

JUDICIAL DISCRETION AND SENTENCING STANDARDS:
 VICTORIAN ATTEMPTS TO SOLVE A
 PERENNIAL PROBLEM *

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The following article by Sir Leon Radzinowicz and Dr. Roger Hood recounts the Victorian attempts to resolve the major criminal sentencing issues consistently recurring throughout the period. On the one hand, reformers were concerned that sentences for various crimes be imposed uniformly and reflect the relative gravity of the crime. At the same time, they felt a need to tailor the sentence to the circumstances and characteristics of the individual offender. The conflict between these concerns reflected disagreement regarding the proper purposes of criminal punishment. Rehabilitation and deterrence were each articulated as goals at various times, and each motivated particular proposals for reform. Victorian attempts to accommodate these concerns met with little success, however, perhaps because of their basic incompatibility.

The Victorian experience is of more than historical interest. Striking parallels exist between the Victorian era and the contemporary American debate on criminal sentencing; the same sorts of concerns continue to arise, and similar or identical mechanisms have been proposed as solutions.

Increasingly, the penal reform movement in the United States has focused on disparities in the quality and lengths of sentences, disparities of basically two kinds. Sentences imposed for similar crimes vary substantially, an effect of the wide discretion afforded to judges to determine, within statutory limits, the appropriate level of punishment. Although judges should tailor sentences to the circumstances of the individual offender,^a they disagree about which circumstances should be determinative and even about the purposes that punishment should serve. The various proposals to deal with this problem include judicial sentencing councils, instituted in some

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^a See *Williams v. New York*, 337 U.S. 241, 247 (1949).

areas.^b *These councils provide a forum for the exchange of sentencing information among judges. Individual trial judges thus retain discretion but are better equipped to impose sentences consistent with those imposed by other judges.*^c *Appellate review of sentences is another proposed solution.*^d *Both suggestions have analogues in the Victorian era.*

The second disparity, widely divergent statutory penalties for similar crimes, stems, at least in part, from the piecemeal evolution of sentencing practices and procedures. Criminal statutes are often historical amalgams, with crimes and sentences being adjusted as need or political pressure dictates. The result is often "utter inconsistency and irrationality of . . . penalty structure" with "little attempt to produce an integrated whole."^e *As in the Victorian period, codification is perceived as a remedy for these internal disparities. Recent proposals to revise the federal criminal code attempt to eliminate inconsistencies. The new code itself, however, may well contain similar discrepancies as a result of disagreement among the drafters and pressure from interested political groups.*

The codification movement and other contemporary sentencing reform proposals are motivated in part by the neoclassical principle of proportionality, that the severity of the punishment should be commensurate with the gravity of the offense. The Model Penal Code, for instance, suggests that sentences not be set so low as to "depreciate the seriousness of the defendant's crime."^f Similarly, others urge that penalties should closely match "the relative degrees of culpability and risk of harm represented by each offense."^g At the same time, the need to adjust sentences to individual circumstances continues to be recognized. The Model Sentencing Act, for example, explicitly provides that "persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances, and needs."^h

^b See Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 116-17 (1975).

^c R. DAWSON, *SENTENCING: THE DECISION AS TO THE TYPE, LENGTH, AND CONDITIONS OF SENTENCE* 218 (1969).

^d AMERICAN BAR ASSOCIATION, *STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* (1967).

^e Low, *Preliminary Memorandum on Sentencing Structure*, in 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1245, 1246 (1970).

^f MODEL PENAL CODE § 7.01(1)(c) (Proposed Official Draft, 1962).

^g THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 24 (1976).

^h NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *MODEL SENTENCING ACT* § 1 (1972).

As in the Victorian era, then, current sentencing reform efforts in the United States are attempts to balance the concerns of uniformity, proportionality, and individuality. The existence of conflicting goals, the lack of agreement regarding a controlling rationale for sentences, and the resulting ambivalence of the sentencing structure are characteristics of the Victorian debate reflected in contemporary American criminal justice concerns. Examination of the Victorian experience is thus helpful to an understanding of current sentencing issues and of the implications of various reform alternatives. With this objective in mind, we offer the following article.

