lying in the port (section 104). The same provision was embodied in 39 & 40 Geo. 3, c. xlvii, s. 95 (1800).[98]

Wilful destruction otherwise than by setting on fire

The main purpose of this paragraph has been to survey the capital statutes relating to arson, some of which it has been seen also covered the destruction of property otherwise than by setting it on fire.[99] Apart from these provisions, wilful destruction was the exclusive subject of a number of other

[92] Both this statute and 9 Geo. 1, c. 22, were made perpetual by 31 Geo. 2, c. 42.

[93] By 22 Geo. 2, c. 33, s. 2, § 25 (1749), if anyone were to burn or set fire to any magazine, store of powder, ship, boat, ketch, hoy, vessel, tackle or furniture thereto attached, not belonging to an enemy or rebel, he was to be sentenced to death by a court martial. This statute, as well as 12 Geo. 3, c. 24, has already been mentioned above, pp. 618–819 (offences against the State). For the destruction of ships to the prejudice of insurance companies see above, p. 652; for wilful destruction otherwise than by setting on fire see below, pp. 656–657.

[94] See on this Appendix 2, below, pp. 688–691.

[95] The statute extended to counsellors, aiders and abettors knowing of and privy to such offences. It also contained a number of capital provisions relating to various offences against the person; see above, p. 631.

[96] Section 2 of this Act relating to destruction of property is mentioned below, p. 656.

[97] This statute has already been mentioned in connection with blackmail; see above, p. 641; see also pp. 341–342.

[98] It is interesting to note that by the same sections of these two Acts, wilfully to damage, otherwise than by setting on fire, any such works or ships was to be punished with fine, imprisonment or transportation.

[99] See, for instance, 22 & 23 Car. 2, c. 7, s. 2, above, p. 654; and 12 Geo. 3, c. 24, and 33 Geo. 3, c. 67, s. 5, above, p. 655.

Acts. By 4 Geo. 8, c. 87, s. 16 (1763) and 22 Geo. 3, c. 40, s. 1 (1782) capital punishment was appointed both for the actual destruction of property mentioned therein and for the mere breaking into any place where such property was to be found, with intent to cut or destroy. Thus the first Act made it a non-clergyable felony to cut or destroy any linen yarn or linen cloth, the looms, tools or implements used for their manufacture, and to break into by day or night or to enter by force with intent to commit this offence, any house, cellar, etc., where any such property was to be found.[1] The second Act related to serge, woollen, velvet, silk, linen or cotton goods; to any rack on which any of these articles are hanged in order to dry; and to any tools used in their manufacture. Like the former Act it also covered the offence of entering by force any premises where such goods were to be found, with intent to destroy these goods or the tools used in their manufacture.[2]

A number of similar statutes were also passed during the first twenty years of the nineteenth century. Thus 52 Geo. 3, c. 16, s. 1, imposed capital punishment for destroying or injuring any stocking or lace frames or other machines, and any articles or goods on such frames or machines. This statute was repealed in 1813 by 54 Geo. 3, c. 42, which made the same offences felonies punishable by transportation for life or for not less than seven years, but capital punishment was again re-imposed in 1817 by 57 Geo. 3, c. 126.[3] In addition certain omissions of 9 Geo. 1, c. 22, and of 43 Geo. 3, c. 58, s. 1, were supplemented by 52 Geo. 3, c. 130, which made it a non-clergyable offence unlawfully and riotously to assemble and wilfully or maliciously to demolish or pull down, or to begin to demolish any building or engine used in the carrying on or conducting of any trade or manufacture (section 2).[4] Finally 56 Geo. 3, c. 125, s. 1 (1816) imposed the same penalty on any persons unlawfully and riotously assembled together who shall demolish, pull down, destroy or damage, or begin to demolish any engine, bridge, building or truck belonging to collieries and mines.

A striking instance of the indiscriminate severity of the eighteenth century criminal law is provided by 6 Geo. 2, c. 37, s. 6 (1733). It enacted that if any person or persons shall, during the continuance of 9 Geo. 1, c. 22,[5] 'unlawfully and maliciously cut any Hop-binds, growing on Poles in any Plantation of Hops, every Person or Persons so offending, being thereof lawfully convicted, shall be adjudged guilty of Felony, and shall suffer Death as in Cases of Felony, without Benefit of Clergy'.

The offences of destroying or damaging ships were often only preparatory to plundering, so that many of the relevant statutes might well be included among those relating to offences against property, as two actually are.[6] But since the motives for destroying ships may also be revenge or malice, it is not practicable to divide these statutes into distinct groups. It is therefore proposed to consider all these statutes—except for the two already mentioned—under the heading of malicious injuries to property. Thus 22 & 23 Car. 2,

[1] For other capital provisions of this Act see above, p. 635.

[2] For capital statutes relating to the destruction or pulling down of bridges, floodgates, etc., see above, pp. 620–621; for riotously assembling and destroying mills see above, p. 620.

[3] Under this Act also persons forcibly entering a house by day or night with 'an Intent to cut or destroy any Framework knitted Pieces, Stockings, Laces . . .' were to be punished capitally.

[4] For another section of this statute relating to arson, see above, p. 655.

[5] 9 Geo. 1, c. 22, and 6 Geo. 2, c. 37, were made perpetual by 31 Geo. 2, c. 42.

[6] See above, § 18, 'Destroying ships to the prejudice of insurance companies' (4 Geo. 1, c. 12, and 11 Geo. 1, c. 29, ss. 5 and 6); p. 652.

c. 11, s. 12 (1670) enacted that any captain, master, mariner or other officer belonging to a ship who wilfully cast away, burnt or otherwise destroyed his ship, or who procured similar acts to be done, was to suffer death. 1 Anne, st. 2, c. 9, s. 4 (1701) appointed the same punishment for these acts if done to the prejudice of the owner of the ship or of any merchant who should load goods thereon; and section 5 of 12 Anne, st. 2, c. 18 (1713) for making or assisting in making a hole in a ship in distress, and for wilfully doing anything tending to the immediate loss or destruction of such ship or vessel.[7] The provisions of the last two Acts were extended by 26 Geo. 2, c. 19, s. 1 (1753) to include the destruction of any goods, merchandise or other effects in any ship in distress or which was wrecked, lost, stranded or cast on shore in any part of the dominions, or of any furniture and provision or part of such a ship,[8] as well as the putting out of any false light or lights with intention to bring any ship or vessel into danger.[9] These capital statutes relating to malicious injuries to property should be considered in conjunction with the Waltham Black Act, a number of the provisions of which were, it has been seen, concerned with the protection of trees, fish-ponds, deer and cattle.[10]

§ 21. PIRACY

In the Middle Ages piracy [11] had been regarded as a kind of treason, provided that the offender was not an alien, in which case it was declared to be felony.[12] In more recent times piracy was held to be a robbery or unauthorised depredation on the seas.[13] At Common Law it had not been a felony. The first statute which made it a capital offence—but not a felony—was 28 Hen. 8, c. 15 (1536), which enacted (section 3): 'That for Treasons, Robberies, Felonies, Murthers, and Confederacies done upon the Sea or Seas, . . . the Offenders shall not be admitted to have the Benefit of Clergy'. When 1 Edw. 6, c. 12, restored benefit of clergy to a number of specified offences and 'in all other Cases of Felony', it began to be doubted whether offenders guilty under 28 Hen. 8, c. 15, were still to be deprived of it. According to Hale, 1 Edw. 6, c. 12, was not applicable to 28 Hen. 8, c. 15, because it purported to restore benefit of clergy in all other cases of felony, while piracy had not been a

[7] This Act was made perpetual by 4 Geo. 1, c. 12, s. 1. It also declared it a capital, non-clergyable offence to steal any pump belonging to any such ship in distress; see 'Simple grand larceny', above p. 634. For destruction of ships to the prejudice of insurance companies see above, p. 652.

[8] It was immaterial whether anyone had been on board any such vessel at the time of the offence.

[9] By the same Act also the stealing of any such goods, merchandise or other effects was made a non-clergyable crime; above, § 10, p. 634; see further, § 8, above, p. 631.

[10] Above, pp. 58–68.

[11] 'A pirate', writes Hawkins, 'is one who to enrich himself, either by surprize or open force, sets upon merchants or others trading by sea to spoil them of their goods or treasure; and he is called *hostis humani generis*, and therefore every nation between whom amity and peace subsist, although there is no actual alliance, may punish a subject or foreigner for this offence'; 1 P.C. 267.

[12] This discrimination was abolished by 25 Edw. 3, st. 5, c. 2, since when piracy had been a capital felony, but not treason, irrespective of by whom it had been committed; Coke, 3 Inst. 113.

[13] Eden, *Principles of Penal Law* (2nd ed., 1771), p. 113. According to a definition framed by Sir Charles Hedges, judge of the High Court of the Admiralty, 'piracy is only a sea-term for robbery, piracy being a robbery within the jurisdiction of the Admiralty'; 13 St.Tr. 454; see also Stephen, *H. C. L.*, Vol. 2, p. 27.

felony at Common Law and was not declared a felony by the Act of Henry VIII.[14] This issue lost its importance with the enactment of 11 & 12 Will. 3, c. 7 (1700). Section 8 of this Act declared that the King's subject who committed an act of hostility on the high seas against any other subject of the King by commission of any foreign power or under pretended authority from any person whatsoever, should be considered guilty of piracy and should 'suffer such Pains of Death, and loss of Lands, Goods, and Chattels, as Pirates, Felons, and Robbers upon the Seas ought to have and suffer'.[15]

Section 9 made a number of other acts of piracy liable to the same punishment. It thus referred to any commander or other seafaring person who betrayed his trust and ran away with any ship, boat, ordnance ammunition or goods; or who yielded them up voluntarily to any pirate; or brought any seducing messages from any pirate, enemy or rebel; or who consulted, combined or confederated with; or attempted or endeavoured to corrupt any commander, master, officer or mariner to yield up or run away with any ship, goods, merchandise or to turn pirate or go over to pirates; or who conspired to do these acts; and to any person who assaulted the commander of a vessel to hinder him from fighting in defence of his ship or confined him, or made or endeavoured to make a revolt on board.

Two other groups of offences were declared to be piracy and made subject to absolute capital punishment by the important Act of 8 Geo. 1, c. 24 (1721), made perpetual by 2 Geo. 2, c. 28, s. 7 (1729). The first group comprised the offences of trading or corresponding with pirates; section 1 of the Act referred to any commander or master of any ship or vessel, or to any other person who should trade with any pirate by truck, barter, exchanges or in any other manner, or should furnish any pirate with ammunition, provision or stores of any kind, or should find out any ship or vessel knowingly and with design to trade with or supply or correspond with any pirate, and to any person who should in any way 'consult, combine, confederate, or correspond with any Pirate, Felon, or Robber on the Seas, knowing him to be guilty of any such Piracy, Felony, or Robbery'. The same section also referred to any person or persons belonging to any ship or vessel who upon meeting any merchant ship or vessel on the high seas or in any port, haven or creek should 'forcibly board or enter into such Ship or Vessel, and though they do not seize or carry off such Ship or Vessel, shall throw over-board, or destroy any Part of the Goods or Merchandizes belonging to such Ship or Vessel.'[16] All

[14] Hale, 2 P.C. 370. Hawkins distinguishes between piracies committed on the high seas and those committed in creeks or ports, the latter falling—in his view—within the restoring provision of 1 Edw. 6, c. 12. See 1 P.C. 271, s. 16.

[15] The question was later raised as to whether such offenders, by having adhered to the King's enemies, had not committed high treason. Consequently it was enacted by 18 Geo. 2, c. 30, that King's subjects or denizens committing hostilities at sea, etc., against other subjects, or giving aid, etc., to enemies at sea, were liable to be tried and convicted as pirates and if found guilty to suffer the penalty of death by virtue of 11 & 12 Will. 3, c. 7, s. 8. It should be noted that s. 2 of 18 Geo. 2, c. 30 (1745), provided that any person who had been tried and acquitted or convicted according to this Act for any of the said crimes, should not be liable to be indicted, prosecuted or tried again for the same crime or act as high treason. But in s. 3 the Act also stipulated that this should not preclude any offender not tried according to it from being tried for high treason within the realm according to 28 Hen. 8, c. 15.

[16] In 1758, during the war with France, 32 Geo. 2, c. 25, was passed for the duration of hostilities only, under which (s. 12) 'the commander of any pirate ship or vessel of war, duly commissioned, who should agree with the commander or other person belonging to any neutral ship for the ransom of any such neutral

these provisions also extended to accessories. The relevant section 3 of the Act recited that 'Whereas there are some Defects in the Laws for bringing Persons, who are Accessaries to Piracy and Robbery upon the Seas, to condign Punishment, if the Principal who committed such Piracy or Robbery, is not or cannot be apprehended and brought to Justice', and then enacted that all persons declared to be accessories by 11 & 12 Will. 3, c. 7,[17] should thenceforth be considered as principal pirates, and if convicted should suffer death without benefit of clergy. Those who stood mute on an arraignment were liable under 28 Hen. 8, c. 15, to be subjected to *peine forte et dure*,[18] but under 12 Geo. 3, c. 20 (1772) those arraigned or indicted for piracy who stood mute or did not directly answer to the charge were to be convicted by the same court as if they had been convicted by verdict or confession.

By 5 Geo. 4, c. 17 (1824), s. 1, dealing in slaves on the high seas, etc., was declared to be piracy, felony and robbery, punishable with death. This provision was also embodied in 5 Geo. 4, c. 113, s. 9, a more general statute relating to slave trade.

ship, or the cargo or any part thereof, after the same has been taken as a prize and in pursuance of any such agreement should quit, set at liberty, or discharge any such Prize, . . . instead of bringing the same into some Port or Ports belonging to his Majesty's Dominions', any such person should be guilty of piracy and should suffer death, loss of lands, etc. These provisions were later re-enacted by 2 Geo. 3, c. 16, for the duration of the war with Spain.

[17] Above, p. 658.

[18] On *peine forte et dure* see above, note 82 at p. 26.

APPENDIX 2

INTERPRETATION BY THE COURTS OF CERTAIN CAPITAL STATUTES

The main purpose of this appendix is to examine the interpretation by the courts of some of those major capital statutes relating to offences against property unattended with violence which were singled out by reformers for revision. In addition, some other statutes have been selected in order to emphasise the leading trends in the interpretation of capital statutes in general before 1800.

I

§ 1. LARCENY FROM THE PERSON: 8 Eliz. c. 4 (1565)[1]

Section 2 of this Act provided that 'no Person or Persons which hereafter shall happen to be indicted or appealed for felonious Taking of any Money, Goods, or Chattels, from the Person of any other, privily without his Knowledge, in any Place whatsoever, and thereupon found guilty by Verdict of twelve Men, or shall confess the same upon his or their Arraignment, or will not answer directly to the same according to the Laws of this Realm, or shall stand wilfully, or of Malice, or obstinately mute, or challenge peremptorily above the Number of twenty, or shall be upon such Indictment or Appeal outlawed, shall from henceforth be admitted to have the Benefit of his or their Clergy, but utterly be excluded thereof, and shall suffer Death in such Manner and Form as they should if they were no Clerks'.

The preamble pointed out that this offence was often committed by thieves acting in confederation, but the statute only referred to the person or persons indicted or appealed for feloniously taking any money, goods, or chattels from the person of another. The construction put on this provision was markedly restrictive. In a case tried in 1731 at the Old Bailey, the defendants were indicted under 8 Eliz. c. 4 before Raymond, C.J., Comyns, B., and Denton, J., for privately stealing from the person of John Innis a banknote of one hundred pounds payable to William Lord Malton, or bearer.[2] The note was taken in a scuffle and it was impossible to prove which of the defendants took it. The court ruled that since the statute appointed the death penalty without benefit of clergy for those who should be found guilty of privately stealing from the person, and since it did not mention aiders and abettors, it must be construed as only extending to principals in the first degree. It follows, therefore, 'that the hand alone which takes the property can be guilty of the offence; and as it is uncertain which of the prisoners took the note, it is impossible to find any of them guilty of the capital charge'. In *R.* v. *Murphey*[3] this decision was fully upheld. The plaintiff and the two defendants were drinking together in a public-house and at a certain moment the plaintiff fell asleep for about ten minutes. When he woke up he found

[1] See above, Appendix 1, pp. 636–637.
[2] *R.* v. *Baynes and Others* (1731) 1 Leach 7.
[3] (1783), 1 Leach 266.

that his watch had been taken from him; almost immediately afterwards it was found upon the person of the prisoner. Eyre, B., said: 'The circumstance of privacy which constitutes the capital part of this offence, seems to be personal, and confined to that agent alone who commits the fact. It depends almost generally upon a nice species of dexterity which does not require the assistance of a second person to perform, and therefore the legislature has not thought it necessary to involve those who are present when the offence is committed, in the severity of its punishment, however well inclined they may be to give effect to its completion; for the statute is quite silent as to aiders and abettors. The rule of law therefore upon this subject has uniformly been to confine the guilt of privately stealing to the individual hand that commits the fact; and wherever it is totally uncertain, as it seems to be in the present case, which of the two prisoners actually took the property, it will follow that both of them must be acquitted of the capital part of the charge'. The jury found the prisoners guilty of stealing, but not privately from the person.[4] Similarly in *R.* v. *Sterne*,[5] though a gold decoration stolen from the Duke of Beaufort was immediately found in the possession of the defendant it was held that this was no proof that he himself had stolen it, for it might have been handed to him by the other person who was known to be present at the commission of the offence but later escaped. If this were the fact both Sterne and that other person would be equally guilty of *common larceny*; but neither could be considered guilty of *privately stealing*, 'because that particular species of guilt can only be fixed on the person who did the act; and the inference of law arising from the possession of the stolen property, will be rebutted and destroyed'. The jury returned the verdict of guilty of stealing, but not privately, and the prisoner was transported for seven years.

A corollary of these constructions was to interpret 8 Eliz. c. 4 so as to exclude from it aiders and abettors as well as accessories before or after the fact. The statute referred to a person who feloniously takes any money, goods or chattels from the person of another,[6] and stipulated that if found guilty such a person is to be deprived of benefit of clergy. It did not, however, mention aiders, abettors and accessories before or after the fact. Accomplices, it was held, were therefore not to be ousted of their clergy, nor to suffer the penalty of death. In acting upon this view the courts were supported by such authorities as Hale and Foster, Hale's comment on this statute being: 'It doth not oust accessaries of their clergy, nor it seems doth it oust any of his clergy but him, that actually picks the pocket, and not those that are present, aiding and assisting, upon the reason of *Evans' Case* before, for it shall be taken literally'.[7] It should also be noted that when examining where and for what offences capital at Common Law clergy was partially or wholly taken away by Acts of Parliament subsequent to 25 Edw. 3, c. 4, Hale said that where any such statute 'hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem vitae et privilegii*

[4] In respect to 8 Eliz. c. 4, as in other aggravated larcenies, the prisoner might be acquitted of the capital part of the charge, and found guilty of simple larceny; 2 East P.C. 706.

[5] (1787), 1 Leach 473.

[6] Above, p. 660.

[7] 1 P.C. 529. The important case of *Evans and Finch* relates to robbery in a dwelling-house; see below, pp. 681–682.

clericalis such statutes are construed literally and strictly'.[8] Though this opinion related to a different Act, it may be taken as the expression of a wider principle of judicial interpretation to which Hale adhered, and which was also accepted by Foster both as a general principle and in respect to 8 Eliz. c. 4. 'Cases without number may be cited'—he writes[9]—'to shew in general, how extremely tender the judges have been in the construction of statutes which take away clergy; sometimes even to a degree of scrupulosity excusable only in favour of life'. He agreed with the construction put on statutes relating to murder, robbery, rape, sodomy and burglary, by which aiders and abettors present were deprived of their clergy, such construction being consistent with the unequivocal provisions of the law. For these statutes, he considered, differed widely from those in which aiders and abettors were not named, nor 'described by any terms importing that the legislature intended to oust them'.[10] The construction put upon the former should therefore on no account be extended to the latter. This rule was always adhered to in the administration of 8 Eliz. c. 4, and Foster was accurately summing up judicial practice when he stated that 'the person who actually picketh the pocket is ousted, not he who is present aiding and abetting . . .'.[11] The predominant opinion on this point is well expressed in the following statement concerning the already-examined case of *Sterne*: 'The statute upon which this count is framed, makes privately stealing from the person a capital offence, but it has in this respect been always construed with great strictness in favour of the party accused, and as it does not extend in express terms to persons aiding and abetting the commission of the offence, the law holds, that only he whose hand actually takes the property is guilty of the privately stealing'.[12] This strict interpretation undoubtedly still further circumscribed the operation of the statute, for as Foster himself acknowledges, 'without some accomplice ready at hand to take off the booty this sort of theft seldom succeedeth'.[13] Moreover these accomplices were often the main instigators and drew the greatest profits.[14]

8 Eliz. c. 4 stipulated that for the offence to fall within its capital provisions, (1) the accused must be found guilty of feloniously taking money, goods or chattels from the person of any other, and (2) the felonious taking must be carried out privately without (the robbed person's) knowledge.[15] It is now proposed to review the manner in which this latter fundamental proviso was interpreted by the courts, first in respect to such cases of stealing privately from the person as were contiguous to taking by force (not amounting to robbery), and secondly in respect to larcenies which, while not open larcenies from the person, were yet committed in circumstances leaving room for doubt as to whether or not the felonious taking away was carried out *privately without the knowledge* of the injured party.

In *Brown's Case*[16] the prisoner took the prosecutor's watch out of his pocket while he was asleep, thereby causing him to awake and unsuccessfully

[8] 2 P.C. 335.
[9] *Crown Law*, 355.
[10] *Ibid.*, 357.
[11] *Ibid.*, 356.
[12] 1 Leach 475.
[13] *Crown Law*, 356.
[14] On this offence and on the attitude of the public towards such offenders, see also remarks of some foreign observers, Appendix 3, below, pp. 706–707.
[15] Above, p. 660.
[16] (1777), East 2 P.C. 702.

to attempt to retrieve his watch. Since, however, the prosecutor had seen part of the fact, Hotham, B., on the advice of Aston, J., left it to the jury to decide whether they would acquit the prisoner of privately stealing and find him guilty of simple larceny only. In the case of *Baker*, indicted at the Old Bailey for highway robbery,[17] it appeared that the prisoner snatched the property from the hands of the prosecutor without speaking to him, or stopping him, or in any way touching his person. The court thought that the violence committed was not such as to constitute robbery; nor could the offence be brought within 8 Eliz. c. 4. The prisoner was accordingly acquitted of the capital part of the charge and found guilty of simple larceny only. In a similar case of *Macauley*, also tried at the Old Bailey, the court took the same view and returned the same verdict.[18] In *Horner's Case*, tried at the Old Bailey in 1790 before Buller, J., and Thomson, B., on a charge of robbery, the court said that the offence did not amount to robbery and defined it as a special type of larceny, distinct both from stealing privately from the person and from taking by force and violence.[19] The important conclusion which emerges from these various cases is that the courts took the view that the offence which may be described as open larceny from the person was within benefit of clergy, since it could not be held to constitute either robbery or stealing privately from the person without that person's knowledge. It should be noted, however, that this doctrine only established itself in the last quarter of the eighteenth century—about 1781. Earlier, the courts were sometimes inclined to bring open larceny from the person under the statute of Elizabeth, thus making it a non-clergyable offence. Holt, C.J., ruled, for instance, that snatching a hat and wig from the head of a person walking in the street was no robbery, because the party was not put in fear, but that it was *clam et secreté* and came within 8 Eliz. c. 4.[20] It would seem that this interpretation was later abandoned.

The other kind of offence was that in which the act, while not an open larceny from the person, was nevertheless committed in circumstances which made it debatable whether or not the felonious taking was carried out in a manner envisaged by 8 Eliz. c. 4. The main point at issue in such cases was whether the statute covered offences committed on persons asleep or drunk. In the case of *Mary Reading and Mary Jones*, tried at the Old Bailey Session of December, 1778, for privately stealing from the person,[21] it appeared that the defendants emptied the pockets of the plaintiff, a hackney-coachman, after he had fallen asleep in his coach when waiting for his fare at the door of a brothel; they succeeded in doing so without waking him up. The court said that 'it was the opinion of the late Mr. Justice Aston in a similar case, and with whose opinion they perfectly agreed, that this was not a case within the spirit of the Act of Parliament; for that it was evident from the preamble of it, that it was intended only for the protection of persons in public meetings, and places of proper resort'. This is indeed a most significant instance of an interpretation of a capital statute in favour of the accused.

A similar instance is provided by the decision in *R.* v. *Gribble*.[22] The prosecutor and the prisoner had been drinking at a public-house. Being both

[17] *R.* v. *Baker* (1783), 1 Leach 290.
[18] *R.* v. *Macauley* (1783), 1 Leach 287.
[19] East, 2 P.C. 703. It would seem that a similar distinction had already been made at the Old Bailey in December, 1781, in *Chick's Case*, *ibid.*
[20] *Steward's Case* (1690), East 2 P.C. 702.
[21] 1 Leach 240, note (a).
[22] (1782), 1 Leach 240.

much intoxicated they went together to the prisoner's lodgings where the prosecutor fell asleep; while he was asleep the prisoner stole his watch. The court ruled that the circumstances of this theft were not such as to deprive the offender of benefit of clergy, although it was committed privately. In support of their opinion the court mentioned the following decision of Aston, J. and Gould, J., concerning a plaintiff who had become intoxicated and had fallen asleep on his way home in one of the watch-houses on Westminster Bridge. The defendant, passing the same way, stole the buckles off his shoes without waking him. It was ruled that the defendant ought not to be sentenced on the capital charge, because the latter 'was intended to protect the property which persons by proper vigilance and caution should not be enabled to secure: but that it did not extend to persons who by intoxication had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exertion of which the larceny might probably be prevented'. In *Gribble's Case* the same reasoning was followed, the jury consequently finding the prisoner guilty of stealing, but not privately, from the person.

This interpretation was later considerably narrowed and the administration of the statute became more stringent. In *R.* v. *Branny*[23] the defendant was tried at the Carlisle Summer Assizes of 1786, before Buller, J., for having privately stolen forty-three guineas and thirteen half-guineas from the person of Hugh M'Guinar. The prosecutor was an illiterate Irish driver who had sold some cattle at a fair where the prisoner, a total stranger to him, got acquainted with him under the pretext of being his countryman. After having learned that M'Guinar had on him the money for the cattle, the prisoner and two companions persuaded him to spend some time with them in an inn where they all stayed for the night. The next morning the prisoner and his companions got up before the prosecutor, and had breakfast ready when he came downstairs. After breakfast Branny proposed having some brandy, of which he persuaded the prosecutor to drink a large quantity. The prosecutor became so intoxicated that the landlord proposed putting him to bed, but the prisoner and his companions said they would take him away with them. They put him on a horse, carried him about 300 yards from the house and then picked his pocket without his knowledge and left him on the road. The jury found the prisoner guilty but the case was reserved for the judges to consider whether under the circumstances the prisoner was guilty of a capital offence within the Act. It was ruled that the conviction was proper and the prisoner guilty of a capital offence, but the judges were divided as regards the principle on which their decision was to be founded. Five of them held that the statute extended to all cases where goods were stolen from the person of another without his knowledge, whether he were awake or asleep, drunk or sober—an opinion which contradicted the decisions in some of the previous cases to which reference has already been made. The other four thought that the law did not cover the case of a man who was asleep, except where some craft or cunning was used by the prisoner to cause him to be so.[24] This latter interpretation was henceforth adopted. For instance, the death sentence was passed a year later on John Thompson for having privately stolen a silver watch from Jonathan Simpson without his

[23] 1 Leach 240, note (a).

[24] Speaking of the case under consideration, Gould, J., said that the prisoner's whole conduct was *in fraudem legis*.

knowledge while he was asleep in his cabin,[25] despite the counsel for the defence's quoting *Gribble's Case*,[26] in which it was stated that the statute did not protect persons asleep. The sentence was respited, and the case reserved for the opinion of the judges, who decided that the conviction was right.[27]

Nevertheless, the merciful construction put upon 8 Eliz. c. 4 in *R.* v. *Gribble* [28] and *R.* v. *Reading* [29] was upheld in all cases in which it was proved that the person from whom the property was stolen privately and without his or her knowledge failed to exercise a reasonable degree of vigilance in the protection of his or her property. All such cases were declared to be outside the statute and offenders guilty of such thefts were acquitted of the capital part of the charge. Thus Elizabeth Duff, indicted before Buller, J., was acquitted of the capital part of the charge when it appeared that she emptied the pockets of the prosecutor while he was asleep at her lodgings.[30] Most important is the case of *Margaret Kennedy*,[31] tried at the January 1797 Session of the Old Bailey, inasmuch as the judges to whom it was referred acknowledged that it was just to distinguish between these two kinds of larceny, and defined the circumstances which would exclude the offence from 8 Eliz. c. 4. The prisoner was indicted before Lawrence, J., and Macdonald, C.B., for privately stealing some money and a silverplated button from the person of the prosecutor. The prosecutor was a coachman; being intoxicated he was persuaded by the prisoner to accompany her into a house, where he fell asleep. When he woke up he found that the property laid in the indictment was taken from his pockets. He had felt no hand in his pocket, and had in no way been aware of the larceny when it was committed. The stolen money was found immediately afterwards in the mouth of the prisoner, who was attempting to swallow it. It was contended on the part of the prisoner that a distinction must be made between cases where the prosecutor exposes himself to theft by becoming intoxicated of his own free will and cases where property is stolen privately from a person taking a natural rest. It was claimed that the offence only came under the capital provision of the statute if committed in the latter circumstances. *R.* v. *Gribble* [32] was quoted as an example of the first, and *R.* v. *Willan* [33] and *R.* v. *Duff* [34] as examples of the second. However, the jury found the prisoner guilty of the whole charge in the indictment, and sentence of death was passed. This sentence was respited and the case referred to the judges for their decision as to whether the prisoner was, under the circumstances of this case, liable under 8 Eliz. c. 4. The judges reversed the verdict on the ground that the prosecutor became drunk by his own default and not owing to any fraud employed by the prisoner. This case—they held—was to be distinguished from that of *R.* v. *Branny*,[35] which came within the

[25] *R.* v. *Thompson* (1787), 1 Leach 443.
[26] Above, pp. 663–664.
[27] Similarly in *R.* v. *Willan* the prisoner was sentenced to death under 8 Eliz. c. 4 for stealing money from the person of Stephen Bolton while he was asleep in the stables, the prisoner's counsel objected that this case did not come within the statute. However, the court said 'that whatever notions might have formerly prevailed upon this subject, the contrary had lately been determined by all the judges of England': (1788), 1 Leach 495.
[28] Above, pp. 663–664.
[29] Above, p. 663.
[30] *R.* v. *Duff* (1796), 2 Leach 789.
[31] *R.* v. *Kennedy* (1797), 2 Leach 788.
[32] (1782), 1 Leach 240.
[33] (1788), 1 Leach 495.
[34] (1796), 2 Leach 789.
[35] (1786), 1 Leach 240, note (a).

statute because the prosecutor had been made insensibly drunk by the artifices of the prisoner, whose whole conduct was *in fraudem legis*. In consequence of this decision the prisoner was pardoned on condition she paid one shilling and was imprisoned for twelve months. Following the precedent of the foregoing case, Thomas Morris, indicted at the Old Bailey in April 1798 for privately stealing a silver watch, was acquitted of the capital part of the charge.[36] This interpretation was subsequently followed with marked consistency.[37]

8 Eliz. c. 4 was also often administered very much in favour of the offender when the latter was apprehended and indicted for privately stealing in a different county from that in which he had committed the offence. Thus in *Lucas' and Divers' Case*, tried at the Old Bailey October Session of 1786 before Eyre, C.B., the court decided not to sentence the offender to death on the ground that he could not have been found guilty of privately stealing in the county in which he had committed the offence. Hawkins, who quotes this case,[38] while aware that this decision was incompatible with a clause of 3 & 4 W. & M. c. 9, s. 3,[39] applicable on this point to 8 Eliz. c. 4, supports it on the ground that 'in the construction of the penal act, (8 Eliz. c. 4) the private stealing cannot be construed to extend to a county in which the property was not taken from the person of the prosecutor, but was only found in the custody of the prisoner'.