The Editors

I. A GRAND NEOCLASSICAL DESIGN

In 1833 Commissioners were appointed

to digest into One Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also to digest into One other Statute all the Provisions of the common or unwritten Law touching the same, and to inquire and report how far it may be expedient to combine both those Statutes into One Body of the Criminal Law.¹

They were at it for fifteen years. They worked hard, and they were well paid. They produced thirteen hefty reports and many bills. Their appointment engendered much enthusiasm, but their efforts were also kept under constant and close scrutiny. They were distinguished lawyers of varied experience and accomplishments. They were Whigs and reformers. Their outlook was strongly influenced by the Benthamite creed and, like so many of their contemporaries, they believed that reform of the law, long overdue, was a political and social necessity.²

¹ *Copy of the Commission to Inquire into the Means of Improving the Law and Practice Touching the Conveyance of Real Property: And Also, Account of the Criminal Law Commissioners Who Have Resigned or Been Appointed since the Last Session of Parliament* (29), 41 HOUSE OF LORDS SESSIONAL PAPERS 223 (1847-48).

² For information on the backgrounds of the eight commissioners, see 1 *DICTIONARY OF NATIONAL BIOGRAPHY* 366-67 (1908) (Andrew Amos); *id.* 737-40 (John Austin); 10 *id.* 686-87 (David Jardine); 11 *id.* 47 (Charles Henry Bellender Ker); 18 *id.* 997-98 (Thomas Starkie); 21 *id.* 196 (William Wightman). The other two were R. V. Richards and Sir E. Ryan. The secretary was J. J. Lonsdale. John Austin, the founder of the discipline of jurisprudence in England, resigned after

The time seemed especially propitious to review and revise the structure of criminal penalties. As long as two hundred offenses carried capital punishment, nearly always mandatory, and as long as almost no account was taken of mitigating circumstances, a flexible sentencing structure based on the principle of proportionality between the gravity of crimes and the severity of punishments could hardly be said to exist. Inevitably, attempts to contract the scope of the death penalty took precedence over any schemes to reclassify offenses according to their seriousness and to devise a scale of appropriate punishments.

This protracted movement at last began bearing fruit. Building upon the endeavors of Romilly, Mackintosh, and Peel, Lord John Russell, the Home Secretary, took another step forward. By 1838 no more than eight offenses remained capital, including two of rare occurrence.³ No less significant, the total number executed was only six, a decrease from fifty-nine ten years earlier, from ninety-seven twenty years earlier.⁴ Yet the penalty structure growing up in place of capital punishment was haphazard and inconsistent and often gave the courts exceptionally wide discretion. Under an 1832 statute, for example, transportation⁵ for life was the mandatory sentence for stealing up to five pounds in a dwelling house. Yet under the Statute of 1833, when, in addition to theft, the

three years. Although he was a poor man and had no other occupation, he felt that the views of the Commission were "too narrow to enable it to effect the reforms which appeared to him to be required." Book Review, 118 EDINBURGH REV. 439, 460-61 (1863). For the commissioners' dates of appointment, tenure, remuneration, and other particulars, see *Returns Relating to Criminal and Statute Law Commissions* (210), 43 PARL. PAPERS 403 (1854-55); *Copy of All Correspondence with the Chancellor of the Exchequer or Lords of the Treasury, Previous to the 25th July 1850, Regarding the Criminal Law Commission and Digest* (305), 20 HOUSE OF LORDS SESSIONAL PAPERS 259 (1850); *Copy of the Commission to Inquire into the Means of Improving the Law and Practice Touching the Conveyance of Real Property: And Also, Account of the Criminal Law Commission Who Have Resigned or Been Appointed since the Last Session of Parliament* (29), 41 HOUSE OF LORDS SESSIONAL PAPERS 223 (1847-48).

The first three commissions (1833-45), which produced eight reports, are generally referred to as the First Criminal Law Commissioners; the fourth commission (1845-49) is referred to as the Second Criminal Law Commissioners. See C. GREAVES, *THE CRIMINAL LAW CONSOLIDATION AND AMENDMENT ACTS OF THE 24 & 25 VICT., WITH NOTES AND OBSERVATIONS* xi-xiii (London 1861).

³ 4 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 330 (1968). The two rare capital offenses were piracy and treason. *Id.* For a discussion of the role of Lord Russell in narrowing the number of capital offenses, see *id.* 316-26.

⁴ *Id.* 329-30.

⁵ Transportation was a "species of punishment consisting in [sic] removing the criminal from his country to another, . . . there to remain in exile for a prescribed period." BLACK'S LAW DICTIONARY 1670-71 (4th ed. 1951).

offense included breaking into the house, the punishment became entirely discretionary.⁶

The Criminal Law Commissioners sought to bring order to this confusion, to provide a coherent and rational approach equating the gravity of crimes and the severity of punishments. Their first report revealed their basic approach and main concerns:

For the legal definitions of offences are frequently of so large a description, and the criminal acts they include differ so widely in the mischief they occasion to society, that, without a definite scale, marking different degrees of criminality, appropriate punishments cannot be previously defined. Thus, in the instance of the offence of burglary, the punishment of death is applicable, without distinction, to a numerous class of offences, the extremes of which have little resemblance, in point of moral guilt, or the injury sustained, to each other. The consequence of which imperfection in the law is, great uncertainty in the application of punishment, whereby the motive to abstain from the commission of offences is weakened.⁷

The commissioners were utilitarians. They believed that punishments, to be effective, must deter, and they resolutely opposed the idea of suspended terror, punishment enforced only erratically by way of example. Punishment must be certain and proportionate to the gravity of crime in order to create a disincentive against committing a more serious offense. Disproportionate punishments disturbed moral distinctions which the criminal law "ought to recognise and impress . . . because nothing can be more certain, as nothing is more natural, than that neglect of moral distinctions should cause the laws to be disregarded." Penal laws "without the aid of morals" were "vain and unprofitable."⁸

Lack of certainty was also criticized as leading to arbitrary sentences "depending on the peculiar notions of policy entertained by different individuals, or their firmness and resolution of mind."⁹ Such capriciousness was not only an encouragement to take the risk of crime but also an injustice, in that an offender did not know the penal consequences of his action. Injustice existed unless the aggra-

⁶ *First Report from His Majesty's Commissioners on Criminal Law* (537), 26 PARL. PAPERS 105, 153 (1834) [hereinafter cited as *First Report*].

⁷ *Id.* 152.

⁸ *Seventh Report of Her Majesty's Commissioners on Criminal Law* (448), 19 PARL. PAPERS 1, 8-9 (1843) [hereinafter cited as *Seventh Report*].

⁹ *Second Report of His Majesty's Commissioners on Criminal Law* (343), 36 PARL. PAPERS 183, 211 (1836) [hereinafter cited as *Second Report*].

vations taken into account by courts in sentencing were defined by law. As the commissioners graphically put it: "the malefactor is not only without notice of the intention to prove the circumstances which operate in aggravation, but is without warning that they will be regarded as aggravations."¹⁰ This absence of notice contravened the "ancient and well-known rule of Law that a man shall not be punished for a crime which is not clearly alleged against him on the record."¹¹ Particularly unjust were penalties dependent not on aggravations incident to the offense itself, but partly on what the commissioners called "collateral considerations," circumstances independent of the principal crime and even of the offender's previous conduct. These considerations included other misconduct, solicitations of prosecutors, and the number of executions in the same circuit.¹² Although these principles, expounded primarily in their second report, were directed particularly at capital punishment, the commissioners went out of their way to indicate that they extended to all offenses and grades of punishment: "Such inferior punishments are applied indiscriminately, are often disproportionate to the offences in respect of which they are inflicted, unsystematic, and frequently of a description ill adapted to the effectual prevention of crime."¹³

In contrast to the doctrine of discretionary selection, the commissioners propounded the doctrine of defined aggravations. "The scarcity of distinctions defining the gradations of guilt and annexing commensurate penalties constitutes a remarkable characteristic of the Criminal Law of this country. Crimes bearing little moral resemblance to each other, are, by sweeping definitions, frequently classed together without discrimination as to penal consequences."¹⁴ They cited the law of theft as particularly illustrative:

If three men, acting in concert, break open a building [not being a dwelling house, etc.], and steal property to the amount of a thousand pounds, or the same number of persons, by means of an artful stratagem, in which each acts his part, contrive to get possession of and steal property to the same amount, the offence in each of these cases would be the same, and the penalty the same as in the case of a boy who stole an apple from a stall. The difference in the

¹⁰ *Seventh Report*, *supra* note 8, at 103.