§ 2. LARCENY IN A SHOP, WAREHOUSE, COACH-HOUSE OR STABLE: 10 & 11 Will. 3, c. 23 (1699)

The provision of 10 & 11 Will. 3, c. 23, relating to this offence runs as follows: 'All and every Person and Persons that shall at any Time or Times, by Night or in the Day-time . . . in any Shop, Warehouse, Coach-house, or Stable, privately and feloniously steal any Goods, Wares, or Merchandizes, being of the Value of five Shillings or more (although such Shop, . . . be not actually broke open by such Offender or Offenders, and although the Owners of such Goods, or any other Person or Persons be or be not in such Shop . . . to be put in Fear) or shall assist, hire, or command any Person or Persons to commit such Offence, being thereof convicted or attainted by Verdict or Confession, or being indicted thereof shall stand mute, or will not directly answer to the

[36] *R.* v. *Morris* (1798), 2 Leach 790, note (a).

[37] For instance, in the case of *Huckley* indicted in 1787, before Serjeant Kemp, for privately stealing a watch from the person of Charles Wager, a seaman, the facts were as follows: the prosecutor was unable to find a lodging and spent the night on the street. When he was asleep the prisoner snatched his watch without his knowledge. On it being objected that 8 Eliz. c. 4 did not extend to cases of persons asleep the point was referred to Gould, J., who was of the opinion that the prisoner was guilty of the capital part of the charge because the situation of the prosecutor was occasioned by the necessity of finding some place where he could rest and by the fact of his not having succeeded in procuring a lodging for this purpose; 2 Leach 789, note (a).

[38] Hawkins, 1 P.C. 256, s. 9.

[39] This section of 3 & 4 W. & M. c. 9, s. 3, runs as follows: 'That if any Person or Persons hereafter be indicted of Felony for stealing of any Goods or Chattels in any County within this Realm of *England*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, and thereof be convicted, . . . he or they shall be totally excluded from having the Benefit of his or their Clergy, if it appears upon Evidence or Examination . . . that the said Goods or Chattel were taken by Robbery or Burglary, or in any other Manner, in any other County, whereof if such Person or Persons had been convicted by a Jury of the said other County, he or they are excluded . . . from having the Benefit of his or their Clergy'.

indictment, or shall peremptorily challenge above the Number of three and twenty . . . shall . . . be absolutely debarred and excluded of and from the Benefit of Clergy'. Like 8 Eliz. c. 4, 10 & 11 Will. 3, c. 23 was passed to arrest the ever-increasing growth of this offence, the preamble stating that the crime of stealing goods privately from shops and warehouses, commonly called *shoplifting,* had much increased.

Three questions arose in the administration of this statute: (a) what groups of offenders were covered by it; (b) in what places might this offence be committed, and what kind of property was the statute intended to protect; and (c) what kind of taking was to be considered privately stealing within the Act.

In respect to (a), the case of *Jonathan Wild,* tried at the Old Bailey May Session of 1725 is of great significance.[40] Wild was indicted under 10 & 11 Will. 3, c. 23, for privately stealing a box of lace from a shop. He was, however, acquitted of the capital part of the charge when it transpired that he had not been in the shop at the time of the offence, but had waited at the corner of the street to receive the goods taken by the principal felon. This was a remarkably strict interpretation in favour of the offender, for the statute expressly stipulated that those who shall assist, hire or command any person or persons to commit such offence are also to be ousted of their clergy. In explaining the words *commandment* and *aid* as applied to accessories before the fact Coke writes: 'Under this (commandment) is understood all those that incite, procure, set on, or stir up any other to doe the fact, and are not present when the fact is done'.[41] And further on, 'Under this word (aide) is comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to doe the act, and are not present when the act is done; for if the party commanding, furnishing with weapon, or aiding, be present when the act is done, then is he principal'.[42] It could be maintained with good reason that Wild's participation in the offence was in fact such as to bring him within the relevant part of the statute, and Hawkins intimates that the decision was to some extent inconsistent with the statute.[43] Foster similarly observes that in statutes concerning accessories before the fact no unified expressions were used but that the Legislature 'hath rather chosen to make use of a variety of words, all terminating in the same general idea'. From the list of various such expressions which he then gives it appears probable that he would interpret the relevant clause of 10 & 11 Will. 3, c. 23 as relating to an accessory before the fact.[44] By the decision in *Wild's Case,* however, the scope of the Act of William 3 was in this respect considerably narrowed.

(b) A similarly restrictive construction was put on the provision regarding the places in which the offence had to be committed and regarding the question as to whether the theft from a shop of goods belonging to a third party was within the Act. Thus in a case tried at the Old Bailey in 1723[45] a man was indicted under 10 & 11 Will. 3, c. 23, for stealing a shirt from a shop. It appeared that the shirt had been left by the owner with the master of the shop who was to send it to a sempstress for mending, and the question arose

[40] 1 Leach 17, note (a).
[41] 2 Inst., Part 1, 182.
[42] *Ibid.*
[43] Hawkins, 1 P.C. 260, sect. 3.
[44] *Crown Law,* pp. 130–131.
[45] 1 Leach 334, note (a); see also 8 Mod. 165.

as to whether in these circumstances the prisoner should be deprived of benefit of clergy. The court ruled that he should not, the statute having been enacted to protect shopkeepers' *own* goods, and not goods left in their shops. Consequently the stealing of such goods to the value of five shillings, was not a felony without benefit of clergy. In a later case[46] the prisoner was indicted under 10 & 11 Will 3, c. 23 for privately stealing a watch which had been sent to the shop of John Alcock for repair and was stolen from a glass show-case there. It was held, that the provision on which the capital part of the indictment was founded had always been understood to relate solely to goods exposed for sale and not to be *repositories* for goods. With respect to this watch Alcock's shop was not a *place for sale,* but a mere *repository* and the prisoner should therefore be acquitted of the capital part of the charge. The jury found him guilty of simple larceny only and he was transported for seven years. This decision was supported by Foster, who held that the statute was only concerned with such goods as are usually exposed for sale in a shop and not with 'any other valuable thing which may happen to be put there'. The decision in *Stone's Case* was, according to him, an 'equitable construction'.[47]

An important and very significant case was that of *John Howard,* who was indicted at the Old Bailey in 1751 before Parker, C.B., Foster, J., and Birch, J., for privately stealing goods belonging to Messrs. Fludger & Co., in the warehouse of John Day.[48] In another indictment the prisoner was charged with the theft of goods belonging to John Day. The latter kept a warehouse by the waterside, where merchants usually lodged goods intended for export pending putting them on board. The goods in the indictment were sent by Fludger & Co. to Day's warehouse for this purpose. The court decided that the case was not within the statute because, by 'the word *warehouses* in the statute are meant, no mere repositories for goods, but such places where merchants and other traders keep their goods for sale in the nature of shops, and whither customers go to view them: and though the goods in this case might with propriety enough be said to be the goods of *John Day,* as they are in the second count, since he had the charge and possession of them . . . ; yet still the same objection recurreth, his warehouse was not a place for sale, but merely safe custody'. The prisoner was found guilty of larceny to the value laid down in the indictment, but was acquitted of stealing privately.

The severity of this statute was further attenuated by the decision in *R.* v. *Godfrey.*[49] The prisoner was indicted under 10 & 11 Will. 3, c. 23, for stealing a piece of woollen cloth, the property of Edward Shepherd, privately in his warehouse. The prosecutor was a factor, who used to receive the goods by bales or packages from the manufacturers of textiles. Each piece so received was separately tied up in paper and numbered. The packages were never exposed for sale in the warehouse windows, nor at the door; nor was the bulk of the pieces ever broken or sold by retail. They were, however, sold on commission, either for home consumption or for export. Generally the warehouse was kept shut and fastened by a latch, but not so as to prevent its being opened on either side. The court thought it doubtful whether such a warehouse could come within the intent and meaning of the statute on which the indictment was based. The foregoing decision given in *Howard's Case* was quoted in support and reference was also made to the preamble to the statute

[46] *R.* v. *Stone* (1784), 1 Leach 334.
[47] *Crown Law,* p. 78.
[48] *Ibid.,* pp. 77–78.
[49] (1783), 1 Leach 287.

which referred to the offence of stealing goods privately out of *shops* and *warehouses*, commonly called *shoplifting*. The prisoner was acquitted of the capital part of the charge. Since the Act used the word 'warehouse' in its general sense without any indication that it intended to exclude from the operation of the law all warehouses not used as shops, it is open to doubt whether the court's interpretation of the word 'warehouses' in the cases of *Howard* and of *Godfrey* was compatible with the statute.

The tendency to narrow the scope of the statute is also borne out by the case of *John Seas*. The prisoner was indicted at the Old Bailey for stealing a coat, the property of the prosecutor, privately in his stable.[50] This appeared to be a livery great-coat which the prosecutor's coachman had hung up in the stables. Despite the fact that the statute specifically referred to privately and feloniously stealing any goods, etc., from a stable, the courts thought this case to be outside the Act because 'it has been uniformly held, that the goods stolen must be such as are proper to, and usually kept in, the respective places which the Act describes'. A coachman's livery coat—it was held—could not be considered a part of the proper or usual furnishings of a stable 'which seems only to include bridles, saddles, horse-cloths and such other articles as are necessary or useful therein'. The prisoner was acquitted of the capital part of the charge and found guilty of larceny only.[51]

It should be noted further that the stealing of money was also considered to be outside the Act. Commenting on this point Foster writes: 'But it hath been very rightly holden, that money is not within the act with regard to any of the places mentioned in it, the words being *goods, wares and merchandize*: for althought the word *goods* may in a large sense take in money, and often doth, yet being connected with *wares and merchandizes,* the safer construction of so penal a statute will be, to confine it to goods *ejusdem generis,* goods *exposed to sale*'.[52]

(c) The statute requires that to be within the Act the offence must be committed privately and feloniously. The leading decisions show that this clause too was always most strictly interpreted. In this respect two important points emerge. First, the courts excluded from the statute all cases involving any degree of force in taking the goods. This ruling was given at the Old Bailey in 1711 in the case of *Tims and Cecil,* and in 1726 in *R.* v. *Cartwright.*[53] It is supported by Hawkins on the ground that where any degree of force is used in obtaining the goods, the offence cannot be considered to have been privately stealing.[54] The extent to which this point of view was upheld is well illustrated by *Jones' Case,* tried at the Lancaster Lent Assizes of 1787. A shop which had been left locked on Saturday night was entered and robbed of goods to the value of over £700 between then and the following Monday morning. The offence was committed by means of a false key or pick-lock, no violence being used in gaining admittance, although a desk in the counting-house was forced. The case was considered to be within the statute and the death sentence was pronounced. However, it was objected on behalf of the prisoner that force having been used to break open the desk, the offence was not that of privately stealing. The case was submitted for the consideration of the judges, who held that since force had been used the conviction on

[50] *R.* v. *Seas* (1784), 1 Leach 304.
[51] See also an anonymous case (1723), 8 Mod. 165.
[52] *Crown Law*, p. 79.
[53] East, 2 P.C. 641.
[54] Hawkins, 1 P.C. 260, s. 6.

the capital part of the charge was wrong. It was also contended that the opening of the door with a pick-lock constituted a use of force sufficient to exclude the case from the statute. Jones was accordingly recommended for pardon on condition of being transported, the judges holding that he should have been convicted of simple felony only.[55]

This very strict construction was consistently put on the word 'privately' not only as regards the *modus operandi* but also as regards the cognizance by other persons that the offence was about to be committed. Hawkins says that it was the common practice of the courts to allow the prisoner the benefit of clergy if it appeared that he was seen to take the goods mentioned in the indictment either by the prosecutor or by his servants or agents. The slightest glimpse of the taking, or even a suspicion of it, seemed sufficient to obviate the capital part of the charge.[56]

§ 8. LARCENY TO THE VALUE OF FORTY SHILLINGS IN A DWELLING-HOUSE OR IN AN OUT-HOUSE THERETO BELONGING, ANYBODY BEING THEREIN: 12 Anne, st. 1, c. 7 (1718)

This was a very severe law on which a very strict interpretation in favour of the offender was put in all the leading cases. These decisions may conveniently be divided into three groups.

(a) The Act aimed at protecting house-owners against thefts committed in their houses by others. Thus when it appeared in *R.* v. *Thompson and Macdaniel* that the theft had been committed in Macdaniel's house, the court held that 'the meaning of the Legislature did not extend to the case of a person stealing in his own house'.[57] Similarly in the earlier case of *Anne Gould,* the wife of John Gould, it was held 'that the prisoner could not be convicted of the capital part of the indictment inasmuch as the felony was committed in the dwelling-house of her husband, which must be construed to be her house also, and it is apparent that the legislature intended that the stealing must be in the house of another person, to oust the offender of clergy'.[58] She was found guilty of simple larceny only. As already mentioned, however, the statute did extend to larceny committed by servants.[59]

(b) For an offence to be within the Act it was necessary that the stolen property should have been *deposited* in the house. The Act did not protect property which was *on the person* of the party from whom it was taken, though committed in his or her dwelling-house. This was decided in *R.* v. *Campbell,* tried at the Old Bailey before Eyre, C.B., Buller, J. and Wilson, J., and later referred for the consideration of the judges.[60] The facts of this interesting case are as follows. The prisoner hired the first floor in a common lodging-house. One morning the overseer of the parish called on the landlady for the payment of taxes. She took out of her pocket a bank-note of twenty-five pounds to pay him, but as the overseer had no change, she sent her maid with the note to the prisoner requesting him to give her change. The prisoner said he had not enough gold about him to do this but suggested that he should go to his banker to change the note. He then left the house with the bank-

[55] East, 2 P.C. 641, and Russell, *On Crimes* (1819), Vol. 2, 1167.
[56] Hawkins 1 P.C. 260, s. 7. Hawkins quotes in this connection two Old Bailey cases, that of *Charlotte Smith* (1784), and *R.* v. *Graham* (1785),
[57] (1784), 1 Leach 338.
[58] *R.* v. *Gould* (1780), 1 Leach 217.
[59] Above, Appendix 1, p. 637.
[60] (1792), 2 Leach 564

note and did not return. Since the statute spoke of any money, goods, etc., *being in any dwelling-house or out-house,* etc., it was doubted whether the prisoner could be deprived of his clergy 'the statute having been made to protect such property as might be deposited in the house, and not that which was on the person of the party'. The judges ruled that this was not a capital offence under 12 Anne, c. 7, and the prisoner was sentenced to transportation for seven years.

This strict construction was upheld in a number of other cases,[61] some of which should be mentioned here. In *R.* v. *Owen*[62] a firm of manufacturers sent their employee, James Foreman, to London to collect some money at a counting-house and to do other business. Foreman accordingly went to the counting-house and raised over a hundred guineas on his master's account. When on his way to settle the other business he met the prisoner with whom he engaged in conversation. Soon afterwards the prisoner stooped down and picked up a purse. To examine its contents they went together to the house of Patrick Brady, where they were joined by John James. James opened the purse which contained a receipt for a diamond cross, value 230 guineas, and a small box containing the supposed jewel. James declared that as Foreman was present when the prisoner found the purse he was entitled to half of the value of the cross and offered him one hundred guineas. He left immediately afterwards to fetch that sum for Foreman, but came back saying that he was unable to procure it and could Foreman not raise it on the security of the supposed diamond cross. He promised to return it, together with the additional 100 guineas, the same evening. Foreman then *drew his master's money from his pocket* and deposited the required sum. It was arranged that he should meet James later in the day at an appointed place. In the meantime Foreman discovered that he had fallen victim to a fraud and at once returned to Holborn in the hope of meeting the men. He came across James and Owen; the former succeeded in escaping, but Owen was seized and ninety-eight guineas were found on him. Foreman admitted that the money which he deposited was the property of his master. On behalf of Owen, the prisoner, it was objected that the case did not come within 12 Anne, st. 1, c. 7, because Foreman was neither the owner of, nor a settled inhabitant in the house in which the money was taken, while the Act was intended to protect money, goods, etc., usually *kept or deposited in the house,* as distinguished from property under the protection of *the person. R.* v. *Campbell* was cited in support of this point of view. The jury found the prisoner guilty but the judgment was respited and the case referred to the judges. On their behalf Ashhurst, J., declared that Owen could not be sentenced to death because for a case to come within this Act the property stolen had to be under the protection of the house and deposited therein for safe custody (such as furniture, plate, money kept in the house); 'things immediately under the eye or personal care of someone who happens to be in the house' were not so protected. *R.* v. *Watson*[63] related to the same offence, known as the practice of ring-dropping. On the authority of *R.* v. *Campbell* and *R.* v. *Owen* the court held that the prisoner should be acquitted of the capital part of the charge, a direction which was upheld by the judges.

[61] The ruling given in *R.* v. *Castledine* (1792), 2 Leach 574, note (a), followed the same principle.
[62] (1792), 2 Leach 572.
[63] (1794), 2 Leach 640; see also *R.* v. *Moore* (1784), 1 Leach 314.

(c) The third restrictive construction put on this Act was that the stealing must be to the amount of forty shillings *at one time*, a series of smaller larcenies being excluded from the statute even though the aggregate value of the stolen property were forty shillings or more. Thus the case of a servant who had at different times feloniously stolen property from his master was ruled to be outside the scope of the Act since it could not be proved that he had ever stolen to the amount of forty shillings at one particular time. 'A number of distinct petty larcenies cannot be combined so as to constitute grand larceny; nor can any distinct number of grand larcenies be added together so as to constitute a capital offence'.[64]

On the other hand, it was held that the theft of banknotes was within the Act; this was ruled in 1795 in *R.* v. *Dean*,[65] notwithstanding some earlier decisions to the contrary.

§ 4. LARCENY TO THE VALUE OF FORTY SHILLINGS IN A SHIP UPON A NAVIGABLE RIVER, OR IN ANY PORT, WHARF OR QUAY: 24 Geo. 2, c. 45 (1751)

This statute stated that robberies and thefts on navigable rivers, in the ports of entry, etc., were encouraged owing to the fact that offenders were admitted to benefit of clergy, and accordingly enacted that benefit of clergy shall henceforth be withheld from every person that shall 'feloniously steal any Goods, Wares or Merchandize, of the Value of forty Shillings, in any Ship, Barge, Lighter Boat, or other Vessel, or Craft, upon any navigable River, or in any Port of Entry or Discharge . . . or in any Creek belonging to any navigable River, Port of Entry, or Discharge . . .; or shall feloniously steal any Goods . . . of the Value of Forty Shillings, upon any Wharf or Key adjacent to any navigable River . . . or shall be present, aiding and assisting in the committing any of the Offences aforesaid, being thereof convicted or attainted or being indicted thereof shall of malice stand mute, or will not directly answer to the Indictment, or shall peremptorily challenge above . . . twenty'. The severity of the Act was much mitigated in practice. A very strict construction in favour of the offender was put on the provisions relating to (a) the place where the offence had to be committed to be within the Act; (b) the nature of the stolen property; and (c) the categories of offenders who might be indicted under this law.

With respect to (a) the case of *Pike*, tried before Serjeant Adair at the Old Bailey in 1784, is of particular significance.[66] He was indicted under 24 Geo. 2, c. 45, for stealing a quantity of deals 'in a certain barge on *the navigable river* Thames'. The barge was navigating down the Thames loaded with deals belonging to the prosecutor when the lighterman, fearing that it would sink, unloaded a portion of the cargo into a boat. He then brought both the barge and the boat into Limehouse-dock, where he moored them alongside each other. Owing to the efflux of the tide they were left aground, and at night both boat and the deals were stolen, the value of the latter greatly exceeding forty shillings. The court held that the case was not within the meaning of the Act, the larceny having been committed not on the river Thames but on the banks of one of its creeks. Although another section of the Act referred to any person who shall steal to the amount of forty

[64] *R.* v. *Petrie* (1784), 1 Leach 294.
[65] (1795), 2 Leach 693.
[66] *R.* v. *Pike* (1784), 1 Leach 317.

shillings in any port of entry or discharge, or in any *creek* belonging to any navigable river, etc., this being a different branch of the Act, it was held 'that the indictment should have charged the fact accordingly'.

(b) As regards the nature of property protected by 24 Geo. 2, c. 45, it was ruled that money was not within the meaning of the Act. This decision was taken in the case of *Grimes,* indicted at the Maidstone Lent Assizes of 1752 for stealing out of a ship in port a considerable sum of Portuguese money, not made current by proclamation, but commonly current.[67] Similarly, in *R.* v. *Leigh*[68] tried before Gould, J. and Perrott, B., the court agreed with the counsel for the defence that the Act took away benefit of clergy from those who shall 'steal any goods, wares or merchandise'. The two dollars and the two guineas mentioned in the indictment, being *money,* were consequently held to be outside that definition, the prisoner being found guilty of simple larceny only. Referring to *R.* v. *Grimes,* Foster states that 'although the word *goods* may in a large sense take in money, and often doth, yet being connected with *wares and merchandizes,* the safer construction of so penal a statute will be, to confine it to goods *ejusdem generis,* goods exposed to sale'.[69] This remark is significant inasmuch as it implies that in the case of a non-capital statute Foster's opinion might have been different. This restrictive interpretation of the words *goods, wares* and *merchandise* may have influenced the wording of the subsequent statute (26 Geo. 2, c. 19) relating to the larceny of goods stranded, lost, or cast on shore, where the expression 'goods or effects' is used. In Russell's opinion the operation of this Act could not be similarly restricted, the word *effects* being 'of much more comprehensive significance than the words "goods, wares and merchandize"'.[70]

(c) Interesting light is thrown on the question of the category of offenders included under 24 Geo. 2, c. 45 by *R.* v. *Madox.*[71] The prisoner embezzled thirteen out of 280 casks of butter received by him for conveyance in his own ship. He was indicted for a capital offence under 24 Geo. 2, c. 45 and tried before Graham, B., at the Winchester Summer Assizes of 1805. The counsel for the defence raised two objections, the second being that the Act was not applicable to larceny committed by the owner of the ship himself. Quoting some cases tried under 12 Anne, st. 1, c. 7, which indicated that the latter Act did not cover a theft committed by the owner in his own house—he claimed that the same principle was also valid in the case under consideration. The judge thought, however, that the case of a person stealing the goods of another under the protection of his own house was different to that of a person stealing on board his own vessel the goods which had been committed to his care. The jury found the prisoner guilty, but the sentence was respited and referred to the judges who reversed the verdict holding that the fact was not larceny, and that if it were larceny, it would not have amounted to a capital offence within the meaning of 24 Geo. 2, c. 45.[72]

This lenient administration of 24 Geo. 2, c. 45 is particularly striking in

[67] 1 Leach 53, note (a).
[68] (1764), 1 Leach 52.
[69] *Crown Law,* p. 79.
[70] *On Crimes* (1819), Vol. 2, p. 1208.
[71] (1805), Russ. & Ry. 92.
[72] Writing in 1836 Deacon rightly observed that had this case occurred after 7 & 8 Geo. 4, c. 29, had been enacted, it would have fallen under one of its sections. Madox would then have been treated as an agent entrusted with a chattel and converting it to his own use; *Criminal Law of England* (1836), Vol. 2, p. 771, s. (6).

view of the frequency of such offences. Much interesting information on this subject is to be found in Colquhoun's *Treatise on the Police of the Metropolis*, based on the author's personal experience as a London magistrate. 'The immense plunder and pillage of merchandize and naval stores upon the River Thames'—he writes—'has long been felt as a grievance of great magnitude; exceedingly hurtful to the Commerce of the Country, and deeply affecting the interest of the West-India-Planters, as well as every description of merchants and ship-owners, trading to or from the port of London'.[73] According to his estimate[74] the total value of goods stolen every year on rivers and quays averaged £500,000. He admits that this figure can only be fairly assessed if considered in relation to 'the astonishing extent and magnitude of the trade of the Metropolis, and the multitude of vessels laden and discharged in the River Thames in the course of a year'.[75] But he also vividly describes how these depredations were carried out by a large and well-organised gang of thieves and receivers of stolen property.[76]

§ 5. LARCENY FROM BLEACHING GROUNDS: 18 Geo. 2, c. 27 (1745)

Section 1 of this statute enacted that 'Every Person and Persons, who . . . shall by Day or Night feloniously steal any Linen, Fustian, Callico, Cotton, Cloth or Cloth worked, woven, or made of any Cotton, or Linen Yarn mixed, or any Thread, Linen or Cotton Yarn, Linen or Cotton Tape, Incle, Filleting, Laces, or any other Linen, Fustian, or Cotton Goods or Wares whatsoever, laid, placed, or exposed to be printed, whitened, bowked, bleached, or dryed, in any whitening or bleaching Croft, Lands, Fields, or Grounds, Bowking-house, Drying-house, Printing-house, or other Building, Ground, or Place, made use of by any Callico Printer, Whitster, Crofter, Bowker, or Bleacher, for Printing, Whitening, Bowking, Bleaching, or Drying of the same, to the Value of ten Shillings, or who shall aid or assist, or shall wilfully or maliciously hire or procure any other Person or Persons to commit any such Offence, or who shall buy or receive any such Goods or Wares so stolen, knowing the same to be stolen as aforesaid', shall on conviction be deemed guilty of felony without benefit of clergy.

An interesting instance of how this severe law was evaded by means of ingenious constructions put on it by the courts is quoted by Blackstone.[77] The prisoner was indicted for stealing yarn from a bleaching-ground. The yarn was at first spread on the ground, but later put into heaps in order to be carried into the house. From these heaps the prisoner stole some of it. Thomson, B., held that the theft was not within the statute since the yarn should not have been left on the bleaching-ground in that state. Even more significant is the case of *James Dixon and Others*, tried in 1803 at the county of Nottingham Spring Assizes before Graham, B.[78] It was proved that the prisoners, together with another person not apprehended, had stolen fifty pieces of calico worth £140 from a building on the prosecutor's bleaching-grounds. The offence was attended by greatly aggravating circumstances. During the trial the counsel for the defence raised no objections concerning the nature of the building, nor did he point out the need for direct proof that

[73] (4th ed., 1797), p. 53.
[74] *Ibid.*, p. 44.
[75] *Ibid.*, p. 55.
[76] *Ibid.*, p. 54.
[77] 4 Comm. 240, note (19).
[78] *R.* v. *Dixon and Others* (1803), Russ. & Ry. 53.

it was in actual fact used for printing or drying the calico. It was agreed that in order to bring the case within the statute it was enough to prove that the calico was laid in the building for the purpose of receiving a further printing, it being irrelevant whether the printing took place there or elsewhere. The jury found all the prisoners guilty and sentence of death was passed on them. *After the trial,* however, the *counsel for the prosecution* suggested that it should perhaps have been proved that the building was being used for printing or drying calico, and that the calico in question was placed there for that purpose. It was consequently decided to refer the case to the consideration of the judges. In the course of this second trial it was established that the building from which the calico had been stolen was detached from the dwelling-house, stood within the limits of the bleaching-grounds, and was used by the prosecutors for depositing their unfinished goods; also that the calico in question had received one or two but not the final print, and that the building was locked and secured by a three-inch bar across the door. On the morning after the goods were stolen that door was found broken. It was held that the capital conviction was wrong, since the building from which the calico was stolen had not been used either for printing or for drying. The prisoners were recommended for pardon on condition that they were transported for seven years.

§ 6. HORSE-, SHEEP-, CATTLE- AND DEER-STEALING: 1 Edw. 6, c. 12 (1547); 2 & 3 Edw. 6, c. 33 (1548); 31 Eliz. c. 12 (1589); 9 Geo. 1, c. 22 (1722); 14 Geo. 2, c. 6 (1741); 15 Geo. 2, c. 34 (1742)

(a) The first statute which enacted capital punishment without benefit of clergy for stealing any horse, gelding, mare, foal, or filly was 37 Hen. 8, c. 8, s. 2. This Act was later replaced by 1 Edw. 6, c. 12, s. 10 of which laid down that no person or persons shall have benefit of clergy ' who shall be in due Form of the Laws, attainted or convicted for . . . felonious stealing of Horses, Geldings, or Mares; or being indicted or appealed of any of the same Offences, and thereupon found guilty by Verdict of twelve Men, or shall confess the same upon . . . Arraignment, or will not answer directly . . . or shall stand wilfully, or of Malice Mute '. After this Act had been passed, a doubt arose as to whether it covered the theft of *one* as well as several animals.[79] This uncertainty was eliminated by 2 & 3 Edw. 6, c. 33 which extended the provisions of the former Act to any ' Person and Persons feloniously taking or stealing any Horse, Gelding or Mare '. Finally, 31 Eliz. c. 12 provided that accessories to horse-stealing were also to be punished by death. Section 5 of this Act declared ' that not only all Accessaries before such Felony done but also all Accessaries after such Felony shall be deprived and put from all Benefit of their Clergy, as the Principal by Statute heretofore made is or ought to be '.

(b) The stealing of sheep and cattle was regulated by 14 Geo. 2, c. 6 which in section 1 enacted ' that if any Person or Persons shall . . . feloniously drive away, or in any other Manner feloniously steal, one or more Sheep or other Cattle of any other Person or Persons whatsoever, or shall wilfully kill one or more Sheep or other Cattle of any other Person or Persons whatsoever, with a felonious Intent to steal the whole Carcase or Carcases, or any Part

[79] Hale, 2 P.C. 365.

or Parts of the Carcase or Carcases of any one or more Sheep or other Cattle that shall be so killed, or shall assist or aid any Person or Persons to commit any such Offence or Offences; that then the Person or Persons guilty of any such Offence, being thereof convicted in due Form of Law, shall be adjudged guilty of Felony, and shall suffer Death, as in cases of Felony without Benefit of Clergy'. But the words *other cattle* being considered too vague, another Act was passed the following year (15 Geo. 2, c. 34) which extended 14 Geo. 2, c. 6 'to any Bull, Cow, Ox, Steer, Bullock, Heifer, Calf, and Lamb, as well as Sheep, and to no other Cattle whatsoever'. Mention should also be made here of the 9 Geo. 1, c. 22 (Waltham Black Act), which contained a number of provisions relating to the stealing of animals other than those already specified. By this Act it became a capital offence without benefit of clergy to steal any red or fallow deer, conies, hares, and fish out of any river or pond.[80]

The administration of capital statutes concerning the larceny of horses, sheep and other animals was on the whole more stringent than that concerning many other offences against property, such as for instance larceny from the person or stealing on navigable rivers. None the less the scope of these Acts was considerably narrowed by a number of strict constructions. Attention will, however, also be drawn to some leading cases in which the relevant statutes were more broadly construed.