¹¹ *Second Report*, *supra* note 9, at 212-13.

¹² *Id.* 211-12.

¹³ *Id.* 220.

¹⁴ *Id.* 205.

forcible or fraudulent means used, the union of numbers, and the greater value of the property stolen, would in point of law and legal consequences be utterly disregarded. It appears to us to be impolitic and dangerous that offences of so widely different a character should be treated as legally identical, and that great risk is incurred lest wrongdoers should regard such offences to be as undistinguishable in point of morals as they are in law; each of the aggravations which we have suggested seems to be sufficient in degree, and to admit of a sufficiently accurate and distinct definition to warrant corresponding gradations of punishment.¹⁵

Anticipating the spread of summary jurisdiction, they remarked on that "great mischief [which] results from pursuing the technical definition of the crime too far, and subjecting offenders to the same mode of procedure, who must ultimately be visited by punishments differing as widely as their offenses do in point of real magnitude and atrocity."¹⁶

On reading the Commissioners' reports, one is struck by the affinity between the ideas of Cesare Beccaria¹⁷ and their own. Indeed, they were rather proud to acknowledge their debt to him. Their penal doctrine was, in this sense, an English adaptation of classicism. They were classicists in their unadulterated belief in free will and the unfettered choice individuals exercise in deciding whether or not to commit crime or crimes of different gravity. They were classicists in their emphasis on deterrence as the primary purpose of penal sanctions. They were classicists in acknowledging that deterrence, in order to be effective, must be related as closely as possible to degrees and shades of guilt. They were classicists in their opposition to excessive punishment and their insistence that punishment reflect the moral turpitude of misdeeds. They also believed in speedy enforcement, though always according to the rule of law. And they, like Beccaria, felt that all these qualities could be blended together only within the framework of a codified law.

In contrast to Beccaria, and perhaps because of the English disposition grounded in the common law tradition that room should

¹⁵ *Seventh Report*, *supra* note 8, at 102.

¹⁶ *Second Report*, *supra* note 9, at 221.

¹⁷ The principle that severity of punishment should be commensurate with the seriousness of the crime was emphasized in C. BECCARIA, *OF CRIMES AND PUNISHMENTS* (H. Paolucci trans. 1963) (Tuscany 1764).

always be left to accommodate the peculiarities of individual cases, the Commissioners wished to "confine the mischief within the narrowest practical limits . . . by the constitution of limits sufficiently adapted to the extremes, leaving the various innumerable intermediate cases which cannot be provided for by any set definitions, to the exercise of judicial discretion."¹⁸ They were much less confident than Beccaria that all relevant circumstances and aggravations could be expressed adequately in legal precepts. They believed it "quite impossible, with human language as our vehicle and human conduct for our subject, to lay down any rule to be invariably observed."¹⁹ Again in contrast to Beccaria, the factors they were willing to take into account in distinguishing among gradations of crime, shades of guilt, and choices of punishment included a number of the offender's subjective characteristics, which Beccaria would have rejected as likely to lead to bias and inequality. In this sense, the approach of the Commissioners came closer to that of Jeremy Bentham.²⁰ They were English utilitarians and not orthodox continental classicists.

It was easier to advocate in broad terms a rational scheme for classifying and equating crimes and punishments than it was to lay down a workable and acceptable statutory scheme. The Commissioners set about it cautiously, especially because they recognized that no set formula could be used to determine the nature and amount of punishment appropriate for any specific offense. It was a matter of "positive law," meaning whatever was regarded as good for society at the time. Their first attempt grouped all crimes into four classes only, each with its own punishments:

That the first should consist of such as were capital, in accordance with the principles already considered:

That the second should be punishable with imprisonment for a term of 10 years or more, or transportation for life; and should include Burglaries, Robberies, Arson, Rape, (if it should cease to be capital), together with other offences not capital, but committed under such defined circumstances of aggravation as might render them worthy of the punishment second in degree:

That those of the third class should be punishable by imprisonment for a term not exceeding ten years, nor less than

¹⁸ *Seventh Report*, *supra* note 8, at 98.