Since horse-stealing is a larceny, it was always held that to amount to an offence the taking must be felonious (*animo furandi*) or, as the civil law puts it, *lucri causa*.[81] To quote East's definition, which in all probability was then usually adhered to, larceny is 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner'.[82] It was decided in many cases that almost any removal of goods constitutes the offence of larceny, provided that the felonious intent as defined by East could be established.[83] In *Philipps' and Strong's Case,* tried at the Gloucester Spring Assizes of 1801,[84] it appeared that the prisoners took a mare and a gelding at night from the stables of the prosecutor, and rode them to a place thirty miles away. There they left the horses in the care of the ostlers whom they ordered to clean and feed them, saying that they would return in three hours. Later in the day the prisoners were apprehended in another place. The jury were directed to consider whether the prisoners took the horses with intent to make any further use of them other than riding on them some of the way to their destination and then leaving them to be recovered by their owner. The jury found the prisoners guilty, but expressed the conviction that they had

[80] For a more detailed analysis of these provisions of the Act see above, pp. 58–60.
[81] Blackstone, 4 Comm. 232.
[82] East, 2 P.C. 553, § 2.
[83] In 1800 a man named Rawling was indicted under 14 Geo. 2, c. 6, for stealing six lambs, without any count for killing with intent to steal the carcass or some part thereof. It appeared that the carcasses were found on the grounds of the lambs' owner and that the skins only had been taken away and sold by the prisoner. The jury were directed to find the prisoner guilty, on the ground that the lambs must have been *removed from the field.* It was doubted, however, whether since 14 Geo. 2, c. 6, specified feloniously driving away and killing with intent to steal, *as well as* feloniously stealing in general, it did not intend to make these two different offences. The case was submitted to the judges who held the conviction right on the ground that any removal of the thing feloniously taken constitutes larceny; East 2 P.C. 617, § 48.
[84] East, 2 P.C. 662–663.

no intention other than that of riding a certain distance on the horses. This finding was considered by the judges. Grose J., thought that the case amounted to felony, because there was no intention of returning the horses to their owner. All the other judges (except Lord Alvanley who declined to give an opinion) held the offence to be only a trespass, the prisoners having had no intention of making the property their own, but only of using it for the particular purpose of their journey.

The statute of 37 Hen. 8, c. 8, s. 2, later replaced by 1 Edw. 6, c. 12, and 2 & 3 Edw. 6, c. 33,[85] expressly specified that the stealing of any horse, gelding, mare, foal or filly is a felony, etc. But since these words were omitted in the two later statutes it has been doubted whether they extend to the stealing of a foal or filly. On the other hand, East thought the words of the two statutes of Edward 6 plain and general enough to include a foal or filly, and that ' it is refining rather too much to argue those words into doubt from the over nicety of a prior statute which is set aside '.[86] This broader interpretation seems to have been adopted by the courts, but was rarely followed in respect to other capital statutes, over which similar doubts had arisen.

A particularly interesting restrictive construction was put on 31 Eliz., c. 12, s. 5, the third statute relating to horse-stealing, by which accessories before and after the fact were liable to be punished by death.[87] According to Foster,[88] in a case which occurred in 1703 it was decided that this Act applied only to accessories *at the time the Act was made*, that is accessories at Common Law, and not to persons who were or are made accessories by subsequent statutes. Consequently a person knowingly receiving a stolen horse, who was made an accessory after the fact by the subsequent statute of 3 W. & M. c. 9, could not be deprived of benefit of clergy.

It is important to note that though the two statutes of Edward 6 took away benefit of clergy from offenders found guilty of stealing horses, they only extended to such offences as amounted to grand larceny.[89] They would consequently not cover the theft of, say, a horse worth twelve pence or less, which offence would amount to petty larceny only and would not be punishable by death.[90] Thus in *Pearles' Case* tried at Bedford in 1755 before Foster, J., the defendant was indicted for stealing a bay gelding the value of which was assessed at twenty-three shillings and sixpence. It appeared, however, that the animal was in fact worthless and as a witness said fit only for a dog-horse. On Foster's recommendation the jury fixed its value at twelve pence, thus reducing the offence to petty larceny. The prisoner was transported.[91]

[85] Above, p. 675.
[86] East, 2 P.C. 615.
[87] Above, p. 675.
[88] *Crown Law*, p. 373; East, 2 P.C. 616, § 47.
[89] On the difference between grand and petty larceny see above, pp. 632–633.
[90] ' And so if a man could possibly steal a horse of the value of twelve-pence only, or under, or break a house in the day-time, and steal goods only of the value of twelve pence, the owner, his wife or children being in the house, and not put in fear, this will be but petit larciny notwithstanding the statute of 5 & 6 E. 6 take away clergy, . . . where clergy was before, namely where the offence was capital, as in case of grand larciny '; Hale, 1 P.C. 531.
[91] East, 2 P.C. 741, § 137, and Russell, *On Crimes* (1819), Vol. 2, pp. 1178–1179. Russell also quotes yet another case which he says was much discussed in the legal circles of the time. A ordered his servant to destroy an old horse and to bury it. The servant directed one of A's labourers to execute the order, who, instead of doing so, took the horse to a neighbouring town and sold it to a

A leading case concerning cattle-stealing is that of *Richard Cook,* tried at the Warwickshire Lent Assizes before Serjeant Sayer.[92] He was indicted under 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34 for stealing a *cow* valued at £5. The larceny was proved beyond any doubt, but it appeared that the stolen animal was a female, only two and a half years old, which never had a calf. The prisoner's counsel submitted that since a cow which had never had a calf is always called a *heifer,* the evidence did not support the charge in the indictment and that the prisoner should therefore be acquitted. The jury found the prisoner guilty, subject to the opinion of the judges on the above question raised by the prisoner's counsel. De Grey, C.J., was absent but all the other judges ruled that since the statutes on which the indictment was founded mention both *heifer* and *cow,* the *one* must have been used in contradistinction to the *other;* and consequently that the evidence did not support the indictment, and the prisoner should be acquitted.

Little can usefully be said concerning the offences of stealing deer, conies, hares and fish tried under the Waltham Black Act (9 Geo. 1, c. 22). This Act was mainly used with respect to the malicious injury of property, and notably to the malicious maiming of cattle and the destruction of trees, to arson, and to certain offences against the person.[93] The only case to be mentioned here is *R.* v. *Davis.*[94] He was indicted under the Waltham Black Act before Gould, J. There were two counts; one for killing and the other for stealing a fallow deer valued at forty shillings, from the park belonging to the prosecutor. The case was referred to the judges who were asked to decide whether the prisoner should be tried for felony, in view of the following circumstances: when the prisoner had committed the offence with which he was charged under 9 Geo. 1, c. 22 he had been neither armed nor disguised. The question therefore arose whether that statute had not been virtually repealed by 16 Geo. 3, c. 30. This last named statute repealed parts of several earlier Acts relating to offences against deer and enacted that the felonious carrying away or killing of any deer was to be punished by a fine for the first, and by transportation for seven years for the second offence. But while specifically naming several Acts which it thus abrogated, 16 Geo. 3, c. 30 made no mention of the relevant section of 9 Geo. 1, c. 22 on which the indictment of John Davis was based.[95] It was ruled that by stipulating that the first offence of simply killing deer in an enclosed park should be punished by a fine, and the second by transportation as for a felony, 16 Geo. 3, c. 30 repealed all previous more severe enactments concerning it. This decision would indicate that if a statute provides a milder punishment for a previously capital offence, the earlier Acts concerning it are virtually repealed in accordance with the well-known principle that *leges priores posteriores contrarias abrogant,* irrespective of whether or not the relevant provisions had been specifically named.

farmer for fifteen shillings. Application was then made to a magistrate to commit the labourer for horse-stealing. The magistrate, entertaining some doubts on the matter, mentioned the case to one of the judges then on the circuit. In this judge's opinion by giving this order A disclaimed all property in the horse, which could not therefore be the subject of larceny; *ibid.*, p. 1179, note (*k*).

92 *R.* v. *Cook* (1774), 1 Leach 105.

93 Above, pp. 61–75.

94 (1783), 1 Leach 271.

95 16 Geo. 3, c. 30, repealed the following statutes as far as they related to deer: 13 Ric. 2, c. 13; 19 Hen. 7, c. 11; 5 Eliz. c. 21; 3 Jac. 1, c. 13; 7 Jac. 1, c. 11; 13 Car. 2, c. 10; 3 W. & M. c. 23; 5 Geo. 1, c. 28; 10 Geo. 2, c. 32.

§ 7. HOUSEBREAKING IN THE DAY-TIME NO PERSON BEING THEREIN: 39 Eliz. c. 15 (1597)

General interpretation of the Act

The purpose of this Act is thus explained in the preamble (all italics are ours): 'Whereas of late Year divers . . . felonious Persons understanding that the Penalty of Robbing of Houses in the Day-time (*no Person being in the House at the Time of the Robbery*) is not so penal, to commit . . . a Robbery in any House, any Person being therein . . .; . . . doth embolden divers . . . Persons to watch their Opportunity and Time to commit . . . many *heinous Robberies, in breaking and entering divers . . . Houses* and especially of the poorer Sort of People, who . . . are not able to keep any Servant, or otherwise to leave any Body to look to their House, when they go . . . to hear Divine Service, or from Home to follow their Labour. . . .' The second section then enacted: 'That if any Person or Persons . . . shall be *found guilty, and convicted by Verdict, Confession, or otherwise,* according to the Laws . . . for the *felonious taking away* . . . in the *Day-time,* of any Money, Goods or Chattel being of the value of five shillings . . . in any Dwelling-house or Houses, or any Part thereof, or any Out-house or Out-houses, belonging and used to and with any Dwelling-house or Houses; although no *Person shall be in the said House or Out-houses at the Time of such Felony committed; then such Person* . . . shall not be admitted to . . . Benefit of Clergy'.

All the main elements of the offence—as set out above—were always interpreted to the advantage of the offender:

(1) Thus although section 2 of the Act speaks of felonious taking away, it was not admitted that the mere taking of goods out of a house was enough to constitute the offence within its meaning. It had been held on the contrary that the words 'felonious taking away' must be considered in relation to the preamble, which refers to 'heinous robberies in breaking and entering divers' houses'. This notably narrowed the scope of the Act which was thus confined to a much more serious offence than that described in section 2.[96]

(2) An essential part of the offence under this Act is that there should be

[96] Hawkins, 1 P.C. 248. This view was supported by Hale, who writes on this subject as follows: 'Altho this statute speak only of *felonious taking* in the body or purview, yet inasmuch as in the preamble it speaks of *robbery* of houses, a bare taking of goods out of a house, nobody therein, without an actual breaking of the house, such as would make burglary were it in the night, is not such a taking out of a house, as excludes from clergy, and thus it hath constantly obtained in practice against the opinion in *Popham's Reports 84 Bayne's case* '; 2 P.C. 356. Similarly Hawkins writes: 'Notwithstanding the words of the purview of this statute seem plainly to include all felonious takings to the value of *five shillings* out of an house, etc. whether with or without force; yet, since the mischief complained of in the preamble, and intended to be redressed, is the frequent committing of many "heinous robberies in breaking and entering, etc." and since all other statutes, excluding the benefit of clergy from robberies in houses, have been construed to extend to such larcenies only as are accompanied with a breaking of a house, or of some part of it, it seems agreed, that this statute also shall extend only to such a felonious taking as is accompanied with the like breaking'; 4 P.C. 279, sect. 96.

R. v. *Bayne*, Pop. 84, is sometimes quoted as an instance of the liberal interpretation of a capital statute. The circumstances of this case were as follows: After drinking in company with another man at a London tavern, the prisoner stole the cup from which they had drunk, the owner of the tavern, his wife and servants then being in the house. The judges, among whom

no one in the house at the time of its commission.[97] In *R.* v. *Harding*,[98] tried in 1699 at the Old Bailey, it was ruled that the case was outside the statute because at the time the theft was committed in an upstairs room, someone else was in another room downstairs.[99] In accordance with the same principle it was held that a larceny with breaking in committed in a lodging which was not a mansion or dwelling-house, was not within the statute if any person was in the house of which this lodging formed a part at the time.[1] In all such cases the offender could be found guilty of simple larceny only.[2]

(3) Finally, because 39 Eliz. c. 15 used the expression 'found guilty and convicted by verdict, confession or otherwise, according to law', those offenders who refused to plead guilty, stood mute or challenged the jury peremptorily above the legal number were held entitled to claim their benefit of clergy. It is significant that Foster, referring to this point, calls it a 'legal nicety', and states that 'this great defect, owing to mere oversight or inaccuracy of expression, the judges have never attempted to cure'.[3]

were Popham, Anderson and Brian, declared that Bayne's act was not a burglary, but that it amounted to 'such a robbery, whereby he was ousted of the benefit of his clergy by the statute of 5 E. 6, cap. 9', and he was hanged.

It has been noted already that 5 & 6 Edw. 6, c. 9, was passed in consequence of the strict construction put upon 23 Hen. 8, c. 1. According to section 4 of 5 & 6 Edw. 6, c. 9, if 'any Person or Persons be *found guilty of Robbing of any Person or Persons in any Part or Parcel of their Dwelling-Houses or Dwelling-Places* (our italics), the Owner or Dweller in the same House, or his Wife, his Children, or Servants, being then within the same House or Place, where it shall happen the same Robbery, etc. . . . that such Offenders shall not be admitted to their Clergy'.

The ruling in *Bayne's Case* was not upheld by any further decisions, nor by leading authorities and it therefore cannot be regarded as a valid example of the liberal construction of a capital statute. According to Kelyng, 68, 'The taking away of a Cup in which Men were drinking, as *Bayne's Case*, is only Larceny and no Robbery, for Larceny is described to be a fraudulent taking away of another Man's Goods above the Value of 12d. with intent to steal them. But Robbery is described to be a Rapine, that is, a violent taking any Thing from a Man's Person; and when it is applyed to robbing Houses, there must be the same Circumstance of Force'. Bayne's offence, Kelyng contended, was unaccompanied by any of these circumstances; the court's decision to bring the case within 5 & 6 Edw. 6, c. 9, 'I hold clearly not to be law'.

97 This is stated both in the preamble and in s. 2; above, p. 679.

98 Hawkins, 1 P.C. 250.

99 Similar doubts had arisen with respect to 23 Hen. 8, c. 1, which deprived of benefit of clergy persons found guilty of robbing a dwelling-house in the daytime, any person being therein, though not put in fear. Although these words of the Act would seem to be clear, it was questioned whether it extended (a) to robberies which were committed not *in the very room or place* where the dweller of the house, his wife, children or servants happened to be at that time; and (b) to robberies committed in the very room or place in which the dwellers were present, but while they were asleep. These points were clarified by 5 & 6 Edw. 6, c. 9 (1552), which declared that offenders guilty of all such robberies were to be deprived of benefit of clergy.

1 Russell, *On Crimes* (1819), Vol. 2, pp. 974–975.

2 However, if the prisoners had been let into the house by a servant in confederacy with them, and had broken open several inner doors and carried away goods of great value, the judges decided that the case was within the Act although the servant was then in the house, on the ground that the house was just as defenceless with a treacherous servant as with no one in it; *Smith's Case* (1698), 2 Leach 568, note (a).

3 *Crown Law* (1792), p. 358.

The case of Evans and Finch[4]

Foster writes 'that in the construction of statutes which take away clergy, the question, whether principal or accessary, is *now* become a matter of extreme consequence to the prisoner; it is in many cases life or death to him: but that was not the case, when the judges began to consider aiders and abettors, not as accessaries *at* the fact, but as principals *in* it'.[5] It has been seen that when this question arose in cases tried under the Waltham Black Act, the courts followed a liberal interpretation resulting in the infliction of capital punishment on some principals in the second degree, who had taken no active part in the commission of the crime.[6] Such decisions were, however, exceptional, and more characteristic of the general tendency were the particularly striking decisions in the early cases of *Evans and Finch* and *Page and Harwood.*[7]

Evans and Finch were tried under 39 Eliz. c. 15, the circumstances of this case being as follows: The defendants had broken into a room in the Inner Temple when no one was there, and had stolen £40. Although there were persons in other parts of the building, it was resolved that a room of any inn of Court or of Chancery is a *domus mansionalis* within the Act. No objections were therefore raised on this point. It appeared, however, that of the two prisoners, only one (Evans) had actually been inside the room and had taken the money out of it, while the other (Finch) 'stood upon the ladder in the view of the said Evans, and saw Evans in the chamber, and was assisting and helping to the committing of the said robbery, and took part of the money'. The court declared that Evans was a principal in the first degree within the Act and he was sentenced to be hanged. Benefit of clergy was, however, granted to Finch on the ground that he had been standing on the ladder, while according to the Act the offence must be committed *in* the house.[8] This decision was also supported by leading authorities on yet another ground: as section 2 of the Act stipulated that 'such person, etc . . .' should not be admitted to his clergy, it was held that the clergy is only taken away from the *person taking, i.e.,* from the offender actually taking, and not *from the offence.*[9] Referring to the case of *Evans and Finch* on another occasion,[10] Holt, C.J.—who fully approved that decision—thus summed up the main arguments: 'There, no doubt, they both (Evans and Finch) were principals in the fact; but because clergy is only taken away by the statute from such as enter and take away, and Finch did not enter, he had his clergy: yet if clergy had been taken away from any that committed burglary or housebreaking, there he should not have it. For the statute did not take away clergy upon account of the felony, but upon account of felony under these circumstances of entering into the house and taking away. . . .'

This opinion was not unanimously approved of, and while some supported it unreservedly,[11] others thought that the interpretation was too rigid and was only justified because it related to a capital statute. For instance, Powell, J., said: 'The case of *Evans and Finch* seems only to go on this distinction,

[4] (1637), Cro. Car. 473.
[5] *Crown Law*, p. 429.
[6] See the case of *Midwinter and Sims* and the *Coalheavers' Case*, above, pp. 52–55.
[7] Below, pp. 697–698.
[8] See above, p. 679.
[9] See for instance Hale, 1 P.C. 521, and 2 P.C. 358.
[10] *R.* v. *Whistler*, 7 Mod. 129.
[11] See the above quoted opinion of Holt, C.J.; Hale and Foster held similar views.

where clergy is taken from the offence, and where from the party offending; for where it is taken from the offence, it is taken from all that aid thereto; but if taken from the person entering the house, that case says, it shall not be taken from the aider or assister; but that was a case in favour of life; and I know not whether it will be a case to rule others by'.[12] Hawkins' comment is very interesting, for whereas he generally endorsed the doctrine of strict interpretation, particularly in regard to capital statutes,[13] he was very doubtful as to whether the decision in the case of *Evans and Finch* was justified or not: 'It seems agreed, that no accessary is ousted of his clergy by this statute. Also it hath been adjudged, that he who stands by and abets another while he breaks and enters the house, and afterwards divides the money with him, but doth not actually enter the house himself, is not within the statute. The reason whereof seems to be this, that the words, "If any person shall be convicted, etc., of a felonious taking, etc., in a dwelling-house, etc.," shall, in so penal a law, be intended only of an actual taking, and not of a constructive one. But this seems an extremely nice case, and if it were a new point, and not confirmed by experience, the authority of it might perhaps be justly questioned; . . .'[14]; the more reserved views of Powell, J. and Hawkins seem to have been shared by Lord Mansfield, who said in another case: 'In the case of robbery in a house—there was great reason for Powell's and Hawkins' doubt; and the Legislature thought it necessary to make a new Act'.[15] Lord Mansfield was referring to 3 W. & M. c. 9, by which benefit of clergy was also withdrawn from all those who 'shall comfort, aid, abet, assist, counsel, hire or command' any person who breaks into a dwellinghouse, etc. The passing of this Act may be taken as an indirect acknowledgment of the fact that the courts could not be expected to deviate from the established practice of strict interpretation and that the matter could therefore only be solved by legislation.

§ 8. TAKING A REWARD UNDER THE PRETENCE OF HELPING THE OWNER TO RECOVER HIS STOLEN PROPERTY: 4 Geo. 1, c. 11 (1717)

This dangerous practice was, according to Blackstone, 'a contrivance carried to a great length of villainy in the beginning of the reign of George the First: the confederates of the felons thus disposing of stolen goods at a cheap rate to the owners themselves, and thereby stifling all further inquiry'.[16] East justly calls it a 'kindred offence growing in truth out of the character of a receiver of stolen goods: for these confederates of the thieves, who are difficult to be discovered, frequently dispose of the goods stolen to the owners for a reward, under the pretence of helping them again to their stolen goods'.[17] The offender who took a reward for helping to recover stolen goods was actually a more refined and in many respects more dangerous receiver of stolen goods. As the law then stood, a receiver of stolen goods was an accessory after the fact and

[12] *R.* v. *Whistler*, 11 Mod. 25, 28. According to 2 Ld. Raym. 845, Powell, J., said, this case being a case of life, '. . . the judges in favour of life construed the statutes tenderly; otherwise it seems absurd, to take away clergy from him who was upon the top of the ladder, and give it to him that was at the bottom; for if both had entered the room, and one of them had had the money in his custody at the request of the other, both of them would have been deprived of their clergy'.

[13] Above, note 4 at p. 84.

[14] Hawkins, 4 P.C. 279–280, sect. 98.

[15] *R.* v. *Royce* (1767), 4 Burr. 2073, 2076.

[16] 4 Comm. 132.

[17] 2 P.C. 769, § 155a.

could not be prosecuted unless and until the principal to that offence had been convicted. Without going into the details of this matter it is proposed to examine the manner of administering 4 Geo. 1, c. 11, s. 4—a statute which allowed the courts in certain cases to inflict capital punishment on offenders who took a reward for helping to restore stolen property to its owner.

The preamble to section 4 of 4 Geo. 1, c. 11, recited that 'whereas there are several Persons who have secret Acquaintance with Felons, and who make it their Business to help Persons to their stolen Goods, and by that Means gain Money for them, which is divided between them and the Felons, whereby they greatly encourage such Offenders'; and the section then enacted 'that where ever any Person taketh Money or Reward, directly or indirectly, under Pretence or upon Account of helping any Person or Persons to any stolen Goods or Chattels, every such Person so taking Money or Reward, as aforesaid, (unless such Person doth apprehend, or cause to be apprehended, such Felon who stole the same, and cause such Felon to be brought to his trial for the same, and give Evidence against him) shall be guilty of Felony, and suffer the Pains and Penalties of Felony, according to the Nature of the Felony committed in stealing such Goods, and in such and the same Manner as if such Offender had himself stolen such Goods and Chattels, in the Manner, and with such Circumstances as the same were stolen'. One of the most dangerous offenders of this type was Jonathan Wild, whose skill amounted to genius.

Jonathan Wild was first indicted under 5 Anne, c. 31, s. 6, which enacted that even if the principal felon cannot be taken, the receiver of any goods stolen by him may yet be tried as for a misdemeanour and punished by a fine and imprisonment or by corporal punishment. It was maintained that Wild could not be tried under this Act since in this case the principal felons had been apprehended, convicted and executed. This view being shared by Pratt, C.J., Wild was acquitted.[18]

In 1725 he was indicted again, this time under 10 & 11 Will. 3, c. 23, for privately stealing fifty yards of lace valued at £40 in a shop. During the trial it appeared that Wild himself had not been actually in the shop when the theft was committed, but only waiting at the corner of the street to receive the goods. Once more he was acquitted.[19] Almost immediately after this acquittal he was tried and convicted under 4 Geo. 1, c. 11, s. 4, for receiving ten guineas from the prosecutor as a reward for helping her to recover the lace stolen by Henry Kelly, who, in this case, was examined as a witness for the Crown. Wild was found guilty, was sentenced to death and executed on May 24, 1725.[20]

Although the danger arising from the traffic in stolen goods was widely realised, the practice of interpreting the statutes most strictly in favour of the accused was not abandoned in respect to 4 Geo. 1, c. 11. This is borne out by *R.* v. *Drinkwater*, tried at the Old Bailey before Lee, C.J., and Denton, J.[21] The prosecutor had sent his watch to a watchmaker for repair. The latter delivered it to his workman from whom it was privately stolen by Catherine Kaylock. It was proved that the defendant helped the watchmaker

[18] *Jonathan Wild's Case* (1719), East, 2 P.C. 746, § 142.

[19] 1 Leach 17, note (a); see also above, p. 667.

[20] *Jonathan Wild's Case* (1725), East, 2 P.C. 770, § 155. Obviously Wild could not have been convicted had the court refused to admit the testimony of a thief (in this case Henry Kelly) against the receiver. This important point was reaffirmed in *R.* v. *Haslam* (1786), 1 Leach 418; see also the cases of *Price and Collins* (1786) and of *Patram* (1787); *ibid.*, 419, note (a).

[21] (1740), 1 Leach 15.

to recover this watch and received from him eight guineas as a reward. The important circumstance in the case was that Catherine Kaylock, the principal felon who had stolen the watch, was dead and had never been convicted of the offence. The counsel for the defence submitted that in view of this circumstance John Drinkwater could not be indicted under 4 Geo. 1, c. 11, s. 4, arguing that under this Act the receiver of stolen goods, who was an accessory after the fact, had to be punished in the same manner as the main perpetrator. The charge against Catherine Kaylock was that of privately stealing, a capital offence under 8 Eliz. c. 4, but since Kaylock was dead and had never been tried it remained a moot point whether she would have been convicted on the capital charge, found guilty of petty larceny only, or even acquitted. The verdict in her case would have determined for what offence the defendant in the present case could have been indicted. At Common Law the receiving of stolen goods was a misdemeanour. It was made a felony by a particular Act of Parliament, but it was never admitted that an accessory could be tried for a *felony* till the principal had been convicted; when the principal could not be found, the accessory could be indicted for the *misdemeanour* only. The prosecution asserted that the doctrine of principal and accessory was not applicable in this case, the statute stipulating that the person who helps to recover the stolen property shall suffer a penalty according to the nature of the felony committed, but not mentioning that the principal must be convicted first.

The case was reserved and submitted to the judges. Their opinion was not made public but since the prisoner was discharged, after being retained in prison for a certain time, it may be assumed that they held it to be outside the scope of 4 Geo. 1, c. 11, s. 4. East's comment on this case is of some relevance here. In his opinion the fact that the *principal was not convicted* was not the reason for Drinkwater's discharge. He held that the terms of the statute indicated that a conviction of the principal is not a necessary preliminary to the trial of an accessory under 4 Geo. 1, c. 11, since it stipulates that the latter shall be guilty of felony, etc., 'unless he doth apprehend, or cause to be apprehended, the Felon who stole the Goods, and cause such Felon to be brought to his Trial for the same, and give Evidence against him'. In East's opinion the reason for Drinkwater's discharge was that since the principal had died, the above-quoted requirement of 4 Geo. 1, c. 11, could not be complied with.[22]

§ 9. FORGERY OF ANY WARRANT OR ORDER FOR PAYMENT OF MONEY OR DELIVERY OF GOODS: 7 Geo. 2, c. 22 (1734)

In the eighteenth century forgery was not yet clearly defined by law and the courts often found difficulty in distinguishing between forgery and larceny, as well as between forgery and some forms of embezzlement. Attention has been drawn already to the great number of statutes by which various kinds of forgery were all made capital, non-clergyable offences,[23] as well as to the relatively high co-efficient of executions for this offence, [24] only a small fraction of delinquents found guilty of it being pardoned by the Crown.[25] This trend was not reflected in the practice of the courts, however, the forgery laws being interpreted most strictly and to the advantage of the offender. The administration of 7 Geo. 2, c. 22, well illustrates the case in point.

[22] 2 P.C. 770–771, § 155.
[23] Above, Appendix 1, pp. 642–650.
[24] Above, table at p. 157.
[25] Above, p. 122.

By this statute the forgery of any acceptance of any bill of exchange, or of the number or sum of an accountable receipt for any note, or of any warrant or order for payment of money or delivery of goods, as well as the uttering of all such instruments, was made a felony punishable by death without benefit of clergy. The most important section of the Act was that relating to the forgery of any warrant or order for the payment of money or delivery of goods.

Even in the first case under this Act a most ingeniously restrictive construction was put on the words *warrant* or *order*.[26] The facts of this case are as follows. The defendant, who was entitled to relief from the parish, went to the prosecutor's drapery shop and pretending to have come on behalf of the overseer of the poor of that parish produced an order desiring the prosecutor to let her have the several things mentioned in that order, on credit. The prosecutor, suspecting a forgery, sent her away, kept the order and got in touch with the overseer. The defendant was apprehended and found guilty. Foster, J., before whom she was tried, thought that the judgment should be respited since it was doubtful whether the order set forth in the indictment was a warrant or order such as could bring the case within 7 Geo. 2, c. 22.[27] At the conference, one judge doubted but acquiesced, another dissented, but nine agreed with Foster that this writing was not a warrant or order for the delivery of goods within the meaning of the Act, for the following reasons[28]: 'The words *warrant* or *order*, as they stand in the act, are synonymous, and expressive of one and the same idea, and in common parlance import, that the person giving such warrant or order hath, or at least claimeth, an interest in the money or goods which are the subject-matter of that warrant or order; that he hath, or at least assumeth, a disposing power over such money or goods, and taketh on him to transfer the property, or custody of them at least, to the person in whose favour such warrant or order is made. This they took to be the strict literal construction of the act. And though the present case, and many other cases of the like kind mentioned in the debate, may come within the mischiefs intended to be prevented, yet in the construction of acts so penal as this, the old rule of adhering strictly to the letter must not be departed from; and therefore the prisoner ought to be discharged from this indictment'. To contrast this interpretation with that of Sir Sidney Stafford Smythe, the only judge who maintained that the case came within the Act, is to make its leniency even more apparent.[29] He argued that the purpose of 7 Geo. 2, c. 22, was to cover all cases which were outside the earlier statute (2 Geo. 2, c. 25), and that it should therefore be liberally interpreted. The word *order* was in daily use among traders, in a larger sense than that conceived by the majority of the judges. Letters or messages sent in the course of dealers' commercial transactions requesting the forwarding of goods were called orders, though the person sending such an order might not have, nor pretend to have, either an interest in the goods, or the power to dispose of

[26] *R.* v. *Mitchell* (1754); see Foster, *Crown Law*, p. 119, and East, 2 P.C. 936. See also *R.* v. *Willoughby* (1783), 2 East P.C. 581, 944.

[27] The text of the order was as follows:

'Oct. 16th, 1753.

'*Mr.* Jefferys

I desire you to let this woman have six yards of ordinary stuff, one pair of stockings, one shirt, one apron, one handkerchief, and I will see it all paid for. Witness my hand, George May '.

[28] Foster, *Crown Law*, p. 120.