¹⁹ See 4 RADZINOWICZ, *supra* note 3, at 315.

²⁰ On the subjective aspects of Bentham's penal doctrine, not always sufficiently appreciated, see 1 *id.* 370-73.

two years, or by transportation not exceeding fourteen years, nor less than seven years; and should consist chiefly of ordinary burglaries and robberies (exclusive of those which are such by mere construction), together with theft aggravated by its extent, the time and place of its commission, the number concerned in committing it, their relation to the prosecutor, or such other defined circumstances of aggravation as might render it worthy of the punishment third in degree:

That those of the fourth class should be punishable by imprisonment not exceeding two years, transportation not exceeding seven years, or fine; and should consist of simple thefts, and of offences not included in any of the three preceding classes:

That with regard to any such of the above-mentioned offences as should be made punishable with imprisonment, solitary confinement and hard labour might be added to the punishment, according to definite rules.²¹

Each category specified only two alternative types of penalty. Judicial discretion was reduced further because, in two of the classes, the penalty had to fall between a maximum and a minimum.

In the Commissioners' fourth report, the four classes became fifteen, each providing a maximum penalty but not a minimum, ranging from death through three different lengths of transportation, five lengths of imprisonment, to five maxima of fines. The greater differentiation among the grades of crime demanded a greater differentiation among penalties: "When the definitions of crimes are completed, it will be necessary to consider the classes of punishment with the most scrupulous care, in order to ensure the consistency of the whole system; but this must, for obvious reasons, be one of the last operations to be performed."²²

The Commissioners realized already that aggravations of one offense producing the gravest results might be less important or nonexistent in others. The very attempt at exact definition could produce fresh difficulties. An effort to clarify the Commissioners' phrase "robbery when accompanied by stabbing, cutting or wounding" by adding "at the time of or immediately before or immediately after such robbery" brought down criticism from the Commissioners themselves, who doubted whether "immediately before" or

²¹ *Second Report*, *supra* note 9, at 223.

²² *Fourth Report of Her Majesty's Commissioners on Criminal Law* (168), 19 PARL. PAPERS 235, 251 (1839) [hereinafter cited as *Fourth Report*].

“immediately after” sufficiently connected the assault with the robbery. A judge observed that the terms were “of large construction, and . . . not of any signification.” Particularly difficult was the problem of defining aggravations as narrowly as possible and yet avoiding loopholes which might allow particularly atrocious offenders to escape. The Act dealing with attempts to murder furnished good examples. Was there any logical justification for the distinction between attempts to kill by poison, stabbing, cutting, or wounding, which were made capital however slight the injury, and attempts to kill by other means, which were capital only if causing injury dangerous to life? As the Commissioners did not fail to point out later, a person who, with murderous intent, struck another with a bludgeon and fractured his arm was not subject to capital punishment (providing the fracture was not dangerous to life), whereas a person who, with the same intention, inflicted the most trifling cut or wound on the victim’s arm was guilty of a capital crime.²³

The Commissioners originally had acknowledged that no more than twenty classes of penalty should ever exist, but by their seventh report their scale had been stretched to forty-five. This elongated scale of possible sentences extended from death by hanging and quartering at one end to a forty-pound fine at the other. In between, the discretion allowed to judges within each class of punishment was further narrowed. Sometimes the punishment was restricted between a maximum and minimum term, sometimes only a maximum was established, and sometimes the sentence was mandatory. For example, the ninth class of punishment was

Transportation for any term not exceeding fifteen, nor less than seven years, or imprisonment for any term not exceeding three years nor less than one year. The 26th class was imprisonment for any term not exceeding two years; 28th class, imprisonment for the term of one year; 43rd class, fine of £500.²⁴

Once the Commissioners started to break down the broad legal definitions of offenses into variations according to degrees of gravity and shades of moral guilt, all of which should be met by different penalties, they were inescapably driven to this expansion. Their desire to restrict judicial discretion to its narrowest limits acted as a

²³ *Id.* 277, 279.

²⁴ *Seventh Report*, *supra* note 8, at 283-87.

further impetus in this direction. All this was the inevitable consequence and flaw of a consistently applied classical approach.

In 1845 a new commission was appointed to review the work of the previous Commissioners. The new Commissioners were obviously ambivalent about so detailed and rigid a scale of penalties; they reduced it to thirteen in one report,²⁵ only to increase it to thirty-one in another.²⁶ Their fourth report contained the *Draft of a Bill for Consolidating and Amending the Criminal Law of England, so Far as Relates to the Definition of Indictable Offences, and the Punishment Thereof*.²⁷ This document embodied the final formulation of their views on the sentencing structure and marked a retreat from the extreme position of their predecessors. The new Commissioners compressed the forty-five classes into eighteen, partly by the simple expedient of eliminating those classes of punishment that had been affixed to single offenses sufficiently indistinguishable to merit their own mode of punishment. These were grouped with offenses of similar gravity and subjected to the same class of punishment. More significantly, the Commissioners conceded that the courts should have a wider discretionary power, and therefore abolished those classes of punishment that were mandatory and many of those that fixed the penalty between a maximum and a minimum. These they fused into fewer, broader classes.²⁸

The Commissioners did not depart from the fundamental premise that aggravations that would justify greater punishment must be defined by law. Again, theft provides a handy illustration. Upon conviction, punishment of the twelfth class was required—imprisonment for a term not exceeding two years, a fine imposed at the discretion of the court, or both. Article 27 listed four aggravations:

Whosoever shall commit any theft attended with any one of the following aggravations, viz.—

1st. With the violation of any repository or place of security, that is to say, with the breaking into or opening of any chest, drawer, box or other repository containing the thing stolen; or with an entry into any building, court-

²⁵ *Second Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law* (709), 24 PARL. PAPERS 107, 153-55 (1846).

²⁶ *Third Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law* (830), 15 PARL. PAPERS 1, 86-89 (1847).

²⁷ *Fourth Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law* (940), 27 PARL. PAPERS 1, 66-70 (1848).

²⁸ *Id.* In abolishing minimum terms of imprisonment, the commissioners followed 9 & 10 Vict., c. 24 (1846).

yard or other inclosed place where the thing so stolen is deposited, otherwise than by the ordinary doorway, gateway or entrance, the same being open; or with the breaking, severing, unloosing or removing of any artificial fastening, tie or impediment intended to protect or secure the thing stolen.

2nd. The thing stolen being upon the person or any other party.

3rd. Acting in concert with any accomplice.

4th. The thing stolen being of the value of £1 or more.

Anyone convicted of theft accompanied by one of these aggravating circumstances would be subject to the penalties in the tenth class—transportation for seven years, or imprisonment for a term not exceeding three years. If the theft were accompanied by either the first or second aggravation or by the third or fourth, the penalty would be in the eighth class—transportation for a term between seven and ten years, or imprisonment for a term not exceeding three years. If either the first or second aggravation were combined with both the third and fourth, the penalty would be in the seventh class—transportation for a term between seven and fifteen years, or imprisonment for a term not exceeding three years.²⁹

While the more aggravated species of theft were marked, therefore, by higher maximum periods of transportation, the discretion left to the courts was sufficient not to compel them to punish them differently. Indeed, the alternative period of imprisonment was the same for all aggravated classes of theft. In attaching less specific penalties to each aggravated form of crime, the Commissioners moved towards a more flexible and individual approach to punishment, what in modern terminology would be called a neoclassical position. The severity of crimes was marked by differing maximum punishments, but judicial discretion was no longer so constrained by statutory minima.

II. CODIFICATION—NOT AN ANSWER

The Commissioners' approach to the question of punishment was inextricably bound up with the form of their Code. Consequently, no progress towards the reform of sentencing could be made until and unless the Code was accepted. As long as the Commissioners were engaged in developing the foundation neces-

²⁹ *Fourth Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law* (940), 27 PARL. PAPERS 1, 182 (1848).

sary to restrict capital punishment along the lines desired by Lord John Russell, they could count on parliamentary support. Much sympathy also existed for their views on the jumble of inconsistent and illogical periods of transportation and imprisonment. The Commissioners would have reduced the fifty-five variations³⁰ to seven distinct classes of penalties. They would also have preferred to make one continuous scale of punishment by closing the schism between the shortest periods of transportation and the longest terms of imprisonment, the alternative sentence.³¹