[29] Foster, *ibid.*, pp. 120–121.

them. In conclusion he demanded that the prisoner should be sentenced to death, but as already mentioned he was overruled and the prisoner was discharged.

The decision in *Mitchell's Case* inevitably weakened the effectiveness of 7 Geo. 2, c. 22, and enabled this kind of forgery to be committed with virtual impunity. As Deacon says: 'But as many orders for the delivery of goods are immediately complied with by a tradesman, upon the simple *credit* of the person whose name is signed to the order, and who has no property whatever in the goods, but merely gives the order as a customer—and as most of such orders are worded in the shape of a *request*, this construction of the former act was found to be very inconvenient on many occasions, as opening a door to frequent forgeries of this kind in the transactions of commerce'.[30]

None the less the construction put on 7 Geo. 2, c. 22, in *Mitchell's Case* was upheld in all cases in which a doubt had arisen on this important point. Thus in *R.* v. *Williams*[31] it was ruled that the principles laid down in the case of Mary Mitchell 'could not now be departed from' and the offender was accordingly acquitted. The same was decided in two subsequent cases.[32]

II

§ 10. BURNING OR OTHERWISE DESTROYING ANY SHIPS TO THE PREJUDICE OF INSURANCE COMPANIES: 4 Geo. 1, c. 12 (1717); and 11 Geo. 1, c. 29 (1724)

This offence had been made a felony punishable by death by 22 & 23 Car. 2, c. 11, s. 12, which recited that 'it often happens that Masters and Mariners of Ships having ensured or taken upon Bottomry, greater sums of Money than the Value of their Adventure, do wilfully cast away, burn, or otherwise destroy the Ships under their Charge, to the Merchants' and Owners' great Loss'. It enacted that a person found guilty of these offences, as well as one who procures the same to be done, shall suffer death as a felon. Section 4 of 1 Anne, st. 2, c. 9, slightly enlarged the nature of the offence by defining it as a wilful casting away, burning, etc., of the ship 'to the Prejudice of the Owner or Owners thereof, or of any Merchant or Merchants who shall load Goods thereon'. Furthermore, section 5 of the same Act materially changed the punishment by declaring that offenders were to be deprived of their clergy. The law was again enlarged and finally settled by 4 Geo. 1, c. 12, s. 3, and the explanatory statute of 11 Geo. 1, c. 29, ss. 5 and 6. These statutes mention not only the master and the mariner but also the captain and officers belonging to, and the owner of, the ship and define the offence for which they may be indicted (or those which procure the offence to be done) as wilfully casting away, burning, or otherwise destroying the ship to which they belong or which

[30] *Criminal Law of England* (1836), Vol. 2, p. 1414, sect. (F).

[31] (1775), 1 Leach 114.

[32] *R.* v. *Ellor* (1784), 1 Leach 323; and *R.* v. *Clinch* (1791), 1 Leach 540. An equally strict construction was put on those words of 7 Geo. 2, c. 22, which define the party who may fall victim to the intended forgery. The Act speaks of defrauding 'any Person or Persons whatsoever'. In *R.* v. *Harrison* (1777), 1 Leach 180, it was ruled that the offence was not within the Act because it aimed at defrauding the Bank of England. To rectify the position on this point 18 Geo. 3, c. 18, was passed, which enacted that persons found guilty of any offence under 7 Geo. 2, c. 22, whose intention was to defraud any corporation whatsoever should also suffer death without benefit of clergy; on the Act of Geo. 3, see above, p. 645.

they own, 'with Intent or Design to prejudice any Person or Persons that hath, or shall underwrite any Policy or Policies of Insurance thereon, or of any Merchant or Merchants that shall load Goods thereon, or of any Owner or Owners of such Ship or Vessel'. The punishment appointed for these offences was death without benefit of clergy.

But this progressive extension of the law and its increased severity was offset by the very strict construction put on these Statutes by the courts.

(a) A restrictive construction was put on a part of the Act relating to 'casting away or destroying' the ship. Thus in 1765 Sir Thomas Salusbury, J., Yates, J., and Aston, J., ruled that if the ship were run aground or stranded on a rock but was later found to be capable of being easily refitted, she could not be said to have been 'cast away or destroyed'.[33]

(b) It was held in the same case that if the cargo only were insured, and not the ship, the offence was not within the Acts, because they speak of burning, etc., to the prejudice of any person that shall underwrite any policy of insurance *thereon* but mention ships only, not their cargoes. East supports this interpretation on the ground that 'penal statutes are to be construed strictly'.[34]

(c) It was decided that an accessory to a felonious shipwreck was not within the Acts, unless he *belonged* to the ship. This was ruled in *R.* v. *Pow*.[35] The case was tried at the Admiralty Session at the Old Bailey before Adams, B., Sir Thomas Salusbury, J., and Sir Thomas Birch, J. Two of the prisoners were indicted for unlawfully burning and destroying a ship with intention to defraud the underwriters; in the same indictment Thomas Pow was charged as an accessary before the fact for counselling, advising, etc., the main prisoners to commit the offence. The ship had been insured by her owner for £400. Pow, who was a tailor and salesman, sailed to Lundy Island, where the ship was being unloaded, went on board, and gave Lancey, the main perpetrator, several new notes of hand promising to pay a certain sum of money as compensation for clothes, etc., in the event of any misfortunes causing the ship to be lost on its voyage to the Cape of Virginia. He then returned to shore. The ship set sail, and the next morning Lancey ordered her to be set on fire. The jury found Lancey guilty and he was executed on June 7, 1754. They also found 'that Thomas Pow, before the said felony was committed by Lancey, did, near the island of Lundy within the county of Devon, incite, move, instigate, stir up and counsel the said John Lancey to commit the same; but that the said Thomas Pow was neither Owner, Master, Captain, or Mariner of the said ship'. Two questions were submitted to the judges. The first was whether an accessory *on the land* to the offence of later burning a ship *on the high seas*, was within the jurisdiction of the Court of Admiralty, or whether he ought not to be indicted and tried at the assizes for the county within which *his* offence was committed. The second was whether Thomas Pow, being a trader and found by the jury to be neither *owner*, *master*, *captain*, nor *mariner* of the burnt vessel, came within the meaning of 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29, on which the indictment was founded. No opinion was given on the first point but it was decided that the prisoner was not an offender within the meaning of the Acts.

(d) The scope of 11 Geo. 1, c. 29, was further restricted by the decision in

[33] *De Londo's Case* (1765), East, 2 P.C. 1098, § 42.
[34] *Ibid.*, 1099.
[35] (1754), 1 Leach 45.

R. v. *Easterby and Macfarlane*,[36] which excluded from it offences committed by persons on shore. A ship was destroyed by two mariners acting on the instructions of the defendants, who were the ship's owners. The ship had been insured for £700 and her cargo for a further £10,250. But it was discovered that when the vessel was destroyed she was loaded with a cargo worth not more than £3,230, while large quantities of goods which were to have been part of the shipment were found concealed in the houses of the two defendants. It was also proved that one of the mariners who destroyed the vessel had frequently conferred with the defendants previous to sailing, and that the destruction of the ship had then been decided upon. There was no evidence, however, that either of the defendants had himself been *on board the vessel when on the high seas.* It was contended on their behalf that since they had committed no act or deed on the high seas their offence was not within the jurisdiction of the Admiralty Court under section 7 of the Act. Of the two mariners one was acquitted and the second sentenced to death and executed. But the case of the two chief defendants, Easterby and Macfarlane, was referred to the judges. Having heard the case argued twice, they decided that although the statute in question made persons who directed or procured the destroying of a ship principals or accessaries, yet inasmuch as no act was done by the owners within the jurisdiction of the Admiralty, they were not subject to that jurisdiction and that consequently the trial was improperly laid.

The restrictive constructions put on 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29, in the cases of *Pow* and of *Easterby and Macfarlane* led to the repeal of these two Acts and their replacement by 43 Geo. 3, c. 113 (1803), which again made the law more stringent. This new Act (1) no longer required the wilful casting away, burning, or destroying of the vessel to be committed by a person belonging to the ship, but stated that it might be committed by any person; and (2) made it possible to try the principal as well as the accessories before the fact 'by the Common Law Court, or in the Admiralty Court, as the Offence shall be respectively committed, within the Body of a County, or on the High Seas'.

§ 11. ARSON: 23 Hen. 8, c. 1 (1531); 25 Hen. 8, c. 3 (1533); 1 Edw. 6, c. 12 (1547); 4 & 5 Ph. & M. c. 4 (1557); 22 & 23 Car. 2, c. 7 (1670); 9 Geo. 1, c. 22 (1722)

Burning of one's own house

While the burning of almost any type of property, irrespective of its value and the social danger thereby produced was to be punished by death without benefit of clergy,[37] the Common Law definition of arson as the malicious and wilful burning of the house of *another*, was upheld.[38] The burning of one's own house was therefore outside the scope of the law, even though the criminal intent of the act was apparent. If it endangered the houses of other people it was no more than a great misdemeanour,[39] and could only be made a felony if one or more of the adjoining houses were actually burnt.[40] Thus if a person set fire to his house in order, say, to obtain the insurance money, he could only

[36] (1802), 2 Leach 947.
[37] Above, pp. 654–655.
[38] Coke, 3 Inst. 66; Hawkins, 1 P.C. 295.
[39] Hawkins, 1 P.C. 297, sect. 15.
[40] In *Proberts' Case*, tried in 1799, Grose, J., said that if it had so happened that any of the neighbouring houses had been set on fire in consequence of the

be punished by a fine or imprisonment[41]; but if he set fire, for instance, to a stack of hay he was liable to be sentenced to death.

This principle was always strictly upheld by the courts. In *Holmes' Case*, for instance,[42] the defendant burnt a house of which he had possession under a lease for a number of years. He was convicted of trespass and misdemeanour only, on the ground that it was not a felony to burn a house whereof he was in possession under a lease for several years, 'for it must be the house of another, which could not be said in the case of a lessee in possession at the time of the burning'.[43] In the already quoted case of *Proberts*, Grose, J., said that the interpretation in the case of *Holmes* was 'a lenient construction of the law of arson'.[44]

The judgment in the subsequent case of *Harris*, tried in 1753 before Denison, J.,[45] though much more severe, was not in principle contradictory to the decision in *Holmes' Case*. The prisoner, a 14-year-old girl, was indicted for burning a dwelling-house in the possession of Edward Stokes; Anne Course, the girl's mother by a former husband, was indicted as an accessary before the fact. When her first husband died, Anne Course was entitled to a life interest in this house, but it was never assigned and she let it to Stokes from whom she received the rent. Having under her care a large family she applied for relief to the parish; this request was refused unless she would agree to let the rent be paid to the overseers. She then threatened to burn the house, which her daughter Elizabeth, acting under her direct instigation, eventually did. They were both convicted but the case was referred to the judges because doubts had arisen whether, considering the interest Anne Course had in the house, the decision in *Holmes' Case* could be held good. It was agreed that the prisoner's title to a dower was not an interest such as could bring her within the decision given in *Holmes' Case*. According to Foster, who supported their view, this ruling was based on the following grounds. Holmes had the possession by legal title, and during the continuance of his lease his possession could not be challenged; the house could therefore in a limited sense be called *his own*. But in *Harris' Case* the house was in the possession of Edward Stokes,

defendant's wilful and malicious burning of his own house (which was proved to have been done in order to obtain the insurance money), his offence would have amounted to a capital felony; East, 2 P.C. 1030, 1031. On this see also *R.* v. *Coke and Woodburne* (1722), 16 St. Tr. 55, and the statement of Buller, J., in *Isaac's Case* (1799), East, 2 P.C. 1031, § 8.

It had also been held that if a person were to burn his house *with intent to burn his neighbours' houses*, but only succeeded in destroying his own house, he could not be found guilty of arson; Hawkins, 1 P.C. 297, sect. 11; see also other authorities there quoted.

[41] He could also be ordered to stand in the pillory and sometimes to pay sureties for his good behaviour when at large. In the above quoted case of *Proberts*, the sentence awarded was two years' imprisonment, pillory, and sureties for good behaviour for seven years. The punishment of the pillory was abolished by 56 Geo. 3, c. 138 (1816), except for perjury and subornation of perjury.

[42] *R.* v. *Holmes* (1634), Cro. Car. 376.

[43] See also Kel. 29.

[44] East, 2 P.C. 1030, § 7. 'The judgment in *Holmes' Case*, to say no more of it, was a very merciful judgment. The house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual; like the bailee and the absolute owner of goods in the case of larceny'; Foster, *Crown Law*, p. 116.

[45] Foster, *ibid.*, pp. 113–116.

subject to a yearly rent. Anne Course's title to a dower gave her no more right of entry, it being a bare right of action.[46]

This broader interpretation was not upheld in any of the leading cases during the second half of the eighteenth century, and the validity of the restrictive ruling given in *Holmes' Case* was repeatedly reaffirmed. In *R.* v. *Spalding*,[47] the prisoner, under particularly aggravating circumstances, set fire to a house of which he was a tenant in possession. Within four yards on each side of his house were other houses. Some time before committing the offence the prisoner had surrendered the house to the use of Benjamin Nott, who was also a mortgagee, but Nott had never come to live in the house after its surrender. Spalding insured the house and grounds against fire and had paid the premium subsequent to the commission of the offence. The court held that the offence did not amount to arson, for although the house had been surrendered to the use of a mortgagee it was not the house of another as long as the tenant continued in possession. 'The resolution in *Holmes' Case* has been too long established to be controverted and the interpretation of the statute must be governed by that determination.[48] The circumstance of the premises being insured makes no difference in this case'.[49] In *R.* v. *Breeme*[50] it was ruled that the burning of the house by a tenant in possession under a three-year-lease agreement was also not arson. The court said that arson is the burning of the house of *another*; that it is an offence against *the possession*, and that therefore if a person in possession of a house as tenant, however short his term may be, set fire to it, it is not arson. *Holmes' Case* was again quoted in support of this ruling. The same decision was taken in *R.* v. *Pedley*.[51]

The state of the law on this subject was strongly criticised by leading authors and judges. Thus Hume writes: 'Another unfavourable case, and of which the ingenuity of modern times has introduced us to the knowledge, is, where a person insures his house at a high rate, and afterwards sets fire to it, to injure and defraud the underwriters'.[52] Similarly Leach states that some of the judges, when considering the already quoted case of *Breeme*, 'seemed to doubt the propriety of that determination (in *Holmes' Case*), and said, that if the question had been unsettled they should have been of a different opinion'.[53] The strongest criticism came from Lord Mansfield. When *Pedley's Case* was submitted to the consideration of the judges, Lord Mansfield

[46] Both Anne Course and Elizabeth Harris were sentenced to death. Elizabeth Harris, who was only fourteen years old and acted under her mother's instigation, was reprieved and recommended for a pardon on condition she was transported. Anne Course was executed.

[47] (1780), 1 Leach 218.

[48] Spalding was indicted under the Waltham Black Act, (9 Geo. 1, c. 22); it was ruled that this statute does not alter the nature of the crime or create any new offence, but only makes it clear that the principal is to be excluded from the benefit of clergy.

[49] 1 Leach 220.

[50] (1780), 1 Leach 220.

[51] (1782), 1 Leach 242. The only departure from this principle was made in the case of *Gowen*, tried in 1786 before Skinner, C.B. It appeared that the prisoner was a parish pauper. He set fire to the house into which he had been put by the overseers and of which he had the sole possession and occupation without paying any rent. The judges to whom the case was referred declared that the prisoner had no interest in the house, being merely a servant; that it could not therefore be said to be *his* house and that the overseers had the possession of it by means of his occupation. Accordingly they held the conviction to be proper; 1 Leach 246, note (a).

[52] *Commentaries on the Law of Scotland, respecting Crimes* (1844), Vol. 1, p. 134.

[53] 1 Leach 221.

said, referring to the ruling in *Holmes' Case* which according to him re-affirmed the Common Law definition of arson as burning the house of *another*: 'I very much lament that the law is so settled. If it had been a new question, I should not have been singly of a contrary opinion. The bias of my mind is in favour of Mr. Justice Foster's opinion that "the House might with strict legal propriety have been considered as the house of the landlord"; and although he truly says, "that both landlord and tenant have a property in the house, the one temporary and limited, the other absolute and perpetual"; yet to decide that he who has so trifling an interest in a house as a year, a month, or a day, should not be guilty of Arson by burning it, would, in my conception, require great deliberation'.[54]

With the growth of insurance companies, particularly in the last quarter of the eighteenth century,[55] the temptation to commit such offences grew accordingly. Writing in 1832, H. W. Woolrych, a barrister and afterwards Serjeant-at-Law, stated 'that about one-sixth of the fires in London arise from wilful causes, and of these last, an infinite majority proceed from a direct design to defraud the insurance offices'.[56] None the less the relevant statutes continued to be interpreted most strictly.

Powlter's Case

This case[57] (tried in the eighth year of the reign of James I) is recorded in detail by Coke and also discussed at great length by Hale and Foster.[58] In consequence of the fire which Powlter had set to his own house, a great part of the town of Newmarket was burned. The defendant was found guilty of arson and convicted, but a doubt arose as to whether he could claim benefit of clergy. This depended on the interpretation of a number of Acts which were—to use Coke's expression—'divers, intricate, ill-compiled and composed'. It was held that arson continued to be a non-clergyable offence and the defendant was sentenced to death and hanged.[59] The case is most important, being one of the rare instances of the infliction of capital punishment without a direct and explicit legal provision. According to Bacon[60] it shows that 'even statutes which take away clergy are, in some cases, to be taken by equity; and if a statute is made supplementary to the common law, and in a similar case, and takes away clergy, it must be construed liberally'. Similarly Viner, who states[61]: 'Clergy is *denied* in the *case of burning* of dwelling-*houses by* the *equity of* the statute of 23 H. 8, cap. 1, *and in* the *case of provisors* upon the statute of 27 *E.* 3, *cap.* 1. For these are statutes for the publick good; and therefore shall be taken by equity'. And elsewhere: 'Although a penal statute shall not be extended to equity in the exposition of it, yet it shall be so expounded *that the true intent and meaning of it may be known.* For if the former should be, the exposition would be too large and arbitrary; and if the latter should not be, the exposition would be too narrow, and would

[54] 1 Leach 245–246.
[55] Between 1770 and 1800 some twelve or fifteen English companies were set on foot in various parts of the country; see Sir John H. Clapham, *An Economic History of Modern Britain* (1939), Vol. 1, p. 286.
[56] *History and Results of the Present Capital Punishments in England* (1832), p. 183.
[57] *R.* v. *Powlter* (1610), 11 Co.Rep. 29a.
[58] Hale, 1 P.C. 570–574, and 2 P.C. 345–348; Foster, *Crown Law*, pp. 333–336.
[59] 11 Co.Rep. 29a.
[60] *Abridgment of the Law* (1832), Vol. 7, p. 464.
[61] *Abridgment of Law and Equity* (1793), Vol. 19, p. 516, § 48.

extenuate the force of the statute, and hinder the true intent and meaning thereof'.[62] Some modern writers also quote *Powlter's Case* as an instance of the liberal construction of a highly penal statute.[63]

The legal position in respect to this point was briefly as follows: 23 Hen. 8, c. 1, s. 3, made arson, of which Powlter was convicted, a non-clergyable offence. Since this Act only extended to offenders convicted by verdict or confession, a supplementary Act was passed two years later (25 Hen. 8, c. 3) by which benefit of clergy was also taken from offenders wilfully standing mute, challenging peremptorily above twenty, or refusing to plead directly to the indictment.[64] Thus, as Foster rightly observes, in respect to arson, 25 Hen. 8, c. 3, was merely auxiliary to 23 Hen. 8, c. 1.

This was later altered by 1 Edw 6, c. 12. Section 10 of this Act took away benefit of clergy from a number of offences, most of which had already been mentioned in section 3 of 23 Hen. 8, c. 1; it did not, however, specify either accessories before the fact to the offences referred to, or the offence of wilfully burning houses. Furthermore, this section contained the following proviso: 'That, in all other Cases of Felony . . . all Person and Persons, . . . shall have and enjoy the Privilege and Benefit of his or their Clergy . . . as they might or should have done before the four and twentieth Day of *April* in the first Year of . . . King Henry the Eighth'. It was held that with respect to arson, 1 Edw. 6, c. 12, repealed both 23 Hen. 8, c. 1, and 25 Hen. 8, c. 3. Whether this change was deliberate or the result of an oversight cannot be ascertained, but since some of the offences from which benefit of clergy was taken away by the same Act were markedly less serious than arson, one is inclined to attribute it to an oversight. Nevertheless it cannot be denied that a statutory alteration was effected.

Two subsequent statutes later altered two provisions of 1 Edw. 6, c. 12. First, 5 & 6 Edw. 6, c. 10 (1552), again deprived of their clergy persons who had committed robbery or burglary in one county and been indicted in another. These offences had been omitted from 1 Edw. 6, c. 12, while 25 Hen. 8, c. 3, made them non-clergyable crimes. The new Act therefore stipulated that the statute of 25 Hen. 8 'touching the putting of such Offenders from their Clergy, and every Article, Clause, or Sentence contained in the same touching Clergy, shall from henceforth touching such Offences from henceforth to be committed and done, stand, remain and be in full Strength and Virtue, . . . as it did before the making of the said Act . . .'. Secondly, since 1 Edw. 6, c. 12, made

[62] *Ibid.*, p. 521, § 97.

[63] Livingston Hall, 'Strict or Liberal Construction of Penal Statutes', *Harvard Law Review* (1934–35), Vol. 48, p. 750.

[64] It appears that owing to the very strict interpretation put on the earlier Act, offenders who availed themselves of these procedural subtleties were in fact accorded benefit of clergy and thus evaded capital punishment. Referring to 23 Hen. 8, c. 1, the preamble to 25 Hen. 8, c. 3, states that many felons 'perceiving and clearly understanding, by the Words of the same Statute and Act that they shall not lose the Benefit and Advantage of their Clergy unless they be found guilty after the due Course of Law, upon their Arraignment of and upon the said Felonies, Robberies and other Offences before-said, so by them done and committed . . . many of the same Robbers and Felons, upon their . . . Indictments against them stand mute, and sometimes challenge peremptorily over the Number of Twenty, or else will not directly answer to the same Indictments whereupon they be so arraigned, according to the Order of the Law'. And owing to such practice, the preamble further states that they '*enjoy the Privilege and Advantage of their Clergy, to the great Hurt and Loss of the King's Prerogative, and great Boldness of such Offenders*' (our italics).

no mention of accessories before the fact in a number of non-clergyable offences, this second omission was corrected by 4 & 5 Ph. & M. c. 4. This Act deprived of benefit of clergy accessories before the fact not only to the offences mentioned in 1 Edw. 6, c. 12, but also to a number of others, *including that of wilfully burning houses.*

Thus *when Powlter was facing his trial for arson, the law on the subject stood as follows*: (a) By 1 Edw. 6, c. 12, s. 10, a principal in the crime of arson could claim benefit of clergy; while (b) by 4 & 5 Ph. & M. c. 4, an accessory before the fact was deprived of this benefit and was therefore punishable by death. Powlter was tried as a principal and consequently claimed his right to benefit of clergy; but the judges determined otherwise.

The decision in *Powlter's Case* would obviously have been different had the relevant statute been interpreted strictly. The important question which arises, however, is the degree to which the interpretation adopted was liberal. According to Coke, the decision in this case was determined mainly by the view that 5 & 6 Edw. 6, c. 10, revived the *whole* of 25 Hen. 8, c. 3, and not only the section relating to robberies and burglaries. In his opinion the very wording of 5 & 6 Edw. 6, c. 10, implied its wider scope, and although he admits that this was a broad interpretation, he defends it on the ground that penal statutes 'should not be illusory, but should take effect according to the express intention of the makers of the Act'.[65]

Coke's interpretation of the Edwardian statute is not convincing. Hale emphatically denies that the contention that 5 & 6 Edw. 6, c. 10, revived the whole of 25 Hen. 8, c. 3, is in any degree justified. According to him, though the words of the former may seem to be of general import, in the construction of the statute they should be taken in relation to the particular mischief which the preamble indicates was in the contemplation of the Legislature, and for the redress of which the Act was professedly made. He also maintains that emphasis should be laid not on the words cited by Coke but on 'such offenders' and 'such offences'[66] which were indicative of the object of the statute, an object explicitly named in the preamble. Furthermore Powlter could not have been sentenced to death even if it were admitted that 5 & 6 Edw. 6, c. 10, revived the whole of 25 Hen. 8, c. 3, because the latter Act only deprived those offenders of benefit of clergy who had been indicted for arson and had stood mute, challenged peremptorily above twenty, or refused to plead directly to the indictment, whereas Powlter pleaded not guilty and was convicted in the normal course of law.

To bring Powlter directly within the law it would have been necessary to prove that 23 Hen. 8, c. 1, s. 3, had been revived. This was not contended even by Coke, who confined himself to proving the revival of 25 Hen. 8, c. 3. But this line of approach weakened his argument for, as Foster remarks, 'this observation suggesteth the great absurdity of supposing the 25th *H.* 8 to have been revived *in toto* without reviving the 23rd: for both the Acts, as far as concerneth this point, are to be considered as forming one entire system of *police* with regard to the offences which are made the objects of them; the former extendeth to the cases which ordinarily occur, *convictions by verdict or confession*; the latter to such as very seldom happen, and are omitted in the former through mere oversight, the *cases of standing mute*, etc. This being the state of the case, it is extremely difficult to conceive that the legislature

[65] He quotes as an example the decision in a case tried under 27 Edw. 3, c. 1; 11 Co.Rep. 34a.

[66] For the relevant provision see above, p. 692.

should seriously intend to revive the one *in toto* without reviving the other; that they should think of reviving a whole Act, part of which is merely auxiliary to a former, without reviving that for the effectuating of which the other was made'.[67]

It may be questioned whether as regards arguments on which the court's decision rested, Coke's version of *Powlter's Case* is entirely accurate. It is known that Coke was often apt to state his own opinions on the issues involved in the cases he recorded in such a manner as to make it difficult to draw a dividing line between his views and those of the judges.[68] The record of *Powlter's Case* appears to be similarly affected.

It has already been noted that 4 & 5 Ph. & M. c. 4, withdrew benefit of clergy from accessories before the fact, both in all offences mentioned by 1 Edw. 6, c. 12, and in a number of others, including the wilful burning of houses.[69] Hence it could be argued that benefit of clergy was thus also withdrawn from principals in the same crime. Such reasoning would provide a much sounder basis for the decision reached in *Powlter's Case*, and indeed Coke does acknowledge[70] that this 'was taken by divers of the justices to be a good interpretation by the whole Parliament of all the said Acts concerning this matter; for if the principal should have his clergy, it would be absurd, and never seen in the whole law, that the clergy should be taken from the accessary only, and leave the principal offender at large to have his clergy. Secondly, it would be in vain . . . to take away clergy from the accessary before, and leave the principal to have his clergy; for if the principal hath his clergy before judgement, the accessary shall not be arraigned'. Coke does not state how many judges concurred in this reasoning, but it was probably at the basis of the decision, particularly as this was 'the constant practice in like cases'.[71]

It appears, therefore, that if *Powlter's Case* was decided on the strength of the argument that 5 & 6 Edw. 6, c. 10, had revised the whole of 25 Hen. 8, c. 3, such a ruling would have to be considered as based on a remarkably broad liberal interpretation. If, however, the decision rested mainly on the logical implications of 4 & 5 Ph. & M. c. 4, then the adopted interpretation must be considered as much stricter. A careful examination of Coke's report, as well as of Hale's and Foster's comments on the case, make it clear that the implications of 4 & 5 Ph. & M. c. 4 were seriously considered and definitely influenced the decision of the court. Moreover, the exceptional seriousness of Powlter's offence should also be borne in mind.[72] It would seem, therefore, that the importance attached to *Powlter's Case* as an illustration of the liberal construction of capital statutes is somewhat exaggerated. That decision was exceptional rather than typical.

[67] *Crown Law*, p. 333.

[68] 'The difficulty in reading most of his cases', writes Professor P. H. Winfield, 'is to make out where the decision of the court ended and where Coke's comment began . . .'; *Chief Sources of English Legal History* (1925), p. 188. And Dr. C. K. Allen observes: 'Coke, with his enormous superstructure of commentary, was a *thesaurus* of English law rather than a mere set of reports'; *Law in the Making* (3rd ed., 1939), p. 213.

[69] Above, pp. 654 and 693.

[70] 11 Co.Rep. 35a.

[71] Foster, *Crown Law*, p. 334.

[72] As a result of Powlter's act the greater part of Newmarket was destroyed by fire. Coke describes Powlter's crime as 'so heinous'; 11 Co.Rep. 29a.

§ 12. MANSLAUGHTER UNDER THE STABBING ACT: 1 Jac. 1, c. 8 (1604)

Although manslaughter was not a capital offence, one exception was provided by 1 Jac. 1, c. 8, which made it a capital non-clergyable offence mortally to wound another person.[73] Conceived at first as a temporary measure, 1 Jac. 1, c. 8, was prolonged by 16 Car. 1, c. 4, which was to remain in force 'till some other Act shall be made, touching the continuance or discontinuance thereof'. Though as already pointed out elsewhere 1 Jac. 1, c. 8, was designed to meet a special contingency, it remained in force in its original form for almost a hundred and fifty years, only being repealed in the third decade of the nineteenth century.[74] This statute, commonly known as the Stabbing Act, provides a striking example of a highly penal law the operation of which was effectively restricted by the courts almost immediately after it had been passed by the Legislature.

Referring to the Stabbing Act, Blackstone remarks[75] that 'the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the common law'. Eden,[76] while deploring that this Act 'proved fatal to many unfortunate persons, who have suffered, not merely because they had killed, but because they had adopted a mode of killing, to which the law expresses a particular antipathy', nevertheless acknowledges that 'the ingenuity and benignity of the judges have gone hand in hand in the construction and mitigation of this statute'. East[77] similarly thought 1 Jac. 1, c. 8, an unnecessary and impolitic measure. 'But whatever inconveniences might have happened from pursuing the literal construction of the statute', he writes, 'few, if any, can ensue from the interpretation which has been given of it'. Each successive decision tended further to restrict the scope of this Act until, as Foster puts it, 'the justice or benignity of the common-law hath overruled the rigour of the statute'.[78]

(a) As regards the words 'stab or thrust', it was determined that shooting, thrusting any blunt weapon, sending an arrow, throwing a stone from a sling or from any other device, were within the Act. But it was ruled that the Act did not apply to cases where at the time of the stroke the weapon was not actually in the hand of the offender, as, for instance, when a hammer was cast or a sword was thrown from a distance of twenty yards.[79] It was also held

[73] For this Act see also above, p. 630.

[74] The words of this Act are as follows: 'Every Person and Persons which . . . shall stab or thrust any Person or Persons that hath not then any Weapon drawn, or that hath not then first stricken the Party which shall so stab or thrust, so as the Person or Persons so stabbed or thrust shall thereof die within the Space of six Months then next following, although it cannot be proved that the same was done of Malice forethought, yet the Party so offending, and being thereof convicted by Verdict of twelve Men, Confession or otherwise, according to the Laws . . . shall be excluded from the Benefit of his or her Clergy, and suffer Death as in Case of wilful Murder'.

[75] 4 Comm. 193.

[76] *Principles of Penal Law* (2nd ed., 1771), pp. 232–233.

[77] East, 1 P.C. 246, § 28.

[78] *Crown Law* (1792), p. 299. 'This is one of those acts which, to borrow an expression from Lord *Bacon*, was made *upon the spur of the times*; whereas the rules of the common-law, in cases of this kind, may be considered as the result of the wisdom and experience of many ages'; *ibid.*

[79] Hale, 1 P.C. 469; Foster, *Crown Law*, p. 300. Hawkins, 1 P.C. 182, sect. 8, supports this interpretation on the ground that 'penal statutes are construed strictly against the subject, and favourably and equitably for him'. See also

that the stab or thrust must be made with a weapon or instrument the use of which was likely to be dangerous.[80]

(b) A very strict construction was put on the second proviso of the Act, namely that the attack must be made on 'Person or Persons, that hath not then any Weapon drawn'.

With respect to the words *person or persons,* it was ruled that if A is assaulted by B and C, and if B strikes A, upon which A kills C, who did not strike, A who killed him is not within the statute, for he had been assaulted by both.[81]

As regards the word *'then',* the point at issue was whether 'then' meant the very instant when *the stab was inflicted,* or whether it extended to the whole duration of the combat. Thus in *R.* v. *Hunter,*[82] the defendant struck the prosecutor with his hand. On this the prosecutor attempted to draw his dagger, but being prevented by other persons from doing so, he threw a pot at the defendant, but missed him. The defendant then mortally wounded the prosecutor with his sword. During the trial it was contended that although the pot was 'a weapon drawn' in the meaning of the statute as long as it was in the prosecutor's hand, yet the case was within the Act because he was stabbed *after* the pot had left his hand. For the defendant it was submitted that the word *then* denoted the whole duration of the controversy or fight, and not the moment of wounding only. According to Foster[83] this point was not resolved by the judges; but since the defendant was not deprived of benefit of clergy it may be assumed that the second, more lenient interpretation was adopted.[84]

A subtle construction was also put on the words *any weapon drawn.* A weapon drawn was held to be not only a sword or other weapon drawn from a scabbard, but also a cudgel, or other article suitable for defence or annoyance. In the already quoted case of *Bruckner,*[85] Glyn, C.J. stated that a tobacco-pipe might be considered a 'weapon drawn', though East does not approve of this construction.[86]

(c) By another provision the Act required that the injured party 'hath not then *first* (our italics) stricken the Party, which shall so stab or thrust'. This proviso was at first interpreted to the disadvantage of the offender. Thus in *Byard's Case,*[87] Richardson, J., thought that the words 'not having first stricken' signified 'not having struck before the mortal wound was given'; but it was determined that the words only meant 'not having given the first blow in the affray'. This interpretation was later abandoned. Holt, C.J.,

Newman's Case, East, 1 P.C. 248, and *Williams' Case* (1639), Jones W. 432. Referring to this case, Kelyng supports the decision of acquittal because, 'it is not such a weapon or Act that is within that statute', but maintains that the offender could be convicted if the charge in the indictment were one of murder; Kel. 132.

[80] East, 1 P.C. 248, § 29.

[81] *Bruckner's Case* (1655), Sty. 467, 469.

[82] (1686), 3 L. 255.

[83] *Crown Law*, p. 301, sect. 5.

[84] 'It appears upon the whole that if the party killed be at any one instant of time during the controversy out of the protection of the statute, between which time and the time of receiving the mortal wound the common law would allow for the prisoner's blood continuing to be heated, the case will not be governed by that statute'; East, 1 P.C. 249, § 29.

[85] Sty. 467, 468.

[86] 1 P.C. 250, § 29.

[87] (1634), Jones, W., 340.

considered it incompatible with the natural order of the words, and with the obvious meaning of the Act[88]; Foster, J. thought that it construed the words of the statute in a sense contrary to the intention of the Legislature.[89] Hawkins[90] was similarly against such an interpretation, as was Blackstone, who held that 'in the construction of this statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; . . . it seems to be the better opinion, that this is not within the statute'.[91]

(d) One of the sections of the Stabbing Act stipulated that it shall not extend 'to Cases of Self-defence, Misfortune, or in any other Manner than as aforesaid; nor to any Person, who shall commit Manslaughter, in preserving the Peace, or chastising or correcting his Child or Servant'. This restrictive provision was always most generously and broadly interpreted. Thus, for instance, the case of a husband who had killed an adulterer in the act of adultery was held to be outside the Act, and his offence declared to be manslaughter at Common Law.[92] In another case, a man stabbed an officer who abruptly entered his room in the early morning to arrest him, but without declaring his intention or using the words of arrest; the defendant was found guilty of manslaughter, it being held that his offence did not come under 1 Jac. 1, c. 8.[93]

(e) The factor which more than any other ensured the merciful interpretation of the Stabbing Act was the adoption of the principle that the Act was no more than the declaration of Common Law. This was laid down in *Morly's Case*: '. . . and we were all of Opinion that the Statute of 1 Jac. for stabbing a Man not having first struck, nor having any Weapon drawn, was only a Declaration of the Common Law, and made to prevent the inconveniences of Juries, who were apt to believe that to be a Provocation to extenuate a Murder, which in Law was not'.[94] Consequently, all the circumstances which at Common Law would be held to attenuate the offence, had always been fully considered in the cases tried under 1 Jac. 1, c. 8.[95]

(f) A principle of Common Law was however abandoned in the case of *Page and Harwood*.[96] The main perpetrator, who made the thrust, was sentenced to death, but the question arose of whether the Act also applied to the two other persons who were present aiding and abetting. It was argued for the prosecution that if tried for manslaughter at Common Law they would

[88] *Keat's Case* (1696), Skin. 666, 668.
[89] *Crown Law*, p. 301.
[90] 1 P.C. 182, sect. 6.
[91] 4 Comm. 193.
[92] *Maddy's Case* (1672), 1 Vent. 158.
[93] Hale, 1 P.C. 470. Hale writes that there was a divergence of opinion among the judges as to whether this case was within the statute, but that the prisoner was eventually admitted to his clergy because it was held that the case was only unintentionally within the words of the statute, since the prisoner could not know that the party had not come to rob or kill him. See also *Bruckner's Case*, above, p. 696.
[94] (1666), Kel. 54, 55.
[95] When a case occurred which was thought to be within the Act, the prisoner was usually arraigned on two indictments, one at Common Law for murder, the other under 1 Jac. 1, c. 8. According to Foster, if it appeared on evidence that the act was either justifiable, or amounted to manslaughter at Common Law only, the prisoner was but rarely convicted of manslaughter under 1 Jac. 1, c. 8.
[96] *R.* v. *Page and Harwood* (1648), Sty. 86.

have been declared principals, and that as the statute in question was only declaratory of the Common Law,[97] the same principle should apply to it too. It was, however, decided otherwise,[98] on the following grounds: 1 Jac. 1, c. 8, spoke of 'every Person which shall stab or thrust', and these words were taken as the basis for the court's decision. Roll, J., declared that the Statute of Stabbing being a penal law, it shall be taken strictly and not extended to equity, and though in judgment of law everyone present and aiding is a principal, yet in the construction of this statute benefit of clergy shall not be withdrawn from the accessories.[99]

This decision, which was considered sound both by Hale and Foster, was discussed again in *R.* v. *Whistler.*[1] Holt, C.J., said that in his opinion 'if two quarrel, and a third person is the incendiary and put them on, and so in truth is the worst of the three, and one of the two stab the other, he who stabs shall lose his clergy, and he that set him on shall not; and the reason is, because one is within the description of the statute, and the other not; for clergy is not taken away from *the offence of manslaughter,* but from *the person* committing *manslaughter* so and so'.[2] Lord Mansfield, who questioned the decision in the case of *Evans and Finch,*[3] supported the ruling in *R.* v. *Page and Harwood.* 'I have no doubt'—he said—'but that the intention of the statute was to distinguish the person who actually gave the stab. This case differs from the rest, in point of aggravation. Therefore I am clear that the statute so meant'.[4]

[97] Kel. 55.
[98] It seems that the decision was not unanimous.
[99] Sty. 86; Foster, *Crown Law*, p. 356.
[1] (1703), 7 Mod. 129.
[2] *Ibid.*, 137. Holt concluded that the conviction ought to be quashed, but he was overruled.
[3] Above, p. 682.
[4] *R.* v. *Royce* (1767), 4 Burr. 2073, 2076.

APPENDIX 8

VIEWS OF FOREIGN OBSERVERS ON THE STATE OF CRIME AND THE SYSTEM OF CRIMINAL JUSTICE IN ENGLAND MAINLY IN THE EIGHTEENTH CENTURY

§ 1. SOURCES

Writing in 1790 Johann Reinhold Forster stated that 'descriptions of travel have become during the last few years a *Modelektüre*'.[1]

According to Sir Thomas Nugent no other nation was then 'fonder of travelling than the Germans'.[2] Most of these German travellers also visited England, and their recorded observations on the English people, their country, manners, politics and economics constitute a very important part of this type of literature.[3] The list of French books is by no means less impressive and they are certainly of no less value.[4] Swiss travellers to this country were less numerous but their remarks are particularly judicious and penetrating; such authors as de Muralt and de Saussure have acquired a permanent place in the literature on this subject.[5] Because of their common heritage with the English people, the accounts of American travellers, whose number grew considerably towards the close of the eighteenth century, have not been considered here.[6]

Among these foreign visitors there were members of the old aristocracy,

[1] J. R. Forster, *Magazin von merkwürdigen neuen Reisebeschreibungen, aus fremden Sprachen übersetzt* (Berlin, 1790), Vol. 1, p. 1, quoted by J. A. Kelly, *England and the Englishman in German Literature of the Eighteenth Century* (New York, 1921), pp. xii–xiii.

For a list of the most important books on this subject published before the end of the eighteenth century see *The Cambridge Bibliography of English Literature* (ed. by F. W. Bateson, 1940), Vol. 2 (1660–1800), pp. 140–142. For a list of such records relating to later years see Sir Malcolm Letts, *As the Foreigner Saw Us* (1935), pp. 263–271; see also J. A. Kelly, *England and the Englishman in German Literature of the Eighteenth Century* (New York, 1921), pp. xi–xvii, and 152–156.

[2] Sir Thomas Nugent, *The Grand Tour* (2nd ed., London, 1756), 2 vols.; Vol. 2, p. 47.

[3] See on this J. A. Kelly, *op. cit.*, and also P. E. Matheson, *German Visitors to England, 1770–1795* (1930).

[4] Thus E. Smith rightly points out that 'the Abbé le Blanc's bulky work is a veritable encyclopaedia of the ways, manners, industries, frivolities and prejudices of the English, compared with those of the French', and that much the same can be said of Grosley's work; *Foreign visitors in England and what they here thought of us* (1889), p. 141.

[5] B. L. de Muralt's brilliant *Lettres sur les Anglais et les Français* written in 1694 and first published in 1725 are in many respects superior to the famous *Lettres* of Voltaire. They evoked great interest and were widely read. On de Muralt's influence see Professor Otto von Greyerz' 'Introduction' and 'Notes' to a new edition of Muralt's *Lettres* (Bern, 1897). See also M. E. I. Robertson, *Abbé Prévost, Adventures of a Man of Quality* (1930), pp. 30–32, and Charles Gould's 'Introduction' to his edition of Muralt's *Lettres* (Paris, 1933).

[6] Their records have been thoroughly examined by R. E. Spiller; see *The American in England* (New York, 1926). In the bibliography of this work the author quotes about one hundred such records of travel.

diplomatists, professional travellers, merchants, students of social and economic institutions, political exiles, prisoners of war. Some spent barely a week in England. Others, like Defauconpret, returned on several occasions. Others still, and notably Friedrich August Wendeborn, made England the subject of laborious researches to which they devoted many years. Some left short tracts only, others works running into four or five volumes. Their knowledge of English too varied considerably.

There were travellers whose work was 'nothing but the pocket-book of a man who passed rapidly through a country quite new to him, and who writes his sentiments rather than his observations'.[7] Some, like de Custine for instance, followed no system. 'Ce sera l'affaire du lecteur', he writes, 'de rétablir la vérité, lorsqu'elle lui paraîtra déguisée par des jugements contradictoires'.[8] Others still studied all aspects of English life with meticulous attention, collected various data, and even examined *Journals* of both Houses of Parliament. These more detailed accounts are not necessarily the most interesting, though Southey's opinion that 'the more systematically a book of travels is written, the worse it is likely to prove' is an exaggeration.[9]

The value of these records is unequal and some at least are vitiated because the authors approached their subject with certain deeply ingrained ideas and prejudices. Inevitably most foreign visitors make comparisons with their own country. In this there would be nothing wrong provided relations between the two countries were not in any degree strained or unfriendly at the time of their visit, in which case, however, there would be some danger of their being unable to preserve the detachment necessary to impartial observers. Thus it happened that the accounts of French travellers—particularly those written towards the end of the eighteenth and the beginning of the nineteenth centuries—though often brilliant, are not free from prejudice.

In respect to the state of crime and the system of criminal justice in England particularly striking instances of such biased accounts are afforded by the relevant chapters in the works of Pillet[10] and Rubichon.[11] In their defence it may be submitted that English observers in France were also not always above reproach,[12] and that the attitude to French visitors to this country was at that time often unfriendly and even hostile. None the less the books of many French travellers are free from partiality and permeated with a genuine admiration for the achievements which the English nation had to its credit.[13]

[7] Charles Nodier, *Promenade from Dieppe to the Mountains of Scotland* (Edinburgh-London, 1822), p. v.

[8] *Mémoires et Voyages* (Paris, 1830), p. 76.

[9] Robert Southey, 'On the Accounts of England by Foreign Travellers, and the state of Public Opinion' (1816), in *Essays, Moral and Political* (1832), Vol. 1, pp. 252 and 253.

[10] Maréchal de camp R. M. Pillet, *L'Angleterre vue à Londres et dans ses provinces pendant un séjour de dix années dont six comme prisonnier de guerre* (Paris, 1815). On the criticism that this book evoked among Frenchmen themselves see below, note 65 at pp. 708–709.

[11] M. Rubichon, *De L'Angleterre* (Londres, 1811), pp. 228–410. For the views of these authors see note 65 at p. 708, note 76 at p. 712, and note 11 at p. 718.

[12] See Constantia Maxwell, *The English Traveller in France, 1698–1815* (1932).

[13] To quote two instances: Louis Simond, *Voyage d'un Français en Angleterre pendant les années 1810 et 1811* (Paris, 1816), 2 vols., English tr. published in 1815 under the title *Journal of a Tour and Residence in Great Britain during the years 1810 and 1811*; and A. de Staël-Holstein, *Lettres sur l'Angleterre* (Paris, 1825). The latter author was the son of Madame de Staël, and his book is a brilliant contribution to the study of the social

The records left by German observers, while on the whole very laudatory, are sometimes conflicting. D'Archenholz for instance had an unbounded admiration for England,[14] the attitude of Wendeborn was much more critical, while A. Riem, the author of a pamphlet published in 1798 entitled *Reisen durch England in verschiedener, besonders politischer Hinsicht* did not try to conceal his enmity.[15] The Swiss were, on the whole, more uniform in their views and almost invariably friendly, though very searching and judicious in their analysis. The attitude of the American visitors had undergone a change. At first reserved, suspicious, and not infrequently openly hostile, their views became more impartial when the ill-feelings caused by the war began to subside. Also while at first they had sought mainly practical knowledge, later—as Robert E. Spiller puts it—they became attracted by 'the indefinable and mellow fruits of tradition'.[16]

Most of these travellers were well aware of the singularity of the English nation,[17] though not all succeeded in avoiding the pitfalls of generalisations. But some at least were careful not to draw too hasty conclusions from what they had seen and heard; this note of caution is particularly to be detected in the works of Sorbière, who stayed in England in 1663,[18] and August de Staël-Holstein.[19]

structure of England, the working of the English parliamentary system, and the influence of public opinion; and many of his remarks are akin to those made by Dicey in his *Law and Public Opinion in England*.

[14] Johann Wilhelm von Archenholz, author of a history of the Seven Years' War, was also a prolific writer on English life and one of the most ardent admirers of the English; J. A. Kelly, *England and the Englishman in German Literature of the Eighteenth Century* (New York, 1921), pp. xiii–xiv.

[15] Riem devotes two chapters to the administration of justice and reaches the conclusion that English laws were ineffective and barbarous. Malcolm Letts considers him to be 'the most consistently anti-British writer of the whole of the eighteenth century; *As the Foreigner saw Us* (1935), p. 191.

[16] *The American in England* (New York, 1926), p. 393.

[17] 'Man mag England von einer Seite betrachten, von welcher man will, so ist es eines der merkwürdigsten Länder der Welt', writes Dr. Johann Jacob Volkmann, the author of a work in four volumes, *Neueste Reisen durch England, etc.* (Leipzig, 1781). For the quotation see Vol. 1, p. 1. P. J. B. Nougaret states: 'C'est le peuple le plus singulier, le plus originel, celui dont la manière de penser et d'agir diffère le plus de celles des autres nations de l'Europe'; *Londres, la Cour et les Provinces d'Angleterre, d'Ecosse et d'Irlande* (Paris, 1816), 2 vols., see Vol. 1, p. iv; and Adolphe Blanqui writes that long studies are required to understand the English and that even a thorough knowledge of their history '. . . ne suffit pas pour nous initier aux profonds mystères de sa politique et de son caractère . . .'; *Voyage d'un Jeune Français en Angleterre et en Ecosse pendant l'Automne de 1823* (Paris, 1824), p. II.

[18] *Relation d'un Voyage en Angleterre* (Cologne, 1666), p. 90; he modestly adds 'je ne vous raconteray donc, que ce qui m'a paru, et non pas ce qui est peut-être en effet, et dans la verité des choses: Car il y a souvent une grande difference entre les idées que l'on prend à la premiere vue que l'on a d'un pays, et celles que l'on se forme par la suite du temps en corrigeant cette esbauche'; *ibid.*

[19] *Lettres sur l'Angleterre* (Paris, 1825), pp. 13 and 14. And he thus concludes his first letter: 'J'ai visité l'Angleterre à deux époques differentes: je l'ai vue pendant la lutte héroïque qu'elle a soutenue contre la puissance de Napoléon: je l'ai parcourue neuf ans plus tard, après les changements que la paix a introduits dans son économie intérieure aussi bien que dans ses relations politiques, et plus l'étude de ce pays a captivé mon intérêt, plus j'ai reconnu que la prétention d'expliquer des résultats si variés par un petit nombre d'axiomes généraux, serait le comble de la présomption ou de la légèreté'; *ibid.*, p. 20.

It is very difficult to realise to-day how great an influence many of these now almost forgotten books exercised on their own times. A few created a stir or even a sensation; many others helped to smooth out past misunderstandings and to foster friendship among nations, as well as to spread abroad knowledge of England and her institutions. Often they contain an astounding amount of information and are of great value to students of social and political history. Henry Meister, who visited England in 1789 and 1792, writes in one of his letters [20]: 'On first thoughts, it seems as if the person born on the spot, if equal in other respects, should be possessed of better means of knowing the character of his countrymen than a foreigner'. But, he continues, 'are there not however many points of view on which the foreigner will look with more advantage? To make a proper observation we must be equally aware of the false lights held out on a first-sight prospect, as of habits of frequent contemplation with the same prejudices. We pass slightly over such objects as often present themselves, and we behold with too great a degree of astonishment those which are perfectly new. In the first case our remarks are in danger of appearing trite and common, in the second we run a risk of being seduced by a false appearance of the marvellous'.[21]

A number of authors have collected extracts from the accounts of various observers grouped either according to their nationality or to the period of their travels. George Ascoli, for instance, took as the subject of his authoritative study *La Grande-Bretagne devant l'Opinion Française au XVIIe Siècle* [22]; Miss Ethel Jones has written a valuable monograph *Les Voyageurs Français en Angleterre de 1815 à 1830* [23]; the views of German observers have been examined with great care by Robert Elsasser [24] and John A. Kelly,[25] and those of Americans by Robert E. Spiller.[26] The stimulating and entertaining essays by Edward Smith [27] and Malcolm Letts [28] may well be recommended as an excellent introduction to foreign views on England over a long period of time by writers of different nationalities.[29]

[20] *Letters written during a residence in England* (translated from the French, 1799), pp. 130–131.

[21] This question was also raised and similarly answered by Professor Elie Halévy, whom Dr. G. M. Trevelyan describes as 'the great French historian who wrote for us the history of the English Nineteenth Century'; *English Social History* (1944), p. 477. In the preface to his book Halévy apologised for his boldness: 'A Frenchman, I am undertaking a history of England. I am attempting the study of a people to whom I am foreign alike by birth and education'. But, he continues, the risks are 'well worth taking', for 'a great number of characteristics which, being familiar to the natives from birth, have come to form part of their intellectual and moral nature, are for him (for an observer from abroad) matter of astonishment—whether of admiration or disapproval is indifferent—and demand from him an explanation'; *A History of the English People in 1815* (1924), Vol. 1, p. x.

[22] (Paris, 1930), 2 vols.

[23] (Paris, 1930). For the impressions of foreign visitors to Scotland, see P. Hume Brown, *Early Travellers in Scotland* (1851), and Margaret I. Bain, *Les Voyageurs Français en Ecosse, 1770–1830* (Paris, 1931).

[24] 'Über die politischen Bildungsreisen der Deutschen nach England (vom achtzehnten Jahrhundert bis 1815)', *Heidelberger Abhandlungen zur mittleren und neueren Geschichte* (Heidelberg, 1917), Heft, 51.

[25] *England and the Englishman in German Literature of the Eighteenth Century* (New York, 1921).

[26] *The American in England* (New York, 1926).

[27] *Foreign Visitors in England* (1889).

[28] *As the Foreigner saw Us* (1935).

[29] See also F. C. Roe, *French Travellers in Britain, 1800–1926* (1928), which gives a selection of extracts from French records classified under different headings.

But though all the books by foreign visitors to this country contain much information on the administration of criminal justice, their remarks on this subject have not so far been collected.[30] Yet there can be no doubt that such a survey would throw interesting light on many issues which at that time were the subject of so much controversy. It is not claimed that the ensuing survey is exhaustive. Many books could neither be found in any of the leading libraries in this country nor acquired abroad. Nevertheless the net has been widely drawn and it may be confidently asserted that the opinions reproduced here give a true picture of what foreign observers thought about the state of crime and the system of criminal justice in this country in the eighteenth and at the beginning of the nineteenth centuries.

§ 2. THE STATE OF CRIME IN ENGLAND

The prevalence of crimes against property

The first impression one gathers when reading these records is that all travellers were impressed with the high incidence of crimes against property. Thus César de Saussure[31] notes that although 'executions are frequent in London; they take place every six weeks, and five, ten, or fifteen criminals are hanged on those occasions . . . there are in this country a surprising quantity of robbers'. F. Lacombe begins his book of reminiscences[32] by a chapter on highwaymen. 'Les grands chemins, à trente et quarante miles de Londres, sont garnis de voleurs à pied et à cheval, armés', he writes. Sophie von la Roche relates that in a distinguished company of ambassadors outside London a discussion had to be 'interrupted by the fact that all these guests feared highwaymen, for they were all booked for the evening, and so had to leave for London much earlier than eleven; perhaps they needed their money for gaming, and hence could not afford to give it to the highwayman! So they decided to depart all together, as the robbers would hardly hold up four coaches at once'.[33] Of a visit he was to pay at seven o'clock on a Sunday evening to a house near Windsor, the distinguished French scientist B. Faujas de Saint Fond writes[34]: 'It was about the time when highwaymen usually come upon the road, to rob the imprudent traveller. They are known to be numerous, and to carry on their dangerous profession upon horseback, often even mounted on hunters; but we were informed that, though our danger would have been great on the evening before, we were safe that night, which

For more remote times see W. B. Rye, *England as seen by Foreigners in the Days of Elizabeth and James I* (1865), and E. Gurney Salter, *Tudor England through Italian Eyes* (1930).

30 The only foreign author of that period who in his account of England did not comment upon criminal matters was Voltaire; see *Lettres Philosophiques sur les Anglais* (1734). In his introduction to Voltaire's *Lettres*, A. Wilson-Green remarks that 'to heighten the contrast with France, the picture of England is painted in colours at times too cheerful'; Voltaire, *Lettres Philosophiques sur les Anglais* (ed. by A. Wilson-Green, 1931), p. xxi. In his other works Voltaire often wrote with admiration about the English system of criminal justice but also criticised the excessive severity of English criminal law.

31 *A Foreign View of England in the Reigns of George I and George II* (transl. and ed. by van Muyden, London, 1902), p. 127; written between 1725–1730.

32 *Observations sur Londres et ses Environs* (London, 1777), p. 1.

33 *Sophie in London, 1786* (tr. and ed. by Clare Williams, with a Foreword by G. M. Trevelyan, 1933), p. 235.

34 *A Journey through England and Scotland to the Hebrides* (ed. by Sir Archibald Geikie, 1907), 2 vols.; see Vol. 1, p. 60; written in 1784.

was Sunday, when the roads are covered with people of all ranks . . .'.[35] Baert, who made a very thorough examination of the manners and institutions of the English people, took a very serious view of the state of crime[36]: 'Les vols se multiplient à un point effrayant à Londres; . . . le nombre de crimes de toute espèce paroît s'être prodigieusement accru; . . . le débordement de crimes qui assiègent la société en Angleterre'. Goede draws attention to the great number of associations of thieves and receivers of stolen property working in gangs, employing spies under all kinds of disguises and having armed confederates at their disposal.[37]

Categories of offenders

There was also almost complete unanimity among these observers as to the habits and types of offenders against property, whom they divide into four groups: highwaymen, footpads, housebreakers and pick-pockets.

'Highwaymen', notes de Saussure,[38] 'are generally well mounted; one of them will stop a coach containing six or seven travellers. With one hand he will present a pistol, with the other his hat, asking the unfortunate passengers most politely for their purses or their lives. No one caring to run the risk of being killed or maimed, a share of every traveller's money is thrown into the hat, for were one to make the slightest attempt at self-defence the ruffian would turn bridle and fly, but not before attempting to revenge himself by killing you. If, on the contrary, he receives a reasonable contribution, he retires without doing you any injury. When there are several highwaymen together, they will search you thoroughly and leave nothing. Again, others take only a part of what they find; but all these robbers ill-treat only those who try to defend themselves. I have been told that some highwaymen are quite polite and generous, begging to be excused for being forced to rob, and leaving passengers the wherewithal to continue their journey'.

[35] He then gives this delightful description of his journey to Windsor: 'The road was, at this time, covered with numerous cavalcades of men and women, with many servants in their train. Carriages of every kind, most of them very elegant, but all of them substantial and commodious, and many of them, with superb equipages, succeeded each other without interruption, and with such rapidity, that the whole picture looked like magic: it certainly showed a degree of wealth and extent of population, of which one has no notion in France. All was life, movement, and rapidity; and, by a contrast only to be seen here, all was calm, silent, and orderly. A tacit and inviolable respect for each other reigned among the individuals composing this impetuous whirlwind of people all hastening towards the same point. The kind of religious silence pervading this extraordinary scene, faintly illuminated by the mysterious glimmer of the stars, transports one who sees it for the first time into the happy fields of Elysium.

But the story of Elysium is fabulous, and that which I relate here is real; for it is what I have seen and proved, what all Englishmen, and those who know this astonishing country, will acknowledge to be a just description. Whence then comes this calm in the midst of so much movement? It has its origin in the state of the public mind, which is well formed; in the education of the nation, which is good; in reflection always active; in the forms of worship, which, stripped of all vain superstition, consecrates the day of rest to pious meditation, while the law comes in aid by severely repressing the noisy games and tumultuous orgies which on this day degrade or brutalise men in nearly all catholic countries'; *ibid.*, pp. 62–63.

[36] *Tableau de la Grande-Bretagne* (Paris, 1800), 4 vols.; see Vol. 2, p. 504, and Vol. 4, pp. 363 and 369.

[37] Ch. A. G. Goede, *A Foreigner's Opinion of England* (tr. from the German by Th. Horne, 1821), 3 vols.; see Vol. 1, pp. 214–216. See on the boldness and effectiveness of these gangs Fielding's remarks quoted above, p. 405.

[38] *Op. cit.*, p. 128.

Similarly, d'Archenholz observes[39] that these 'men are generally very polite; they assure you *they are very sorry that poverty has driven them to that shameful recourse,* and end by demanding your purse, in the most curteous manner'; they are not, he thinks, 'in the least dangerous, as they never proceed farther than a *menace,* never making use of their pistols, but in case of resistance'. He also states that when travelling in the neighbourhood of London he never carried fire-arms and divided his money into two parts, putting one in a purse, 'which I destined for the collectors'; for 'as prudence will not allow them to stop long, they are in a hurry to depart with their spoil, without stopping to examine it'.[40] The Duc de Lévis observes that some of these highwaymen 'portent sur le visage un crêpe noir pour ne pas être reconnus',[41] and states that 'en général, les choses se passent de part et d'autre avec beaucoup de sang-froid, et souvent même avec politesse'.[42] Also, that the highwaymen often had no horses of their own.[43] P. J. B.

[39] *A Picture of England* (tr. from the French, Dublin, 1790), p. 182. Written about 1787. On d'Archenholz, see above, note 14 at p. 701.

[40] *Ibid.*, pp. 182–183.

Highwaymen seldom stopped pedestrians. The Duc de Brunswick notes with some disappointment: 'Mais les voleurs nous regardèrent dédaigneusement, et sans nous dire un mot. Des émigrés voyageant à pied ne font pas le gibier qu'il leur faut'; *Promenade autour de la Grande-Bretagne* (Edinburgh, 1795), p. 126.

L'Abbé le Blanc relates that about 1720–22 the robbers in London 'in order to maintain their rights, fixed up papers at the doors of the rich people about London, expressly forbidding all persons, of what condition or quality soever, to go out of town without ten guineas and a watch about them, upon pain of death'; *Letters on the English and French Nations* (tr. from the French, 1747), 2 vols., written about 1737; see Vol. 2, p. 296. This seemed to be a general practice for, as the Duc de Brunswick notes, '. . . la seule précaution que l'on prenne c'est en commençant son voyage, de mettre à part la bourse du voleur'; *Promenade autour de la Grande-Bretagne* (Edinburgh, 1795), p. 111.

[41] Pierre Marc Gaston, the Duc de Lévis, *L'Angleterre au commencement du dix-neuvième siècle* (Paris, 1814), p. 30.

[42] J. Fiévée observes that in England thieves commit murder very rarely because they usually meet with little resistance; *Lettres sur l'Angleterre* (Paris, 1802), p. 49. See also de la Coste, *Voyage Philosophique d'Angleterre, fait en 1783 et 1784* (London, 1786), 2 vols.; see Vol. 1, p. 13. On murder and violent offences see below, pp. 708–709.

[43] G. F. A. Wendeborn, *Reise durch einige westlichen und südlichen Provinzen Englands* (Hamburg, 1793), relates the following story. One morning, a Quaker was robbed by a highwayman who forced him also to exchange horses and then disappeared: 'Der Quäker ritt nun ganz langsam, mit losem Zügel, wohin ihn sein neuer Gaul tragen wolte. Dieser ging, bei seiner Ankunft in London, völlig gelassen, durch mehrere Strassen, nach den Ställen zu wo er gehalten wurde. Wie er still stand und einer der Stallknechte kam, um ihn anzunehmen, sagte der Quäker ganz ernsthaft: jemand hat mir dieses Pferd anvertrauet, allein sein Name ist mir entfallen. O, antwortete der Stallknecht, es gehört Herrn N. zu. Wo wohnt doch Herr N. gleich? fragte der Quäker. Herr N. erwiderte jener, hat ein Haus auf der Königstrasse'. The Quaker went to see the highwayman, who refunded the money and returned the horse but begged the Quaker not to denounce him. On this vital point the Quaker was able to reassure him; he (the Quaker) was not prepared to prosecute, his religious convictions disapproving of capital laws.

Dr. G. F. A. Wendeborn was a pastor of a German church on Ludgate Hill from 1770 up to 1790. He wrote a number of books on England and together with d'Archenholz did much to spread the knowledge of England in Germany; P. E. Matheson, 'Introduction' to a reprint of Moritz's *Travels* (1924), note 2 at pp. xiii–xiv.

Nougaret relates that even as late as 1816 the environments of London were infested with robbers.[44]

While offenders mounted on horseback who attacked travellers on the highroads were known as highwaymen, those who held people up in town streets, mainly during the night, were called footpads. By far the more dangerous, they were brutal in manner and often stopped neither at maiming nor even at killing.[45] J. L. Ferri de St. Constant observes that they were much more dreaded than highwaymen.[46] Of their tendency to commit violent crimes he gives a dual explanation. First, being unable like highwaymen quickly to leave the scene of the offence, they were tempted to reduce their chances of apprehension by killing the witnesses. Secondly, their social origin was usually lower than that of highwaymen who, not seldom coming from the higher strata of society, were driven to crime by the pressure of unfortunate circumstances, but were yet anxious to behave like gentlemen.[47] The Duc de Lévis[48] held the same view.

All foreign visitors also noted the great number as well as the ingenuity and boldness of housebreakers,[49] but were particularly struck by the prevalence of pocket-picking. 'Pickpockets are legion', notes de Saussure. 'With extraordinary dexterity they will steal handkerchiefs, snuff-boxes, watches—in short, anything they can find in your pockets. Their profession is practised in the streets, in churches, at the play, and especially in crowds. . . . These rascals are so impudent, they steal even under the gibbet. There never is

[44] *Londres, la Cour et les Provinces d'Angleterre, d'Écosse et d'Irlande* (Paris, 1816), Vol. 2, p. 239.

[45] 'Die Räuber welche zu Fuss greifen und im englishen *Footpads* heissen, sind die ärgsten and grausamsten unter allen. Sie kommen gemeiniglich hinter den Hecken und aus Graben, am Wege, hervorgesprungen und mishandeln die welche sie berauben, oft auf die grausamste Weise'; Wendeborn, *ibid.*, pp. 53–54.

[46] *Londres et les Anglais* (Paris, 1804), 4 vols.; see Vol. 4, p. 167.

[47] 'Les highwaymen sont, en général, d'une class supérieure; ils se piquent d'avoir de l'éducation et de bons procédés; aussi les appelle-t-on *gentlemen of the road*, c'est-à-dire, *messieurs des grands chemins*. On trouve dans tous les recueils, d'anecdotes, des traits de voleurs anglais qui les charactérisent, et qui prouvent qu'ls se piquent de faire leur métier avec distinction. On dirait qu'ils y attachent de l'honneur, et qu'ils visent à l'estime des gens, en même temps qu'à leur bourse'; *ibid.*, p. 167.

[48] According to de Lévis the highwaymen of Italy, Spain and Germany were usually deserters, smugglers, dissolute characters, and men without a profession 'accoutumés à braver la mort et à la donner; exclus de la société, ils sont en guerre ouverte avec elle'. The social origin and the mentality of the English highwaymen were in his opinion altogether different and a comparison only possible between the continental highwaymen and the English footpads —'hommes de la lie du peuple, matelots, déserteurs, ou manoeuvres paresseux et ivrognes'; *op. cit.*, pp. 33–34.

[49] '. . . Les voleurs enfoncent portes et fenêtres . . . et déménagent toute une maison, surtout en été où il y a plus de 30 mille propriétaires qui abandonnent entierement leurs maison à la garde d'une vielle femme'; Lacombe, *op. cit.*, p. 15. 'On volait aussi autrefois beaucoup à Londres dans les maisons, ce qui en fait fermer les fenêtres et les portes avec les plus grandes précautions'; Baert, *op. cit.*, Vol. 4, pp. 220–221. Joseph Sanpsom, an American traveller who visited this country in the years 1801–1802 relates that 'in London where robberies often taken place in open day, the doors of dwelling houses are kept locked, and those of shops are frequently chained to the doorpost to prevent a sudden surprise or retreat'; quoted by R. E. Spiller, *The American in England* (1926), p. 164.

any execution without handkerchiefs and other articles being stolen'.[50] 'Die grösste Gefahr', observed H. von Watzdorf, 'welcher man in London ausgesetzt ist, ist das Stehlen; dies geschieht auf so vielerlei Arten und mit so listigen Erfindungen, dass man die grösste Vorsicht nöthig hat, nicht hintergegangen zu werden'.[51] Similarly P. J. Grosley writes: 'The English themselves acknowledge that London swarms with pick-pockets, as daring as they are subtile and cunning'.[52] Baert noticed amongst pick-pockets a large proportion of children between the ages of twelve and fourteen.[53] He greatly deplores this for—he states—it is a well-established fact that having acquired some means these young offenders often buy a horse and become highwaymen. Both de Saussure and Baert observed a great reluctance among the victims of these depredations to prosecute.[54] They also drew attention to crime carried out as a profession. Blanqui mentions a school 'ou l'on enseignait aux enfants à voler avec addresse'.[55]

Some visitors were struck by the frequency of counterfeiting money, though it was punishable by death,[56] by the amount of smuggling and setting property on fire with intent to defraud insurance companies, and by the virtual impunity enjoyed by receivers of stolen goods.[57] Their works also contain much valuable information on the social evils peculiar to that period for, like Henry Fielding,[58] they were much alarmed by the great number of poor persons, vagrants, mendicants and prostitutes, the widespread habits of drunkenness and gaming, and the licentiousness of the mob.

[50] *Op. cit.*, pp. 129–130. This is how de Saussure relates his personal experience: 'Quite lately a valuable snuff-box was stolen from me. I had placed it in the pocket of my carefully-buttoned waistcoat; my coat was buttoned likewise, and I was holding both my hands over the pockets of my coat. It is true the theft occurred in a very narrow, crowded street, or more properly called passage, leading into a park'; *ibid.*, p. 130.

[51] *Briefe zur Characteristik von England gehörig; geschrieben auf einer Reise im Jahre 1784* (Leipzig, 1786), p. 160.

[52] *A Tour to London; or new Observations on England* (tr. by Th. Nugent, 1772), 2 vols., written in 1765; see Vol. 1, p. 49.

[53] 'Ces filoux volent avec une impudence rare et qui rend les foules fort dangereuses: ils voloient, il y a quelques années, jusqu'aux souliers, au sortir des spectacles, se glissant à cet effet dessous les voitures, et arrachant le soulier du pied des femmes au moment où elles le levoient pour y monter'; *op. cit.*, Vol. 4, pp. 219–220.

[54] De Saussure records: 'When any of these pickpockets are caught in the act and are given over to the populace, they are dragged to the nearest fountain or well and dipped in the water till nearly drowned'; *op. cit.*, p. 130; and Baert writes: 'Lorsque ce sont des enfants et que le peuple peut les attrapper, il se contente ordinairement d'en faire justice lui-même, en les conduisant dans une pompe et les y arrosant'. This author also notes that the law made the conviction of pickpockets very difficult.

[55] *Voyage d'un Jeune Français en Angleterre et en Ecosse pendant l'Automne de 1823* (Paris 1824), pp. 337–338.

[56] 'Les faux *shillings* et les faux *pence*'—observed the Duc de Brunswick—'courrent d'une manière indécente, je n'ai presque jamais changé une guinée sans en recevoir'; *Promenade autour de la Grande-Bretagne* (1795), p. 106. 'The amazing abundance of counterfeited coin is a great nuisance to the public; you are under the necessity of surveying one piece after the other in getting change, and for all that are often deceived, from the bad shillings looking many a time as fair as the good ones'; *Letters from Albion to a Friend on the Continent, written in the years 1810, 1811, 1812 and 1813* (London 1814), 2 vols.; see Vol. 2, p. 135. See also A. Blanqui, *op. cit.*, p. 338.

[57] See for instance Baert, *op. cit.*, Vol. 4, pp. 217-221, and Ferri de St. Constant *op. cit.*, Vol. 4, pp. 170 and 174.

[58] See above, pp. 399–407.

Low incidence of murder

As regards the incidence of murder, England—they held—compared very favourably with other great European countries. Judging from the frequent allusions to this subject by all foreign observers, the number of murders committed in England must have been very low indeed. Writing in 1694 Muralt remarked curiously[59]: 'But the great cruelty of the *English* consists rather in tolerating the Evil than in doing it. 'Tis certain they abhor all cruel Things: Duels, Assassinations, and generally all Sorts of Violence are very uncommon in this Country, and I don't remember to have heard any thing of poysoning, except the two Instances I have mentioned; for generally speaking, an *Englishman* vents his Rage upon himself'. Some forty years later Baron de Pöllnitz noted[60]: 'We don't hear of those assassinations in this country, that are committed elsewhere; and even the highwaymen seem to be more humane here than abroad; for they generally content themselves with what is given them, without shedding of blood'. In the second half of the eighteenth century another distinguished French visitor to this country, Grosley, similarly observed[61]: 'Murder is, notwithstanding, looked upon in England as the greatest and most heinous of all crimes. The prepossession which the laws have established in this respect, has so universally prevailed in the minds of men, that even highwaymen seldom go so far as to kill those whom they rob'. Similarly Meister relates[62] that 'though frequent quarrels arise amongst the populace, murders are very rarely the consequence'; while Baert calls it a crime 'dont on n'entend presque jamais parler'.[63] The Duc de Lévis, a very experienced and accurate observer, notes that 'l'infanticide est peut-être plus rare à Londres qu'ailleurs'.[64]

These statements are particularly significant since they relate to a very long period of English history—from de Muralt's visit to England in 1694 to that of the Duc de Lévis some 120 years later.[65] Thus the above-quoted

[59] *Letters describing the Character and Custom of the English and French Nations* (tr. from the French, 1726), pp. 69–70; on Muralt see above, note 5 at p. 699.

[60] *Memoirs of Charles-Lewis, Baron de Pöllnitz* (tr. from the French, 2nd ed., 1738), 2 vols.; see Vol. 2, p. 456. Pöllnitz visited England in 1733. Similarly G. L. le Sage, who visited this country in 1713 and 1714, relates that murder and poisoning were very rare in England; *Remarques sur l'État present de l'Angleterre* (Amsterdam, 1715), p. 132.

[61] *Op. cit.*, Vol. 1, p. 60.

[62] *Letters written during a residence in England* (London, 1799), p. 170.

[63] He remarks paradoxically: 'Les crimes se commettent en Angleterre avec beaucoup d'hardiesse et de courage, mais ne sont jamais atroces. On y vole avec beaucoup d'honnêteté sur les grands chemins . . .'; *op. cit.*, Vol. 4, pp. 218 and 219.

[64] *Op. cit.*, p. 122.

[65] On this subject, as on so many others, Pillet's judgment is a striking exception. According to him murders were numerous in the whole country; 'ils sont presque toujours accompagnés de circonstances atroces, de particuliarités effrayantes, de réflexion et de calcul, qui décelent le penchant du peuple anglais vers une cruauté froide et systématique'; *L'Angleterre vue à Londres et dans ses Provinces* (1815), p. 179.

Pillet, who spent ten years in this country, six of them in captivity as a prisoner of war, conceived a strong enmity towards England and all his observations were biased to an extreme degree. Ethel Jones writes in her well-balanced and instructive book *Les Voyageurs Français en Angleterre de 1815–1830* (1930), p. 18: 'Une profonde amertume et une animosité excessive envers la perfide Albion et sa cruelle politique animent presque chaque ligne de son récit . . .'. Pillet's views were contradicted by a number of French authors; see *op. cit.*, pp. 22–23. On Rubichon, Jones observes: 'L'ouvrage de Rubichon ne saurait

views on the prevalence of crime in England cannot be accepted without some reservation. For while agreeing that offences against property were very common, all these observers also note the comparatively low incidence of the more serious crimes of violence.[66]

The wealth of London a temptation to crime

Any assessment of the state of crime and particularly of offences against property which disregards the economic and social life of the countries concerned must necessarily be somewhat misleading. The incidence of pocket-picking, for instance, will be much lower in an agricultural community than in towns. Similarly the frequency of larcenies in shops or houses bears some relation to the wealth of these shops and houses, highway robberies to the intensity of the traffic on the roads, and thefts on navigable rivers or in ports to the number of vessels and to the number and wealth of storehouses. The circumstances peculiar to eighteenth century England were often overlooked not only by many foreign observers but even by contemporary English statesmen and students of social history. This failing was an important factor in delaying the reform of criminal law, for the impression had prevailed that England had an exceptionally high coefficient of economic criminality and that it would therefore be inadvisable to relax the rigour of the law. De Saussure, who said that the whole of Switzerland had much less crime than London

être considéré comme impartial, tant les opinions politiques de l'auteur déterminent le jugement qu'il porte sur les choses d'Angleterre et enlèvent à ce jugement toute objectivité ', but justly adds that it is full of original and trenchant observations; *ibid.*, p. 125.

[66] Since the death penalty was then also imposed for so many minor offences, the exceedingly low incidence of murder could not be attributed to the preventive effect of the law. Grosley sought the explanation in the Bible: ' Deliberate murder is, as I have already observed, unpardonable amongst the English, whose abhorrence for that crime has been confirmed by reading the Bible, since it is become the general book of the nation '; *op. cit.*, Vol. 2, p. 161.

All observers note the fierceness of the English populace and its predilection for brutal exhibitions of physical force in various forms. But despite the shocking character of many of these spectacles both those who participated in them and the applauding crowd exhibited a remarkable sense of fair play. Muralt speaks of ' the fierceness of the English nation ', but then adds: ' I would not have you any way offended at this Word; it insinuates, no doubt, something very odious to Strangers, but at the same time, it produces a great many good Effects among the *English*. 'Tis to this Fierceness, which can bear nothing, and is jealous of every thing, that they owe their chief Happiness, their Liberty. 'Tis by this that the People, tho' divided and plunged in Prosperity and Idleness, recover in a Minute all their Strength and forget their Disputes, to oppose unanimously every thing that tends to subdue them '; *op. cit.*, p. 47.

In Grosley's view, ' the people of London, though haughty and ungovernable, are in themselves good-natured and humane: this holds even amongst those of the lowest rank '; *op. cit.*, Vol. 1, p. 62. According to d'Archenholz, ' on any public commotion, when the people run into the streets, and assemble in crowds, the greatest care is taken lest any accident should happen to the women and children, whom they either make room for, or carry in their arms, that they may be better seen '; *op. cit.*, p. 210. Meister witnessed a desperate boxing-match between a servant and a labourer ' surrounded by a circle of spectators who stood quietly viewing the contest, and did not offer to part the champions till one of them acknowledged that he was conquered '; he remarks further that ' none of our duellists of the *Bois de Boulogne*, not even if they had been legislators, could have discovered more coolness nor greater conformity to the rules of single combat, than did these noble combattants with the fist amidst the throng of Pall-Mall '; *op. cit.*, pp. 21–22.

alone, states elsewhere that 'London is assuredly the greatest commercial city in the world'.[67] The Baron de Pöllnitz describes London as 'that city which for its extent, the number of its inhabitants, and their wealth, may pass not only for the capital of a powerful Kingdom, but even for the capital of Europe'.[68] No less impressed was Meister:

> 'The variety, the neatness, and the rich shew made by such numbers of shops of every kind, formed a spectacle of so delightful and astonishing an appearance, as to conceive must needs be seen. There are so many things laid open to view, and spread forth with so much art and attention, that till the eye is accustomed to sights so various and brilliant it must needs be weary. You are not ignorant that London alone transacts two thirds of the trade of the three kingdoms; the splendour and activity of its retail trade will not therefore surprise you; but to take a view of the extent and grandeur of the commerce of this first trading nation in the world, you must penetrate the busy throng which constantly blockades the Strand, and proceed, as I have done, till you mix with the crowds which fill up every avenue to the Custom-House; you must next take boat to go down the Thames, and see the bosom of that noble river bearing thousands and thousands of vessels, some sailing up or down, going or coming from every part of the world, and others moored in five or six tiers as closely to each other as it is possible for them to be; you will then confess that you have beheld nothing that can give you a stronger idea of the noble and happy effects of human industry. I confess that such a view of the glorious consequences of civilisation affect my mind equally with the striking beauties of unadorned nature, and that this sight has filled me with wonder and admiration.'[69]

De Lévis states that in 1810 the population of London considerably exceeded that of Paris, Lyons, Marseilles, Bordeaux and Nantes put together.[70] Ferri de St. Constant relates that although in some Continental towns shops are as wealthy as those of London, '. . . c'est leur multitude innombrable qui étonne dans cette dernière ville et dont aucune autre ne peut donner d'idée'.[71]

[67] Thomas Platter, who travelled in England in 1599, writes that 'the city of London is so large and splendidly built, so populous and excellent in crafts and merchant citizens, and so prosperous, that it is not only the first in the whole realm of England, but . . . one of the most famous in all Christendom'; *Travels in England* (tr. from German and ed. by Clare Williams, 1937), p. 156.

[68] *Op. cit.*, p. 430.

[69] *Op. cit.*, pp. 16–18. The same observer also notes 'that every Monday no less than fourteen hundred vehicles set out from London; that is to say, public ones, such as dilligences, coaches, as well mail, hackney, as stage coaches, etc.: some with four wheels, some with two, three, eight and ten'; *ibid.*, note at p. 11. de Custine says that at a certain point the Thames 'ressemble à une forêt inondée. Pour la première fois, l'ouvrage des hommes a produit sur moi une impression analogue à l'effet des grandes scènes de la nature'; *Mémoires et Voyages* (1830), p. 114. Ch. Nodier, referring to warehouses at the docks, states: 'The multitude, the variety, and the astonishing dimensions of these rich magazines, exhibit a spectacle unrivalled in Europe'; *Promenade from Dieppe to the Mountains of Scotland* (1822), p. 33. Another traveller, C. P. Moritz, was also much impressed by the 'stir and bustle on this river (Thames)' and in some of London's streets; *Travels in England in 1782* (ed. by P. E. Matheson, 1924), p. 21. Tr. from the German.

[70] *Op. cit.*, note 1, at p. 68.

[71] *Op. cit.*, Vol. 1, p. 27. It has already been noted that according to all foreign travellers, pocket-picking and other minor thefts were extremely frequent in London; but they also note an intensity of traffic unparalleled in any other European town. For instance de Custine relates that when he entered the City '. . . j'ai traversé cette fourmilière d'hommes dont le mouvement surpasse tout ce que j'ai vue en ce genre, dans les principales villes de l'Europe, sans même en excepter Naples . . . c'est dans cette partie de Londres qu'il y a un tel

Similarly d'Archenholz describes the unique luxury and magnificence of English houses, '. . . carpets which often cost three hundred pounds apiece, and which one scruples to touch with his foot, cover all the rooms; the richest stuffs from the looms of Asia are employed as window curtains; and the clocks and watches with which the apartments are furnished, astonish by their magnificence, and the ingenious complication of their mechanism'.[72] With a perspicacity and enlightenment remarkable for his time, this author considered crime in London not in absolute terms but against the background of economic circumstances and the constitution of the country. 'London'—he writes[73]—'is nevertheless as well governed as any city can be, which contains such an amazing number of men, who enjoy the most uninterrupted liberty. The human soul can never be more elevated than when a philosophical mind surveys this million of men crowded together, whom neither authority nor the sceptre of despotism, but the invisible power of the laws preserves in unity, by infusing the order and harmony necessary for the regulation of such a gigantic body. If the wealth of this great city, the voluptuousness of every kind with which it abounds, and the luxury of the present age are considered, ought we not rather to be astonished that this prodigious mass does not, by continual friction, sometimes emit the most dangerous scintillations? It appears to me wonderful, that the crowds of poor wretches who continuously fill the streets of the metropolis, excited by the luxurious and effeminate life of the great, have not some time or another entered into a general conspiracy to plunder them'.[74]

The French observer Misson writes that having discussed with his friends whether there was more lawlessness in London than in Paris they 'came to a Resolution, That there is more Vice and more Roguery at *Paris* than at *London*: more infamous Actions, more Cruelty, and more Enormity'.[75] Misson

mouvement d'affaires, que le torrent de la foule s'y renouvelle sans diminuer un instant depuis dix heures du matin jusqu'au soir, et s'écoule comme une fleuve . . .'; *op. cit.*, pp. 132–133 and 133–134.

[72] *Op. cit.*, pp. 82–83. Samuel de Sorbières, who spent the summer of 1663 in England, writes: 'Il faut que je vous die, avant que de passer à d'autres choses plus curieuses, qu'il n'y a peut-être point de Ville au monde où il y ait tant de boutiques, et si belles'; *Relation d'un Voyage en Angleterre* (1666), p. 32.

[73] *Op. cit.*, pp. 178–179.

[74] de Custine visited an arsenal in London where 'quatre cent mille fusils, dont deux cent mille, rangés dans une seule salle, frappent l'esprit de stupeur: cet énorme dépôt pourrait servir à armer en une heure toute la population de Londres, et en voyant un pareil magazin, mal défendu, au milieu d'une ville qui renferme tant d'hommes, rendues doublement envieux par la misère et par le luxe, on se demande si les Anglais n'ont pas un goût exagéré pour les approvisionnements'; *op. cit.* (1830), pp. 137–138.

The possible emergence of such a conspiracy was envisaged by many foreign observers. Thus the Duc de Lévis, speaking about the projected new building for the House of Lords, suggests: 'Les murs doivent être épais, les fenêtres hautes, les portes doubles et solides, les rues adjacents larges et alignées. Au reste, l'emplacement actuel est bien choisi, en le dégageant des bâtiments qui l'obstruent; il est proche du parc où peuvent se rassembler un grand nombre de troupes; il est à l'extrémité de la capitale, et fort loin du quartier habité par le petit peuple; enfin il touche à la rivière, ce qui rend la défense plus aisée, et qui même, dans une émeute, pourroit offrir un moyen de retraite aux membres des chambres assiégées'; *op. cit.*, p. 171.

[75] *Memoirs and Observations in his Travels over England* (tr. from the French by Ozell, London, 1719), p. 67. Misson's memoirs were written in 1698. De la Serre, describing London in 1638, observed: 'The police is, nevertheless, so well observed, that they live here without disorder and without confusion; and there is so much safety in the streets even during the night, that one may walk as

was referring to the state of affairs *circa* 1698. But the same conclusion was reached by Meister in 1789. After relating his experiences during a fortnight's stay in London, he writes: '. . . And yet I have met with fewer disturbances and frays than are to be seen at Paris in one morning'; this despite the small size of the London police force—composed of no more than eight to twelve hundred men—compared with the thirty thousand national guards of Paris. He therefore concludes: 'What a length of time is required for the law to obtain the respect and authority which is necessary to secure the strength of an empire!'[76] G. A. Crapelet, though he acknowledges that it is dangerous to enter London at a late hour, nevertheless states that 'pourtant on peut affirmer qu'aucune ville, proportionellement à sa population, à son luxe et à son commerce, n'est plus sure à toute heure; que nulle part les propriétés ne sont plus à l'abri des vols, de quelque nature qu'ils soient'; he explains this not by the existence of preventive measures but by the spirit of liberty which is the privilege of English citizens and by their respect for law and order.[77]

§ 3. THE ENGLISH SYSTEM OF CRIMINAL JUSTICE

The spirit of liberty

The fact which most forcibly impressed itself upon the minds of all foreign observers was the extraordinary measure of individual and political freedom which is the privilege of English subjects. 'England'—writes de Muralt—'is a Country of Liberty, every one lives there as he wishes; which, no doubt, is the Source of the many extraordinary Characters among them, Heroes in Evil as well as in Good. It likewise gives them a Freedom of Thoughts and Sentiments, which does not a little contribute to their good Sense, wherein they are distinguished, generally speaking, from most other Nations'.[78] De Saussure explains the interest taken by the English in political pamphlets by the spirit of liberty 'which the government affords, and in which Englishmen take great pride, for they value this gift more than all the joys of life, and would sacrifice everything to retain it. Even the populace will make proof of this, and will give you to understand that there is no country in the world where such perfect freedom may be enjoyed as in England'.[79] Similarly Don Manoel Gonzales, a Portuguese merchant who writes about England in 1730,[80]

freely as in the day, without any other arms than those of the confidence one has in the goodness of the people'; 'History of the Entry of Mary de Medicis, the Queen Mother of France, into England, anno 1638'; *Antiquarian Repertory* (ed. by Francis Grose and Thomas Astle, 1809), Vol. 4, p. 531.

[76] *Op. cit.*, pp. 20 and 21. Even Rubichon in spite of his enmity admitted that it would be misleading to assess the state of crime in London without taking into account 'des motifs de tentation'; *De L'Angleterre* (1811), p. 350; on Rubichon's views on the English system of criminal justice see below, note 11 at p. 718.

[77] *Souvenirs de Londres en 1814 et 1816* (Paris, 1817), p. 225.

[78] *Op. cit.*, p. 2; see also M. Cottu, *Criminal Code in England, etc.* (1820), p. 3.

[79] *Op. cit.*, pp. 178–179.

[80] Doubts have been expressed as to whether Don Manoel Gonzales was a foreigner, but it has not been positively ascertained that he was English. Southey mentions that though this tract 'appeared in the Harleian Collection of Voyages as an account of England said to be translated from the manuscript of D. Manoel Gonzales, a Portuguese merchant, (and) has been reprinted in Mr. Pinkerton's collection, without any suspicion of its authenticity, it is manifestly the work of an Englishman, not improbably of Defoe'; 'On the Accounts of England by Foreign Travellers, and the state of Public Opinion (1816)', *Essays, Moral and Political* (1832), Vol. 1, p. 258. Southey himself wrote *Letters from England* (1807), 3 vols., under the pseudonym of Alvarez Espriella.

describes the English government as 'a limited monarchy, such as secures the people's liberty under the grandeur of a king; a monarchy without slavery; a great king, and yet a free people'.[81]

The Baron de Pöllnitz expresses a similar thought: 'What I admire in the *English,* is not only the firmness with which they plead for their rights, but their manner of doing it . . . for as they enjoy the greatest liberty of any people in the world, they have an aversion to every thing which cramps it'.[82] Grosley notes the English 'principles of toleration',[83] while Lacombe explains that liberty in England is founded on 'du droit de propriété' and 'du droit de sûreté personelle', adding: 'Il n'est aucun homme qui puisse s'opposer à la force irrésistible des loix. Les Juges ne peuvent être privés de leur place que par une accusation du Parlement; et le plus mince des sujets ne peut être emprisonné que par la loi'.[84] Even the Abbé le Blanc, whose attitude towards England was strongly biased, acknowledges 'that the zeal of this nation for liberty ought to make it respected by all those, who have the least notion of the dignity of our nature'.[85]

[81] 'The Voyage to Great Britain', in J. Pinkerton's *Voyages and Travels* (1808), Vol. 2, pp. 1–171, at p. 127. See also J. J. Jusserand, *A French Ambassador at the Court of Charles the Second* (1892), pp. 100 and 103, where he quotes a memorandum which the Comte de Cominges, French ambassador at the Court of Charles II, sent to Louis XIV.

Jusserand notes that having read this report Louis XIV wrote the following note for his son and his descendants: 'This subjection which places the sovereign under a necessity to receive the law from his people is the worst evil which can happen to a man in our situation. . . . I must now represent to you the misery of those who are abandoned to the indiscreet will of an assembled rabble (une populace assemblée). . . . A prince who wants to leave some lasting tranquillity to his people and an unimpaired prerogative to his successors cannot too carefully suppress that tumultuous audacity'; *ibid.*, p. 108. The singularity of the English political structure did not fail to make a strong impression also on the minds of Italian ambassadors. See for instance a report of Vincenzo Gussoni, ambassador to Charles I, quoted by Da Nicolo Barozzi e Gugliemo Berchet, *Relazioni degli Stati Europei Lette al Senato dagli Ambasciatori Veneti nel Secolo Decimosettimo* (1863), Serie 4, Inghilterra, pp. 304 and 305.

[82] *Op. cit.*, Vol. 2, pp. 443 and 455.

[83] *Op. cit.*, Vol. 1, p. 301; see also pp. 268–269 and 299.

[84] *Op. cit.*, p. 205.

[85] *Op. cit.*, Vol. 1, p. 10. He and a number of other foreign travellers, particularly of French origin, held that in England liberty often degenerated into anarchy, notably as regards the freedom of the press; a few others agreed with Rousseau that 'the English think they are free, but they are much mistaken. They are so only during an election of members of Parliament; as soon as this election is made, they are slaves, they are nothing'.

Ch. Nodier writes that although, despite whatever he may say on this subject, it will always be believed in France that Great Britain is '*the classical land of liberty and equality*', it is none the less his opinion that in no other European country are 'the shades of rank marked in a more mortifying manner for the inferior classes' than in England; he quotes as an illustration the fact that the dress of students in Oxford is not absolutely uniform but 'the different classes of society to which these young men belong, are indicated by as many modifications in their dress. The nobleman is distinguished from the gentleman, and he from the commoner'; *op. cit.*, p. 66. On this and other points Nodier, like some other French travellers, confounds the terms of liberty and equality and seems to think that the English political fabric was founded on both these elements. In contrast, A. de Staël-Holstein (son of Mme. de Staël) was too acute an observer to commit a similar error. In his *Lettres sur l'Angleterre* (1825), which constitute an illuminating analysis of the social and political structure of England, he warns a Frenchman not to expect to find in this country this 'sentiment qui n'est que trop commun parmi nous, cette passion d'égalité qui dégénère en humeur jalouse contre tous les genres de supériorité sociale'; p. 171.

No less emphatic on this subject was d'Archenholz—undoubtedly one of the most perspicacious foreigners to write about the English people. 'The great difference'—he states[86]—'betwixt them (the English) and the rest of Europe, proceeds entirely from the liberty which they enjoy, and which gives occasion to a thousand extraordinary and singular customs'. Civic and constitutional liberty is, he remarks, the most decisive factor in English history. 'In England, events are continually taking place, which merit the attention of every philosophical observer, and elevate the annals of the present age to the historical dignity of ancient times. *Liberty,* that inexpressible blessing, is, and has always been, the source of all these heroical and sublime actions, which only excite our barren admiration. . . . No nation can boast of having for so long a period of time possessed so many social and political blessings. To see so many millions of men, enjoying an uninterrupted possession of rights, worthy of the dignity of human nature, is a circumstance unexampled in history. It is in that fortunate island alone, that the accumulation of riches, luxury, pleasures, and all their dangerous consequences, has not given to any one class of citizens a pernicious and dangerous ascendancy over the laws'.[87]

Liberal character of English criminal procedure

De Muralt thus explains the latitude of pleasures and even debauchery allowed to criminals awaiting execution: 'An *Englishman* will say, Liberty follows us everywhere, and we find a way to enjoy it to the End of our Lives'.[88] If the correctness of this explanation may be doubted,[89] P. N. Chantreau was probably right in contending that the privilege accorded to criminals about to be executed to make any public statement they liked sprang from the English

[86] *Op. cit.*, p. 206.

[87] *Op. cit.*, pp. 274–275. d'Archenholz's opinion was also shared by C. A. G. Goede, who states that 'in no other European state has the flux and reflux of national opulence ever operated in such a mild and equal manner upon all classes'; *op. cit.*, Vol. 1, p. 100.

See also Carl Philipp Moritz, *op. cit.*, p. 511; J. G. B. Büschel, *Neue Reisen eines Deutschen nach und in England im Jahre 1783* (Berlin 1784), pp. 130–131; von Watzdorf, *op. cit.*, p. 149, where he states that the English constitution though possessing some defects '. . . vertheidigt wenigstens die Rechte der Menschheit'; H. Meister, *op. cit.*, pp. 2–3; *Letters from Albion to a Friend on the Continent written in the years 1810, 1811, 1812 and 1813* (London 1814), Vol. 1, pp. 97 and 98–99; A. Blanqui, *Voyage d'un Jeune Français en Angleterre et en Ecosse pendant l'Automne de 1823* (Paris 1824), p. vii; François de la Rochefoucauld, *A Frenchman in England, 1784* (tr. and annotated by S. C. Roberts, 1933), p. 115. See further Prince Pückler-Muskau, *Tour in Germany, Holland and England, in the years 1826, 1827 and 1828* (tr. from German, London 1832), Vol. 4, p. 24. A. Pichot, whose two volumes on England and Scotland are not only entertaining, but also full of judicious observations, praises the 'two invaluable privileges of the people, namely, the liberty of the press (which cannot here be capriciously suppressed by an ordinance), and individual liberty'; and, he adds, 'there is in England a routine of constitutional manners, if I may so express myself, which we want in France'; *Historical and Literary Tour of a Foreigner in England and Scotland* (1825), Vol. 1, pp. 364–365 and p. 365.

[88] *Op. cit.*, p. 64.

[89] It must be noted, however, that there were other circumstances peculiar to the English system of executions which tend to corroborate Muralt's ingenious interpretation. For instance criminals condemned to death were allowed to put on any attire they liked on their journey to Tyburn and before being hanged, when facing the gibbet, they could read out or make any statement in a loud voice in the face of the crowds and in the presence of the sheriffs.

concept of freedom and respect for the individual.[90] The influence of the concept of individual and political freedom on criminal justice was certainly too obvious to be overlooked or underestimated. Manoel Gonzales notes that the method of trial in England 'is very singular, and different from other nations'.[91] Even Wendeborn, whose attitude towards this country was very critical, acknowledges that Englishmen enjoy 'einer edlen Freiheit',[92] and that throughout the criminal trial the greatest attention is paid to every circumstance, however trivial, that favours the accused.[93] Goede emphasises that in England, as indeed in 'all states whatsoever, where the liberty of individuals is effectually protected, may be remarked a rigid observance and a literal interpretation of the laws'.[94]

On the whole it may be said that the overriding impression of all observers was that in no other country was the administration of criminal justice so firmly established on a legal basis and the rights of the accused so strongly upheld and respected, as they were in this country. 'The administration of justice in England', remarks François de la Rochefoucauld, 'deserves the highest commendation. On two occasions I was myself a witness of the equitable way in which English criminal, as well as civil, cases are conducted and I can testify that almost against my will I was filled with respect and admiration'.[95] A great number of these visitors attended criminal trials. They do not disguise their surprise at the fairness of rules of procedure and their astonishment at being admitted to the courts.[96]

The following features of criminal procedure were most admired. The great caution shown in bringing persons accused of a crime before a magistrate and the liberal character of this first preliminary examination. 'In England', observes the Abbé Prévost, 'people are not arrested on vague suspicions and mere probabilities'.[97] De la Coste relates that when a case comes before the committing magistrate, he becomes 'en quelque façon, le patron de l'accusé', and in any case of doubt does not hesitate to discharge the prisoner.[98] Grosley draws attention to the frequent use of bail by which

[90] P. N. Chantreau, *Voyage dans les Trois Royaumes d'Angleterre, d'Écosse et d'Irlande fait en 1788 et 1789* (Paris, 1792), 3 vols.; see Vol. 1, p. 261. Public executions were explained by similar considerations; see on this above, note 4 at pp. 165–166.

[91] *Op. cit.*, p. 133. Referring to English criminal procedure de la Coste says 'cette procédure, si supérieure à toutes celles qu'on peut lui comparer'; *op. cit.*, Vol. 2, p. 8.

[92] G. F. A. Wendeborn, *Der Zustand des Staats, der Religion, der Gelehrsamkeit und der Kunst in Grossbritannien* (Berlin 1785), 2 vols.; see Vol. 2, p. 238.

[93] *Ibid.*, pp. 43–44.

[94] *Op. cit.*, Vol. 2, p. 2; see also pp. 6–7.

French visitors to eighteenth century England also admired the influence of humanitarian feelings on the administration of justice. '. . . Les dispositions de leur loi témoignent qu'ils respectent l'humanité jusque dans les plus grands scélérats, et sont telles qu'ils ne peuvent " prononcer une peine capitale qu'avec de très grandes précautions " '; quoted by George Ascoli, *La Grande-Bretagne devant l'Opinion Française en XVIIe Siècle* (1930), Vol. 1, p. 446.

[95] *A Frenchman in England, 1784* (ed. by Jean Marchand and tr. by S. C. Roberts, 1933), p. 117.

[96] See, for instance, Zetzner, *Londres et l'Angleterre en* 1700 (1905), p. 9.

[97] Quoted by M. E. I. Robertson, *Abbé Prévost, Adventures of a Man of Quality* (1930), p. 21. During his sojourn in this country the Abbé Prévost was accused of having committed a forgery and was brought before a magistrate; *ibid.*, pp. 13–21.

[98] *Op. cit.*, Vol. 2, p. 5. See also P. N. Chantreau, *Voyage dans les Trois Royaumes d'Angleterre, d'Écosse et d'Irlande fait en 1788 et 1789* (Paris, 1792), Vol. 1, p. 252.

the accused 'is at liberty' and which he quotes as an illustration of the numerous rules of English criminal procedure 'all favourable to the person accused'.[99] Others mention detention on a warrant signed by the magistrate, which is of brief duration and rigorously supervised so as not to be abused [1]; the right of all subjects to invoke the *Habeas Corpus Act*—a guarantee of the inviolability of individual freedom [2]; the institution of the grand jury which provides yet another substantial guarantee for the accused [3]; the fact that all subjects notwithstanding their social rank and origin are tried under the same laws and according to the same rules of procedure [4]; that no one can be convicted and punished except by virtue of current laws [5]; that no recourse is had to torture [6]; the jury system and the fact that the accused

[99] *Op. cit.*, Vol. 2, p. 140.

[1] Quelen de Stuer de Caussade de la Vauguyou, *Le Verité sur l'Angleterre* (London, 1817), 2 vols.; see Vol. 2, p. 2.

[2] By the laws of England, writes Gonzales, 'no English subject ought to be imprisoned without cause shewn; nor may he be denied a writ of habeas corpus, if desired, to bring him speedily to his trial; and if upon an habeas corpus no cause of imprisonment be alleged, the prisoner must be set at liberty'; *op. cit.*, p. 127. D'Archenholz considers this Act one of the six pillars of English liberty, a legal instrument which 'shelters the lowest subject in the state from oppression'; *op. cit.*, pp. 8–9. See also J. Macky, *A Journey through England. In Familiar Letters* (2nd ed., 1724), 2 vols.; Vol. 2, p. 1, and P. N. Chantreau who writes that '. . . les ministres les plus favorisés du prince ne sauroient l'entreindre (cette loi) sans encourir la peine qu'elle prononce'; *op. cit.*, Vol. 1, p. 252.

[3] L. Simond, *Journal of a Tour and Residence in Great Britain during the years 1810 and 1811* (tr. from French, 1815), 2 vols.; see Vol. 1, p. 365. Eduard de Montulé describes the grand jury as '. . . le palladium de la liberté anglaise, puisqu'il juge *absolument* de la valeur d'une accusation'; *Voyage en Angleterre et en Russie pendant les Années 1821, 1822 et 1823* (Paris, 1825), 2 vols.; see Vol. 1, p. 320.

[4] As Lacombe puts it: 'Dans les causes criminelles tous sont jugés . . . selon les mêmes loix, suivant des formes invariables, qui sont les gardiennes de l'innocence contre le crédit et l'oppression'; *op. cit.*, p. 57.

[5] Don Manoel Gonzales observes that none can be 'condemned but by the laws of the land, or by an act of parliament; nor ought any to be fined for any offence, but according to the merit of it'. *Op. cit.*, p. 127.

[6] 'In this country', writes de Saussure, *op. cit.*, p. 119, 'torture is not resorted to to make a man confess a crime; it is thought that many an innocent person might be sacrificed were this barbarous custom adopted'. 'No racks are used to force a confession of guilt from the prisoner; and nothing but clear evidence upon oath can bring him in guilty'; M. Gonzales, *op. cit.*, p. 127. Grosley was so much impressed by this feature of the English system of criminal justice that he was anxious for much more detailed information upon the subject. He accordingly framed a brief 'questionnaire' and asked a leading English lawyer to provide him with replies which he inserted in his work. 'I wanted to know', he writes, '1. Whether it had been formerly in use: 2. Admitting this supposition, I was desirous of being informed when it was abolished: 3. Whether it was abolished by being disused, or by an express law: 4. Whether that law is known, and what is the date of it: 5. Whether the practice is the same in this respect throughout all Great Britain'; *op. cit.*, Vol. 2, p. 162.

About sixty years earlier Muralt wrote: 'Their abolishing of Tortures (which are a Shame to Christianity) is no small Proof of their Aversion to Cruelty. They are looked upon here with Horror, and never put in Practice even to discover the Accomplices in a Plot; while other Nations that regard the *English* as Savages, and value themselves very much for extraordinary Politeness, still retain this barbarous Custom, and carry it so far, that the most frightful Tortures are in the Rank of common Formalities in criminal Proceedings'; *op. cit.*, p. 70.

But all observers note the existence of 'Peine forte et dure'. De Saussure writes: 'Cases have been known of criminals preferring to die in this fashion,

cannot be condemned unless unanimously declared guilty by not less than twelve reputable men[7]; the right of the accused to challenge twelve out of twenty-four jurymen; that the accused is not required to take the oath which is confined to witnesses and the jury; that he is allowed to call witnesses to prove his innocence and that every circumstance that can be alleged in his favour is admitted[8]; that he is allowed to have a counsel who, though required to speak on points of law only, can greatly help him. They note further the predominance of oral evidence, for as Grosley puts it, 'the whole juridical procedure passes in public; the only written instrument made use of upon the occasion is the indictment: the rest of the process is concluded by word of mouth, between the culprit, the judge, and the jury[9]; the very careful and

after two or three days of atrocious suffering, rather than by the hands of the executioner, and this in order not to leave a mark of infamy on their families, and to save their possessions from going to the Crown according to the law'. See also M. E. Totze, *The Present State of Europe* (tr. by Thomas Nugent, London, 1770), 2 vols., Vol. 2, p. 277. They note however that this extraordinary method was very rarely used; see, for instance, G. L. le Sage, *Remarques sur l'Etat present d'Angleterre, 1713–1714* (Amsterdam, 1715), p. 131.

[7] 'Englishmen', writes C. A. G. Goede, who resided in England for ten years 'regard the trial by jury as the greatest bulwark of their civil rights: and most assuredly, the advantages which they derive from it are incalculable; nor is it an extravagant position to assert, that this is the corner-stone of their whole constitution. This is the cement, by which the political fabric is held together; the assimilating principle which unites the constituent members of the commonwealth, and constrains them to guard with unceasing vigilance the impartial distribution of justice'; *op. cit.*, Vol. 2, pp. 27–28.

L. Simond, an acute French observer, who before coming to England lived for many years in the United States of America, observes that one of the advantages of the jury system is that the jurors 'sont placés dans une situation dont l'habitude n'a pas émoussé le sentiment d'importance et de *responsabilité* morale, de curiosité, d'intérêt et de crainte des regards du public'; *op. cit.*, p. 98. But the same author also expresses the view that the required unanimity of the jurors works too much to the advantage of the offenders; see on this below, p. 723.

[8] 'The accused', observes la Rochefoucauld, 'may say as much as he likes himself and defend himself to the best of his ability; the judge never interrupts him. I myself saw the prisoner, in one trial, interrupt the judge when he was speaking three times and each time the judge stopped and let him explain himself—a truly striking instance of forbearance, showing how strongly it is desired to find the man innocent'; *op. cit.*, p. 125.

Defauconpret writes that in England 'on y cherche à connaitre la vérité; mais ce n'est pas en faisant subir à l'accusé une torture morale, en lui addressant des questions insidieuses ou captieuses, en cherchant à le mettre en contradiction avec lui-même, en interprétant une réponse dans un tout autre sens que celui qu'il a entendu lui donner. Le juge est son premier défenseur; il l'avertit même qu'il peut se dispenser de répondre aux interrogations qui tendraient à le forcer à s'inculper lui-même. C'est à l'accusateur à prouver le crime'; *Six Mois à Londres en 1816* (Paris, 1817), pp. 178–179.

For an interesting account of the trial of Elizabeth Fenning which Defauconpret mentions see *L'Hermite de Londres ou Observations sur les Moeurs et Usages des Anglais au Commencement du XIXe Siècle* (Paris, 1820–1821), 3 vols.; Vol. 1, pp. 189–205. This book was most probably written by an Englishman or a Scotsman; it is sometimes attributed to F. MacDonogh. According to Quérard, *Les Supercheries Littéraires Dévoilées*, it was translated into French by Defauconpret.

[9] *Op. cit.*, Vol. 2, p. 142. P. J. B. Nougaret notes that 'Dans les affaires criminelles, toute l'instruction se fait en public: il n'y a d'écrit que l'information; le reste se passe de bouche, en audience publique, entre l'accusé, le juge et les jurés'; *Londres, la Cour et les Provinces d'Angleterre* (Paris, 1816), Vol. 2, p. 62.

impartial manner in which the whole evidence is summed up by the judge [10]—as Lacombe explains: 'Les formes Anglaises tendent à la décharge de l'accusé; conformément à la voix de la nature qui crie, *Sauvez vingt coupables plutôt que de faire mourir un innocent*' [11]; the wide publicity given to proceedings as the result of which 'the judge, the counsel, and the jury, are constantly exposed to public animadversion . . . (that) . . . greatly tends to augment the extraordinary confidence, which the English repose in the administration of justice' [12]; the great dispatch with which business is transacted [13]; the independence of the judges, the high respect in which the sentence of a judge is held and the very few cases in which complaints concerning the

[10] De Saussure, for instance, notes that in his summing-up, the judge 'weighs in general more upon the good than upon the bad'; *op. cit.*, p. 121. Meister notes that 'the summing-up of the evidence is performed by the judge in a manner which appears to be dictated by wisdom, candour, and humanity, pointing out to the jury the matters on which they are to determine'. He also records that the tables at which the judges sit 'are covered with flowers and aromatic herbs, as is the bar at which the prisoner is placed'. He then makes the following curious observation: 'Over the bar looking-glasses are hung up, which serve to cast a reflection on the faces of those under examination, that the workings of the countenance may be visible'; *op. cit.*, note at p. 37. The herbs were in fact used because it was thought that they were a prophylactic against gaol fever.

[11] *Op. cit.*, p. 70. ''Tis surprizing', writes de Muralt, 'to see People sometimes condemn'd for small Matters, and others easily acquitted at the same time that seem to be much more guilty; the Reason is, because they don't determine any thing but on the clearest Proofs, without any Regard to Probability. Here Malefactors may sometimes escape the Punishments they deserve; but 'tis rare to see an innocent Man suffer'; *op. cit.*, p. 71.

Even Pillet, whose book is a continuous attack on the English, recognises that 'le magistrat anglais parle peu à l'accusé, et ce n'est presque que pour le mettre en garde contre lui-même, afin qu'il ne soit point son propre accusateur. C'est un innocent et non pas un coupable que cherche le tribunal. Le magistrat français lui parle beaucoup trop, et par les questions insidieuses dont il accable l'accusé, l'auditoire ne voit plus qu'un ennemi, qui, dans un innocent, veut trouver un coupable. Cette foule de questions, ces longues séances, sont une espèce de torture morale, indigne du caractère d'un juge: c'est le commencement du supplice'; *op. cit.*, pp. 164–165.

But perhaps the most violent critic of the English system of criminal justice was Rubichon. He holds that the power of justices of the peace and magistrates of London was much too great and that they abused it in respect to suspected and accused persons. He finds grave defects in the jury system; 'les jurés ne sont personne, par la raison même qu'ils sont tout le monde' he writes; he also thinks that they have too much sympathy with offenders. English law is too severe and unevenly administered (on this see below, p. 721), while the high percentage of acquittals seems to point to some grave defect inherent in the English system of trial. In the increasing criminality he sees a symptom of a grave moral and social crisis. But he admits that in England 'les juges sont regardés comme ses (of the accused) défenseurs, et le sont vraiment de fait', and that the judges are independent and held in deep respect; *De l'Angleterre* (1811), pp. 272–276, 345, 402–404, 397–398, 399–400.

On his return to Paris, Rubichon added a second volume and published the two in 1819. This work, though in many points original and instructive, is strongly biased (above, note 65, pp. 708–709). Nevertheless it provoked great interest and ran into two editions. The *Quarterly Review* devoted a long article to the refutation of Rubichon's views; 'De l'Angleterre. Par Monsieur Rubichon', *Quarterly Review* (1820), Vol. 23, pp. 174–198. Quelen de Stuer de Caussade de la Vauguyou's *La vérité sur l'Angleterre* (1817), 2 vols., is a reply to Pillet's strictures.

[12] C. A. G. Goede, *op. cit.*, Vol. 2, p. 25.

[13] According to Goede even Hasting's trial lasted 'a very reasonable period, when contrasted with the incredible duration of many German causes!' *Op. cit.*, p. 28.

partiality or iniquity of judicial courts are brought forward[14]; the fact that once acquitted of an offence the same person cannot be again arrested and prosecuted for the same offence.[15] Angiolini was undoubtedly expressing the view of most of these foreign observers when he said in 1790 that 'la procedura Criminale in Inghilterra è il capo d'opera della giustizia e dell 'unamità, e il vero sostegno della libertà di questi Cittadini . . .'.[16]

Excessive severity of criminal law

The enthusiasm of these travellers was, however, by no means uncritical. On the contrary, they note a number of serious defects in the English system of criminal justice and it is interesting to note that they raise the same issues which at that time and for many subsequent years were engaging the attention of law reformers. Their first objection was that English criminal law was too severe and too rigid.[17] On this subject Muralt's remarks are of particular interest. 'The English have, as a People', he writes, 'a greater Share of good Sense, than is generally observ'd among other Nations'. It is therefore particularly surprising that they are so obstinate in their refusal to amend their criminal laws. The task of 'accommodating their (English)

[14] De la Coste was of the opinion that verdicts given in criminal matters in England may be regarded 'comme émanés du peuple'; *op. cit.*, Vol. 2, p. 8. And the Duc de Brunswick states: 'La justice est rendue publiquement et dans la forme la plus imposante'; *op. cit.*, p. 109. See also Cottu, *op. cit.*, p. 27.

[15] Quelen de Stuer de Caussade de la Vauguyou, *op. cit.*, Vol. 2, p. 8. He also thus sums up the essence of English criminal procedure: 'Le principe fondamental de la législation anglaise est, *l'on ne doit condamner personne* sans l'entendre; comme le principe fondamental de la jurisprudence de cette nation est, *point d'emprisonment sans cause positive; et point de jugement sans instruction pleine et entière*, p. 12. Similarly the author of *Letters from Albion to a Friend on the Continent written in the years 1810, 1811, 1812 and 1813* (London, 1814), Vol. 1, pp. 128–130, highly praises that other 'peculiarity of the English legislature . . . that a prisoner once acquitted . . . cannot be brought to trial a second time for the same offence'.

[16] *Lettere sopra l'Inghilterra, Scozia e Olanda* (Firenze, 1790), Vol. 1, p. 36. In 1827, when so many important reforms were introduced in the French system of prosecution and trial, Duvergier de Hauranne referred to the English system as '. . . cette procedure tout-à-fait admirable'; *Du Jury Anglais et du Jury Français* (Paris, 1827), p. iv.

[17] The following passage occurs in a pamphlet entitled *A Description of England and Scotland* written in 1558 by Stephen Perlin, a French ecclesiastic: 'In England the legal punishments are very cruel, for a man is put to death for a trifling offence; for a crime which in France would be only punished with a whipping, a man would have to be sentenced to death'. This strongly biased but curious tract was translated into English and published in the *Antiquarian Repertory* (ed. by Francis Grose and Thomas Astle, 1809), Vol. 4, pp. 501–520, on p. 513.

Thomas Platter in his delightful account of travels in England in 1599 relates: 'This city of London is not only brimful of curiosities, but so populous also that one simply cannot walk along the streets for the crowd. Especially every quarter when the law courts sit in London and they throng from all parts of England for the terms (aux termes) to litigate in numerous matters which have occurred in the interim, for everything is saved up till that time; there is a slaughtering and a hanging, and from all the prisons . . . people are taken and tried; when the trial is over, those condemned to the rope are placed on a cart, each one with a rope about his neck, and the hangman drives with them out of the town to the gallows, called Tyburn. . . . Rarely does a law day in London in all four sessions pass without some twenty to thirty persons—both men and women—being gibbetted'; Thomas Platter, *Travels in England, 1599* (1937), p. 174.

Laws and Customs to their Necessities' is, he holds, most urgent for the following three reasons: (a) 'All reasonable People agree, that there's no Proportion between the Crime and the Punishment, between Thieving and Death'. (b) Experience shows that if any of the laws of this country happen to be more severe than ordinary, they are but faintly executed'. (c) The extraordinary indifference and even courage of criminals about to be executed, and their equal disinclination to be subjected to hard and regular work. 'This Contempt of Death, and Fear of Labour', he says, 'point out very clearly the way to free the Country of Thieves'.[18]

The co-existence in this country of a remarkably liberal criminal procedure and exceptionally severe criminal laws inevitably struck the attention of all observers. Jean Everard Zetzner, who summed up his impressions of a trial at the Old Bailey by saying that in England the law 'traite les malfaiteurs avec beaucoup de prudence et de douceur', could hardly disguise his astonishment when at the conclusion of the proceedings eleven men and three women were sentenced to be hanged.[19] Misson thus comments upon the uniformity of punishments in English criminal law: 'All true Felonies, except those redeemable by the Benefit of the Clergy, are Hanging Cases. Robbers on the Highway, that have doubled their Felony by the Addition of Murder to Theft, do not suffer any greater Punishment than the others . . .'.[20] Similarly Lacombe writes: 'La pendaison est le supplice le plus ordinaire: les voleurs de grands chemins, les assassins, les faux-monnoyeurs, les faussaires, sont pendus indistinctément'.[21] This criticism grew progressively stronger towards the end of the eighteenth century, Meister writing: 'Much as I hold in veneration the leading principles of the British constitution, you are not to suppose that I am equally an admirer of all its results. . . . Criminal Jurisprudence still retains much of its ancient barbarity in many respects. The indulgence which this (English) code shews is often as cruel, as its severity is sometimes shocking. The smallest theft is punished with death'.[22] Wendeborn holds that death sentences are too frequent in England and that their effectiveness would be considerably increased were the capital punishment appointed for a smaller number of crimes.[23] Ch. Saladin states that no one can unreservedly praise English criminal jurisprudence '. . . une jurisprudence

[18] *Ibid.*, pp. 72 and 73. It will be remembered that Muralt wrote his *Lettres* in 1694; see above, note 5 at p. 699.

De Muralt also observes that the English 'shew an unaccountable Indolence (not to be met with any where else in my Opinion) in their neglect of such Expedients, as would soon put an End to the Practice. You wou'd, perhaps, think'—he adds ironically—'that they look upon these Executions as so many public Shews due to the People, and that a Stock of Thieves must be kept up and improv'd for that End'; *ibid.*

[19] *Londres et L'Angleterre en 1700* (ed. by R. Reuss, Strasbourg, 1905), p. 9.

[20] Except that 'their Bodies must be expos'd upon the very Road where they committed the Crime'; and, he adds, 'they fasten the Body with several Iron Hoops, which form a kind of Sack, and hang it upon the Gibbet'; *op. cit.*, p. 78.

[21] *Op. cit.*, pp. 185–186.

[22] *Op. cit.*, pp. 36–37 and note at p. 36.

[23] 'Die Bestrafungen der Einbrüche in die Rechte des Eigenthums sind hier bis zum äussersten getrieben, und wer dem andern so viel stiehlt, als sich der Werth eines Strickes zum Henken beläuft, der hat den Galgen verdient. Um deswillen setzt die Jury often den Werth des Gestohlnen zehn Pence an, weil Strick und Henken dreizehn Pence gerechnet wird'; *op. cit*, Vol. 2, p. 42; see also pp. 40–41.

enfin qui punit beaucoup, qui a une action infiniment plus vive que dans tout autre pays, et qui néanmoins, loin de corriger la génération actuelle et de diminuer le nombre des crimes, les voit se multiplier au contraire, parce qu'elle ne s'est point assez dirigée vers les moyens de les prévenir'.[24] Baert criticises the laws which make 'des offenses peu graves punies de peines capitales que les jurés répugnent à y appliquer, préférant renvoyer le coupable absous, à le faire périr'.[25] Another foreign visitor holds that owing to their severity, English criminal laws were irregularly administered, some offenders being executed for the same offence for which others received much less severe punishments.[26] According to the Duc de Lévis, English criminal law tends to demoralise the juries who almost all feel '. . . qu'elle est trop sévère ou plutôt qu'elle est cruelle, la loi qui condamne exactement à la même peine celui qui vole une guinée, et celui qui assassine de sang-froid son frère'. He points out that because of this shocking disproportion, advantage is taken of most insignificant circumstances—an incidental omission or mistake in the very complicated formalities of procedure, for instance—to acquit the accused. He also comments unfavourably on the system of paying rewards for arresting thieves, particularly odious 'sous l'empire d'un pareil code'.[27] Rubichon notes that the law is the same for theft as for forgery, but adds 'les lois ne sont que des instruments dont les juges font, en plus ou moins habiles ouvriers, plus ou moins d'usage, et un différent emploi; encore eux-mêmes sont-ils obligés de se soumettre jusqu'à un certain point, aux préjugés et aux coutumes du pays'.[28] He subsequently examines what he calls 'l'histoire criminelle de l'Angleterre, 1806', and draws attention to what he considers to be an anomalous disparity in the administration of the capital statutes relating to these two offences—extremely rigorous in cases of forgery and most lenient in those of larceny. A. Pichot praises trial by jury, the liberty of the press, and the system of criminal procedure, 'the admirable principles of which form a gratifying contrast to the English penal code, which is, in many instances, absurd, and even atrocious'.[29] L. Simond finds the excessive severity of English laws incompatible with 'the common sense of mankind' but adds that 'the noble institution of the jury on one hand, and on the other, the right of pardoning in the sovereign, correct all'.[30]

[24] *L'Angleterre en 1800* (Paris, 1801), 2 parts; see Part 1, Vol. 1, pp. 237 and 237–238.

[25] *Op. cit.*, Vol. 4, p. 369.

[26] *Letters from Albion to a Friend on the Continent, written in the years 1810, 1811, 1812 and 1813* (London, 1814), Vol. 1, pp. 125–126.

[27] *Op. cit.*, pp. 36 and 37. Similarly Goede criticises English criminal laws for the lack of proportion between offences and punishments, 'the extreme rigour of many of its regulations', and 'the vast disproportion in the scale of punishments'; he was confident that these defects would be remedied, though as he puts it 'every kind of excellence is slow in its progress toward perfection'; *op. cit.*, Vol. 2, p. 46.

[28] *Op. cit.*, p. 303.

[29] *Historical and Literary Tour of a Foreigner in England and Scotland* (1825), Vol. 1, p. 383.

[30] *Journal of a Tour and Residence in Great Britain during the Years 1810 and 1811* (1815), Vol. 1, p. 146. The Duc de Brunswick thinks that English justice is 'un peu trop executive; car il ne se passe pas de semaine ou il n'y ait quelques gens de pendus', often for slight offences; *op. cit.*, p. 110. But P. N. Chantreau favours a revision of the criminal laws, the abolition of the benefit of clergy, and a change in the law of forfeiture and corruption of blood; *op. cit.*, Vol. 1, pp. 265–266, 264 and 251.

Public executions

Many of these foreign observers describe public executions in detail.[31] Shocked by such spectacles[32] and surprised at the wide interest which they evoked,[33] they had strong doubts as to their expediency and usefulness, particularly in view of the remarkable courage displayed by offenders about to be hanged[34] and of the moral support they almost invariably received from the assembled crowd.

Chances of impunity

The second criticism was that the administration of criminal justice in England permitted a dangerous increase in the chances of impunity and thus encouraged crime. The evil must have appeared to them most alarming, for they described it in strong terms. De Muralt, for instance, speaks of 'Quibbles, to play with the Laws' and 'shameful Tyranny of Law-Tricks'[35]; Misson notes 'a Relaxation, which may be call'd an Inexecution of the Laws'[36]; Le Blanc refers to the 'chicanery of the English law in criminal cases'[37]; and Lacombe even holds that 'la loi authorise les malfaiteurs' and 'favorise plus le coquin que l'honnête homme'.[38] They support their views with instances of the over-strict interpretation of capital statutes, the most

[31] See, for instance, the already quoted works of De Muralt, pp. 42–44 and 72–73; Misson, pp. 123–125; Zetzner, pp. 10–12; De Saussure, pp. 123–127; Pöllnitz, pp. 458–459; Le Blanc, Vol. 2, pp. 293–295; Lacombe, pp. 185–187; D'Archenholz, pp. 187–189; Meister, note at pp. 61–62; Ferri de St Constant, Vol. 1, pp. 303–304, and Vol. 4, pp. 181–186; Wendeborn, Vol. 2, pp. 41–42.

[32] On some of the most striking features of executions see above, pp. 165–205.

[33] De Muralt regarded the execution of criminals as an expression of the 'fierce Diversions' so much enjoyed by the English people. Some other authors thought that Englishmen liked these scenes because in common with the ancient Romans they were anxious to witness scenes when courage and indifference to death could be displayed (Pöllnitz). Ferri de St Constant writes: 'Pour mettre dans un beau jour l'humanité des Anglais, on cite, avec raison, leurs lois criminelles et la manière dont on les exécute. Mais comment concilier, avec les sentiments d'humanité, cette curiosité qui attire, aux exécutions, une foule de personnes des deux sexes? Comment expliquer ce goût décidé pour les spectacles cruels, qui rappellent la barbarie des combats des gladiateurs?' *Op. cit.*, Vol. 1, pp. 303–304.

[34] This courage must have been very conspicuous indeed for all observers were struck by it and comment upon it at some length. 'Tis one of the distinguishing Characters of an *Englishman*, to be intrepid in the Article of Death'; Pöllnitz, *op. cit.*, p. 459. On a number of similar opinions see also above, note 68 at pp. 182–183.

[35] *Op. cit.*, pp. 62 and 71.

[36] *Op. cit.*, p. 67.

[37] *Op. cit.*, Vol. 1, p. 288. 'The king', he writes, 'has not twenty thousand troops to make the laws obeyed, which is doubtless the intent of the standing army, heretofore unknown to the English. Chicanry has fifty thousand lawyers to support its power, and perpetuate its reign. They call them *the army of the law*; and some even make the number of them amount to an hundred thousand. . . . The barristers at Westminster Hall dispute more about the letter of the law, than the justice of their cause. They raise more difficulties about the meaning of the words, which ought to determine the judges, than they give attention to the examination of the facts, controverted by the parties. And as villains frequently get off, by the most frivolous and childish subtleties, the lawyers apply themselves daily to invent new ones; this is the continual study of the great number of inns of court at London, which properly speaking, are only seminaries of chicanry'; *ibid.*, pp. 289 and 290.

[38] *Op. cit.*, pp. 3 and 82. Already Saint-Amant, writing in 1642, stated that 'il y a moins de danger à etre méchant à Londres qu'à Paris'; quoted by G. Ascoli, *op. cit.*, Vol. 1, p. 394.

formalistic exposition of certain rules of criminal procedure and of inadequate protection against perjury. De Muralt relates that the tendency of English courts is 'never to aid the Law, but to keep strictly to the Letter, which is done sometimes after a childish Manner'. Le Blanc, referring to the trial for high treason of a certain Christopher Layer, quotes the exceptions brought forward by the defence, which were that whereas the name of the accused was Christoporus, the indictment spoke of Christop*h*erus, and that one or two sentences in the indictment were expressed in incorrect Latin. On this he comments: 'Can one seriously hear such discussions of insignificant grammatical niceties, in an affair of such importance? . . . After all, is it not as if the counsellor had said: the prisoner, whose defence is committed to me, may be a traytor to his country, but his prosecutors are guilty of blunders, contrary to the rules of the Latin grammar; for which reason, I demand that he be set at liberty, tho' his crime enormous as it is, go unpunish'd. Should we dare to give the name of law, to what would authorise such reasoning?'[39] De Saussure[40] and Misson[41] both emphasise that false witnesses were too leniently punished and that measures ought to be taken to prevent acquittals from being brought about by such means. So serious did this evil appear to Ferri de St. Constant that he devoted a whole chapter of his work to it.[42] Simond entertained some doubts as to the wisdom of requiring the verdict of jurors to be unanimous.[43]

The essence of these and similar objections is well expressed by Le Blanc: 'The intention of most laws is always good; 'tis the execution of them shews their disadvantage, or utility. Those only do honour to the legislators, which really contribute to the happiness and support of society. Laws are made to punish those who disturb its order; the subtilty of lawyers encourages

[39] *Op. cit.*, Vol. 1, pp. 293–294 and 294. See also P. J. B. Nougaret, who writes that in a number of cases '. . . la loi, qu'on suit à la lettre, semble autoriser le crime'; *op. cit.*, Vol. 2, p. 56; A. H. Niemeyer, *Travels on the Continent and in England* (London, 1823), p. 74, who quotes a number of instances '. . . how the spirit of the laws can be so entirely sacrificed to the letter and the words'; and Meister, *op. cit.*, pp. 38–39. Defauconpret observes that 'l'observation des lois (est) en Angleterre tout-à-fait judaïque'; *Six Mois à Londres en 1816* (1817), p. 181. On the other hand Goede holds that the advantages of the very strict exposition of statutes by the courts considerably out-weigh the inconveniences which arise out of it. 'Many and great are the evils unavoidably connected with the literal interpretation of the laws, but they are amply compensated by the invaluable blessings of liberty and public justice, which cannot be otherwise protected or secured. Thus do Englishmen reason, and their reasonings seem confirmed by the authentic records of all legal institutions'; *op. cit.*, Vol. 2, p. 3. See also Amedée de Tissot, *Paris et Londres Comparés* (Paris, 1830), p. 167, note 17.

[40] *Op. cit.*, pp. 338 and 342.

[41] *Op. cit.*, p. 67.

[42] *Op. cit.*, Vol. 4, pp. 174–178. 'Beaucoup d'individus de la classe du peuple ont des idées si imparfaites de la nature du serment, qu'ils croient éviter le crime du parjure, en baisant leur pouce au lieu du livre sur lequel ils jurent. D'autres pensent que le crime du faux serment est en raison directe du livre sur lequel ils le prêtent. C'est un parjure peu grave, selon eux, de jurer faux sur le livre de prières ordinaires; un plus grand parjure, sur le livre de prière et le nouveau testament; et le plus grand de tous sur le livre de prière relié avec l'ancien et le nouveau testament, ce qui constitute proprement ce qu'on appelle le *serment de la bible*'; *ibid.*, pp. 175–176.

[43] *Op. cit.*, pp. 502–503. Similarly Quelen de Stuer de Caussade de la Vauguyou regards the over-strict interpretation as a not too high price for freedom and legality; *op. cit.*, Vol. 2, p. 15.

them'.[44] On the whole their views on these matters were much in line with those expressed by Fielding in the *Late Increase of Robbers*.[45]

The lack of an adequate police force

The third disadvantage of English criminal justice as it then was, seemed to these foreign observers to be the totally inadequate system of crime prevention. What they had in mind was not so much the absence of a constructive social policy as the lack of an adequate police force. De la Coste, who visited England in 1783 and 1784, relates that 'd'un soleil à l'autre, les environs de Londres sont, à vingt milles à la ronde, le patrimoine des brigands', and states that the government did not adopt more effective police measures because it was 'gêné . . . par le combat des intérets opposés du peuple et due roi'.[46] In Fiévée's opinion 'dans aucun pays, on ne trouveroit autant de filous, de voleurs qu'à Londres; la police les connoît, et n'a aucun pouvoir sur eux: aussi tout ce qui attire la foule, présage-t-il toujours de sinistres événements'.[47] De Saussure remarks[48] that after the notorious Jonathan Wild had been hanged, many persons considered that 'more harm was done than good by the execution of this famous thief, for there is now no one to go to who will help you to recover your stolen property; the government has certainly got rid of a robber, but he was only one, whereas by his help several were hanged every year'.

Baert points to the immoral and dangerous consequences of paying £40 for bringing to trial delinquents guilty of very serious crimes; this practice encouraged a tendency to disregard minor offenders until their depredations were serious enough to be worth £40 to the police. Those who were able to acquire some information often sold it to others with the result that when it finally reached the knowledge of the court, the jury, doubting the reliability of the prosecuting party, was inclined to acquit the accused.[49] Baert notes also that many persons abstained from initiating prosecutions either because they expected to be compensated by the offender himself, or because they were terrorised by other members of the gang.[50] The existing police force was considered utterly inadequate to the task and unable to ensure public security. According to the same author the policemen were 'presque tous vieillards', often on intimate terms with the criminals. All observers were unanimous that in a modern State such as England no effective system of detection was possible without a well organised police force working in close collaboration with the committing magistrates.[51] Moritz notes that 'in

[44] *Op. cit.*, Vol. 1, pp. 294–295. Similarly Ferri de St Constant writes: 'Beaucoup de voleurs commettent leur délits systematiquement; et de manière à en rendre la découverte très-difficile, et ont une connaissance complète des parties faibles des lois criminelles, qui les met à même d'éluder les châtiments, en se faisant acquitter, lorsqu'ils sont découverts et poursuivis juridiquement'; *op. cit.*, Vol. 4, p. 172.

[45] Above, p. 407.

[46] *Op., cit.* Vol. 1, p. 12.

[47] *Lettres sur l'Angleterre* (1802), note 1 at p. 50.

[48] *Op. cit.*, p. 132.

[49] François de la Rochefoucauld was perhaps the only foreigner who praised this method of detecting criminals and saw in it an effective substitute for a police force; *op. cit.*, p. 119.

[50] *Op. cit.*, Vol. 4, p. 368.

[51] Jorevin de Rocheford, who visited England in 1672 and recorded his impressions in a work of three volumes published in Paris, relates that when he travelled through England 'we saw all along this road long poles, on the top of which were little kettles, in which fires were lighted to give notice when there is any

London, at least in the city, not a single troop of soldiers of the king's guard, dare make their appearance'.[52] Defauconpret relates that 'le peuple anglais a toujours vu de mauvais oeil l'appareil de la force militaire'. The English mainly rely on the prestige of their magistrates to disperse a dangerous mob; in his opinion it would be wiser to make an appeal to 'une douzaine de baïonnettes' without making use of arms. But in England where authorities are reluctant to have recourse to such measures, 'le mal se propage, le nombre des factieux s'augmente, la populace a le temps de briser les vîtres et les croisées d'une maison, de la pillier, d'en voler et d'en brûler le mobilier avant que la force armée ait le droit le s'y opposer'. He considers this to be a defect in English laws, but as he mentions elsewhere in his book 'rien n'est si difficile en Angleterre que de changer quelque chose à une ancienne institution, quelque vicieuse qu'elle puisse être'.[53]

Le Blanc remarks[54] that 'the English will have no such establishment (as that set up in France); they are afraid of troops, and . . . had rather be robb'd upon the highways than in their houses, and by wretches of desperate fortune than by ministers'. But, he asks, 'is it not strange that the English, who are otherwise so careful of preserving their wealth, should be no more solicitous to secure it against robbers?' Some eighty years later the same question puzzled the Duc de Lévis, who amusingly observes: 'Dans un pays . . . où il n'y a ni forêts ni grandes montagnes, vous ne devriez pas avoir plus de brigands que de loups; mais aussi pourquoi n'avez-vous pas de maréchaussée?' When he put this question to his many English friends they replied: 'Une pareille institution est incompatible avec la liberté'.[55] This explanation failed to satisfy him, however.[56]

Goede also remarks that no adequate measures were taken for the security

danger in the country, and robbers on the way. The towns and neighbouring villages are obliged to send guards to drive them away, or take them, and to keep the highways safe and secure for passengers'; 'Description of England and Ireland in the 17th Century', *Antiquarian Repertory* (ed. by F. Grose and Th. Astle, 1809), Vol. 4, pp. 549–622, at p. 561.

[52] *Op. cit.*, p. 65.

[53] *Six Mois à Londres en 1816* (1817), pp. 202, 203 and 85. He notes with surprise that when the crowd does not disperse, a magistrate makes 'lecture de la loi sur les attroupements séditieux' and if during an hour the crowd is still there, he can appeal to the armed forces which however can only act on his order. But he acknowledges that usually the magistrates succeed in dispersing a crowd without the help of the armed forces. He also relates that when a mariner was sentenced to death and three thousand of his companions assembled on the day of execution to rescue him, the sheriff made a speech to the crowd requiring them to respect the laws of their country and the great tradition of their service, gave order to start off the execution, 'et les trois milles mutins en devinrent les paisible spectateurs'; *ibid.*, p. 206.

[54] *Op. cit.*, Vol. 2, p. 297.

[55] *Op. cit.*, p. 35. He admits that were the police allowed—as in France—to arrest people 'sur un simple soupçon' this would constitute a threat to individual and constitutional liberties. If this right was not to be accorded to them and they could arrest a person only if 'surpris en flagrant délit', it would become necessary greatly to multiply their number, for as he puts it 'c'est le pouvoir laissé à la discrétion de ces militaires qui fait toute la force de l'institution'.

[56] Le Blanc held similar views. The establishment of a well equipped police force was, he thought, inevitable; *op. cit.*, Vol. 2, p. 297. Referring to the lack of an effective police force and to many Englishmen's pride at not having one, Rubichon adds sarcastically: 'Tout ce que je puis observer est que la gloire de n'avoir point de police, paroit plus facile à acquérir, que la gloire d'en trouver une bonne'; *De l'Angleterre* (1811), p. 350.

of property and that the negligence of the London police was such 'that we are at a loss to account for it, even after making allowances for the small number of the civil officers, the defects of the English criminal code, and the formidable host of a licentious populace'.[57]

[57] *Op. cit.*, Vol. 1, p. 211.
On the other hand a number of foreign visitors describe the arbitrariness and ruthlessness of the French police and express understanding for the English attitude; see P. N. Chantreau, *op. cit.*, p. 16; L. Angiolini, *Lettere sopra L'Inghilterra, Scozia e Olanda* (Firenze, 1790), Vol. 2, p. 25, and Quelen de Stuer de Caussade de la Vauguyou, *op. cit.*, Vol. 2, p. 29, who remarks: '. . . ils (les Anglais) ont mieux aimé souffrir des abus de la liberté que de la *protection* de la tyrannie'.

APPENDIX 4

SOME LEADING PETITIONS IN FAVOUR OF THE REFORM OF CRIMINAL LAW

1. THE PETITION OF THE MASTER CALICO PRINTERS IN THE VICINITY OF LONDON (February 27, 1811) [1]

TO THE HONORABLE THE HOUSE OF COMMONS

The Petition of the Master Calico Printers in the Vicinity of London.
RESPECTFULLY SHEWETH,

That your petitioners' property is much exposed, especially while lying out to bleach, and great depredations are annually committed on your petitioners.

That the laws which punish the offence with death have been found ineffectual to restrain these depredations, for that owing to the lenity of prosecutors, the unwillingness of juries to convict, and the general leaning to the side of mercy, when the punishment is by the common opinion of mankind considered as disproportioned to the offence, very few convictions take place, and consequently offenders mostly escape, and are encouraged in the commission of crimes, which are multiplied from the probability of escape being increased, and from the impunity which lax prosecutions frequently afford.

That your petitioners are strongly impressed with the sentiment, that by certainty of punishment being substituted for severity of punishment, the number of crimes would be diminished, and your petitioners' property better secured, and therefore humbly pray that parliament may in its wisdom alter the punishment of death in case of robbing printing grounds into transportation, or such period of confinement in penitentiary houses as to them may appear eligible, provided a system of confinement in such houses should thereafter be adopted by the legislature.

Jo. Tagg & Co.	Tho. Silling & Co.	B. Austin & Co.
David Taylor & Co.	Dudding and Chester	James, Thwaites and Dickson
Moore, Johnson & Mason	John Coleman	
Whane & Son	Burford and Middleton	Wm. Birch
Fosters and Theobald	Edw. Gibbon	Harvey, Gardiner & Co.
W. Nayler & Son	Gould, Edwards & Gould	Thomas Barnett
Stevens, Stevens & Co.	W. Fenning & Sons	George Ancell.
Francis Hicks	Newton, Langdale & Co.	
Littler and Morey	James Howard	

[1] *Journals of the House of Commons* (1810–1811), Vol. 66, p. 123; reprinted by B. Montagu, *The Opinions of Different Authors upon the Punishment of Death* (1816), Vol. 3, pp. 23–24. The petition was presented by Sir Samuel Romilly; see above, pp. 512–513.

2. THE PETITION OF THE CORPORATION OF LONDON (January 25, 1819) [2]

THE PETITION,

As presented by the Sheriffs of London and Middlesex, January 25, 1819

To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled. The humble Petition of the Lord Mayor, Aldermen, and Commons of the City of London, in Common Council assembled,

Showeth, THAT your Petitioners are greatly interested in the Police both for the City of London, and for the County of Middlesex, where His Majesty's commissions for the trial of offenders issue yearly, and eight sessions at the least are held every year; and they are impressed with the conviction, that their representations upon the present state of the Criminal Law, and its effects on public morals, will be deemed worthy the consideration of your Honourable House.

That upwards of 200 crimes, very different in their degrees of enormity, are equally subject to the punishment of Death, which is enacted not only for the most atrocious offences,—for burglary, for rape, for murder, and for treason,—but for many offences unattended with any cruelty or violence, for various minor crimes, and even for stealing privately to the amount of five shillings in a shop.

That from the returns upon the table of your Honourable House, it appears that crimes have for some years been rapidly increasing, both in number and malignity, to the injury of the rising generation, and the debasement of the national character.

That there were committed for trial in Middlesex in the years

1812 ...	1,663	1815 ...	2,005
1813 ...	1,707	1816 ...	2,226
1814 ...	1,646	1817 ...	2,686

The capital convictions in Middlesex were, in the years

1812 ...	132	1815 ...	139
1813 ...	138	1816 ...	227
1814 ...	158	1817 ...	208

There were executed in Middlesex in the years

1812 ...	19	1815 ...	11
1813 ...	17	1816 ...	29
1814 ...	21	1817 ...	16

There were committed for trial in the different Jails in England and Wales, in the years

1805 ...	4,605	1815 ...	7,818
1812 ...	6,576	1816 ...	9,091
1813 ...	7,164	1817 ...	13,932
1814 ...	6,390		

[2] *Journals of the House of Commons* (1818–1819), Vol. 74, p. 33; *Journals of the House of Lords* (1818–1819), Vol. 52, p. 26; also reprinted by S. Fovell, *A Speech on the Propriety of revising the Criminal Laws* (1819), pp. 46–50. The petition was presented in the House of Commons by Alderman Wood and in the House of Lords by Lord Holland; see above, pp. 526–527.

There were confined in Newgate, of boys only, of 17 years and under, in the years

1813	...	123	1817	...	859
1816	...	247			

That without the interference of your Honourable House, in adapting the state of the Criminal Law to the state of the moral and religious sentiments of the nation, the increase of crimes must be progressive, because, strong as are the obligations upon all good subjects to assist the administration of justice, they are overpowered by tenderness for life—a tenderness which, originating in the mild precepts of our religion, is advancing, and will continue to advance, as these doctrines become more deeply inculcated into the minds of the community.

That many injured persons have refused to prosecute, because they cannot perform a duty which is repugnant to their natures, by being instrumental in the infliction of severity contrary to their ideas of adequate retribution; and by such impunity young offenders, instead of being checked in their first departure from virtue, are suffered to advance from small offences to crimes of great atrocity.

That some Jurymen submit to fines rather than act as arbiters of life and death in cases where they think the punishment of death ought not to be inflicted.

That some Jurymen are deterred from a strict discharge of their duty, and acquit guilt or mitigate the offence so as not to subject the offender to the punishment of death, and thus assume a discretion never intended to be vested in juries, and relax the sanctity of a judicial oath, upon which the integrity of the trial by jury much depends.

That this determination by juries to oppose the severe enactments of our laws is of daily occurrence.

That, amongst other instances, a jury, rather than be instrumental in inflicting the punishment of death for larceny to the amount of 40s. from a dwelling, found a 10*l.* note to be worth only 39s.

That another jury, influenced by the same motives, found two bills of exchange, value of 10*l.* each, and eight Bank notes, value of 10*l.* each, worth the same sum of 39s.

That your Petitioners cannot omit to urge upon your Honourable House, that even this disinclination to enforce the law is not confined to the injured parties, and to juries, but extends to the learned judges, who, impressed with a similar feeling, have exercised their ingenuity in discovering means by which the real value of the property stolen should not be found by the jury; and where convictions have taken place, constantly recommend a great part of the convicts to the royal mercy; and His Majesty's advisers, influenced by the same anxiety to preserve human life, readily apply and easily obtain from the throne a remission of the sentence.

That your Petitioners do not apply to your Honourable House with any feeling but of gratitude and respect, for the administration of the law by the learned judges, or for this exercise of the royal prerogative, by causing law and justice in mercy to be executed in every judgement; but they are impelled to submit to your consideration the state of the law itself, which produces evasions dangerous to the community, and which must continue to produce them, as they depend not upon the sentiments of any individuals, but upon certain and general principles of our nature, upon the advanced state of civilisation in the country, and upon the diffusion of Christianity, by

which we are daily taught to 'love each other as brethren, and to desire not the death of a sinner, but rather that he should turn from his wickedness and live'.

Your Petitioners, therefore, humbly pray, that your Honourable House will take the premises into your most serious consideration, and adopt such measures as the importance of the subject requires, and as to the wisdom of your Honourable House may seem meet.

8. THE PETITION OF BANKERS FROM 214 CITIES AND TOWNS (May 24, 1830)[3]

'That your petitioners, as bankers, are deeply interested in the protection of property from forgery, and in the infliction of punishment on persons guilty of that crime.

That your petitioners find, by experience, that the infliction of death, or even the possibility of the infliction of death, prevents the prosecution, conviction and punishment of the criminal and thus endangers the property which it is intended to protect.

That your petitioners, therefore, earnestly pray that your honourable House will not withhold from them that protection to their property which they would derive from a more lenient law.'

Edinburgh, Dublin, Glasgow, Manchester, Liverpool, Chester, Belfast, Birmingham, Litchfield, Wednesbury, Bilston, Dudley, Wolverhampton, Bristol, Bath, Leith, Huddersfield, Murfield, Wakefield, Dewsbury, Leeds, Plymouth, Devonport, Tavistock, Portsmouth, Norwich, Sheffield, Rotherham, Nottingham, Sunderland, Newcastle-on-Tyne, Durham, Darlington, Stockton, Richmond (Yorkshire), Leyburn, Ripon, Knaresbrough, Boroughbridge, Thirsk, Aberdeen, Paisley, Tiverton, Collumpton, Honiton, Barnstaple, Ilfracombe, Bideford, Torrington, Totness, Newton Abbot, Exeter, York, Yarmouth, Beccles, Stockport, Wigan, Worcester, Evesham, Ipswich, Needham Market, Woodbridge, Hadleigh, Manningtree, Banbury, Shipston, Bicester, Oxford, Carlisle, Brighton, Lewes, Reading, Maidenhead, Henley, Windsor, Lynn Regis, Canterbury, Lancaster, Chelmsford, Winchester, Southampton, Bury Saint Edmund's, Guildford, Kendal, Chippenham, Salisbury, Ringwood, Poole, Bradford, Halifax, Wakefield, Pontefract, Doncaster, Barnsley, Derby, Inverness, Burton-on-Trent, Leighton Buzzard, Newport Pagnell, Burslem, Hitchin, Bedford, Newbury, Abingdon, Wallingford, Uxbridge, Fakenham, Faringdon, Wisbech, Truro, Falmouth, Penzance, Helston, Penrith, Kirkby Thuce, Workington, Chesterfield, Teignmouth, Kingsbridge, Dartmouth, Bridport, Yeovil, Dorchester, Blandford, Harwich, Tewkesbury, Cheltenham, Cirencester, Tetbury, Burford, Dursley, Romsey, Basingstoke, Odiham, Hereford, Ross, Dickenfield, Leominster, Ledbury, Royston, Hemel Hempstead, Gloucester, Stroud, Dartford, Ramsgate, Margate, Deal, Boston, Spalding, South Spilsby, Horncastle, Staines, Newport (Monmouth), Monmouth, Chepstow, Diss, Northampton, Towcester, Wellingborough, Daventry, Wellington (Shropshire), Shiffnal, Coalbrookdale, Bridgnorth, Wenlock, Trowbridge, Wells,

[3] *Journals of the House of Commons* (1830), Vol. 85, p. 463. The petition was presented by Brougham; see above, p. 592.

Frome, Wiveliscombe, Wellington (Somerset), Taunton, Leek, Congleton, Halesworth, Sudbury, Stow Market, Reigate, Croydon, Dorking, Rye, Hastings, Kirkby Lonsdale, Swindon, Malmsbury, Marlborough, Melksham, Devizes, Stourbridge, Skipton, Settle, Selby, Howden, Scarborough, Malton, Whitby, Pontypool, Abergavenny, Brecon, Carmarthen, Swansea, Neath, Haverfordwest, Annan, Cupar, Auchtermuchty, Dumbarton, Elgin, Forfar, Galashiels, Jedburgh, Kirkcaldy and Wigtown.

4. THE LONDON JURORS' PETITION (September 6, 1831)[4]

To the Right Honorable The Lords Spiritual and Temporal of the United Kingdom of Great Britain and Ireland in Parliament assembled.

The Petition of the undersigned Inhabitant Householders of the City of London, liable to serve as Jurors,

Humbly Sheweth,

That your Petitioners view with deep regret, the excessive and indiscriminate severity of the Criminal Laws, which annex to Offences of different degrees of moral guilt the punishment of *Death*, and confound the simple invasion of the rights of property, with the most malignant and atrocious crimes against the person and the life of man.

That the recent Acts passed with the professed intention to amend and improve the Criminal Laws, have not remedied the evil of which an enlightened community have the greatest reason to complain, but have still left those laws a disgrace to our civilisation, by retaining the opprobious distinction of being the most sanguinary of any in Europe.

That Christianity, common reason, and sound policy, demand that the laws which affect the liberties and the lives of men, should proportion the punishment to the offence, and not teach cruelty to the people by examples of vindictive legislation.

That where public opinion does not go along with the laws, the persons who suffer under them are regarded as the victims of legislative tyranny, or judicial caprice, and not as criminals whose doom has been pronounced by the voice of dispassionate justice.

That the criminals executed in this country are selected out of a far greater number sentenced to death, and where *the practice* condemns *the law*, the law ought to be altered, that criminals might suffer the punishment of their guilt by the authority of *defined statutes*, and not by the uncertain and capricious rule of *judicial discretion*.

That in the present state of the law, juries feel extremely reluctant to convict where the penal consequences of the offence excite a conscientious horror on their minds, lest the rigorous performance of their duty as jurors should make them accessory to judicial murder. Hence in Courts of Justice, a most unnecessary and painful struggle is occasioned, by the conflict of the feelings of a *just* humanity with the sense of the obligation of an oath.

That witnesses also are very frequently reluctant to give evidence, as well as juries to convict, lest they might bring upon their consciences the stain of blood, and thus criminals who, under a more rational and considerate code of

[4] *Journals of the House of Lords* (1830–1831), Vol. 63, p. 964, and *Parl. Deb.* (1831), 3rd. Ser., Vol. 6, cols. 1174–1176. The petition was presented by the Duke of Sussex; see above, pp. 595–596.

laws, would meet the punishment due to their crimes, escape with *complete impunity*.

That for these reasons, your Petitioners humbly pray your Right Honorable House to take the Criminal Laws into your consideration, for the purpose of the *revision* and *amendment* of the same, by drawing a distinction between the simple invasion of the rights of property, and crimes of violence and blood, and by abolishing the penalty of *death* in all cases in which the Legislative power cannot justify in the eyes of GOD and man, that last and dreadful alternative—*the extermination of the offender*.

And your Petitioners will ever pray, etc.

(*Signed by the different foremen, respectively, of seven Old-Bailey Grand Juries of* 1830, *and by upwards of* 1,100 *merchants, traders, etc., who either have served, or are liable to serve as jurors.*)

APPENDIX 5

THE TABLE OF CAPITAL STATUTES IN 1839[1]

15 Geo. 2, c. 13, s. 12.—Officer or servant of the Governor and Company of the Bank of England, being intrusted with any note, bill, dividend warrant, bond, deed or any security, money or other effects belonging to the said Company, or having any bill, dividend warrant, bond, deed or any security or effects of any other person or persons lodged or deposited with the said Company, or with him as an officer or servant of the said Company, secreting, embezzling, or running away with any such note, etc., or any part of them.

12 Geo. 3, c. 24.—Within this realm, or in any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously setting on fire or burning, or otherwise destroying or causing to be set on fire, etc., or aiding, procuring, abetting or assisting in the setting on fire, etc., of any of His Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built in any of His Majesty's dock-yards, or building or repairing by contract in any private yards for the use of His Majesty, or any of His Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed or building, repairing or fitting out of ships or vessels; or any of His Majesty's military, naval or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war, is, are or shall be kept, placed or deposited.

7 & 8 Geo. 4, c. 30, s. 8.—Any persons riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolishing, pulling down or destroying or beginning to demolish, etc., any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland duly registered or recorded; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary; or any building or erection used in carrying on any trade or manufacture or any branch thereof; or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof; or any steam-engine or other engine for sinking, draining or working any mine or any staith, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine.

9 Geo. 4, c. 31, s. 3.—Being convicted of murder or of being an accessory before the fact to murder.

9 Geo. 4, c. 31, s. 15.—Buggery, committed either with mankind or with any animal.

[1] See Appendix No. 4 (pp. 8–10) to the 'Fourth Report of Her Majesty's Commissioners on Criminal Law' (1839), [168], *Parl. Papers* (Reports, 1839), Vol. 19, p. 235. Statutes relating to treasons are not included. It will be noted that only one offence against property unattended with violence carried capital punishment (15 Geo. 2, c. 13, s. 12); the three other offences against property included in the list had to be accompanied with violence against the person (7 Will. 4 & 1 Vic. c. 86, s. 2; 7 Will. 4 & 1 Vic. c. 87, s. 2; and 7 Will. 4 & 1 Vic. c. 89, s. 2).

9 Geo. 4, c. 31, s. 16.—Rape.

9 Geo. 4, c. 31, s. 17.—Unlawfully and carnally knowing and abusing any girl under the age of ten years.

7 Will. 4 & 1 Vic. c. 85, s. 2.—Administering to or causing to be taken by any person any poison or other destructive thing, or stabbing, cutting, or wounding any person, or by any means whatsoever causing to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder.

7 Will. 4 & 1 Vic. c. 86, s. 2.—Burglariously breaking and entering into any dwelling-house, and assaulting with intent to murder any person being therein, or stabbing, cutting, wounding, beating or striking any such person.

7 Will. 4 & 1 Vic. c. 87, s. 2.—Robbing any person, and. at the time of or immediately before or immediately after such robbery, stabbing, cutting, or wounding any person.

7 Will. 4 & 1 Vic. c. 88, s. 2.—With intent to commit, or at the time of or immediately before or immediately after committing, the crime of piracy in respect of any ship or vessel, assaulting with intent to murder any person being on board of or belonging to such ship or vessel, or stabbing, cutting or wounding any such person, or unlawfully doing any act by which the life of such person may be endangered.

7 Will. 4 & 1 Vic. c. 89, s. 2.—Unlawfully and maliciously setting fire to any dwelling-house, any person being therein.

7 Will. 4 & 1 Vic. c. 89, s. 4.—Unlawfully and maliciously setting fire to, casting away or in anywise destroying any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered.

7 Will. 4 & 1 Vic. c. 89, s. 5.—Unlawfully exhibiting any false light or signal with intent to bring any ship or vessel into danger, or unlawfully and maliciously doing anything tending to the immediate loss or destruction of any ship or vessel in distress.

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II

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