When they turned to the essence of their task and began to digest and codify the criminal laws, however, suspicion, criticism, and outright hostility mounted, ultimately bringing their venture to nought. The first manifestation was a begrudging attitude towards the remuneration of the Commissioners for their expenses and time.³² A more fundamental criticism, based on constitutional and practical grounds, was that the reconstruction of criminal laws was the responsibility of the government and Parliament and should not be the product of an ad hoc committee of experts. A coherent code could not, however, emerge from the parliamentary process; the magnitude of the task was too great, and the procedure of debating a code clause by clause would destroy the necessary consistency. Those who favored codification always cited the Code Napoléon as a splendid example of what could be achieved. Those who opposed codification counterattacked that such a code could only be produced by a group of legal technicians responsible solely to a powerful emperor, a notion completely foreign to England's political climate and legal traditions. They also emphasized that one of the primary purposes of codification in France and Germany, unification of the legal structure of the various provinces, was not present in England. Despite a large measure of support for con-

³⁰ In some of these variations, the period of transportation or imprisonment was mandatory; others had minimum periods, though of differing lengths, and some had no minima. Sometimes no alternative term of imprisonment was provided. Where one was, the maximum varied from two to six years; at times, a minimum was set, and an alternative penalty of whipping or fines was occasionally established. For one of the many criticisms of this inconsistency, see *Defects of the Criminal Law*, 28 LAW MAGAZINE (1st ser.) 1, 23-25 (1842).

³¹ *The Seventh Criminal Law Report*, 30 LAW MAGAZINE (1st ser.) 1 (1843); *Fourth Criminal Law Report*, 22 LAW MAGAZINE (1st ser.) 1 (1839).

³² See 44 PARL. DEB. (3d ser.) 445-46 (1838); 38 PARL. DEB. (3d ser.) 1489-90 (1837); 37 PARL. DEB. (3d ser.) 72-75 (1837); 36 PARL. DEB. (3d ser.) 89-90 (1837); 29 PARL. DEB. (3d ser.) 424-26 (1835). Colonel Sibthorp claimed that 49 commissions existed with 367 paid commissioners, clerks, etc. The total expense amounted to over £562,000. 38 PARL. DEB. (3d ser.) 1489-90 (1837); 44 *id.* 445-50 (1838). See *A Return of All the Commissions That Have Been Issued from November 1830 to the Present Period* (528), 37 PARL. PAPERS 491, 503 (1836).

solidation of the enormous number of statutes relating to criminal matters, antagonism towards the attempt to fuse the common law and the statutory law into a written code was formidable.

Furthermore, so intense was dissatisfaction with many details of the Commissioners' draft that despair set in as to the possibility of ever securing agreement on the final wording. While sympathy was growing for a more rational and certain system of punishments, it is questionable whether much support existed for the elimination of the common law. Codification, a natural product of Benthamite thought, was taken from roots in India. It originated from a belief in the social utility of an orderly, symmetrical arrangement of written, and hence known and easily ascertainable, laws. It was not the product of social grievance or social struggle. It was a more remote, more intellectual, vision of things and, as such, it is doubtful whether it ever made much public impact. The fact that criminal codes were characteristic of foreign countries made the insular British look upon them with more suspicion.

It was pathetic to see how few supported the endeavors of the Commissioners after so many years of labor. Lord Brougham, who had promoted the Commission, almost alone remained loyal to the enterprise.³³ His great involvement made his support appear partisan, however, and he was becoming a doubtful ally—old, bombastic, repetitive, and carrying less and less political influence. The characteristic remark about him, no doubt unkind, yet containing an element of truth, was that “if he had known a little law, he would have known a little of everything.”

From the moment in 1848 that Lord Brougham introduced the Commissioners' draft code as a bill, it obviously had no chance to succeed. At every stage, obstacles were thrown in its path. One argument was that enactment of the whole code was impracticable and that it should be brought forward piecemeal: first a bill concerning offenses against the person, then others covering larceny, burglary, malicious injuries, and other crimes. Moreover, the bills were referred to select committees of the House of Lords, resulting in further delays. For example, the Committee on the Offences against the Person Bill sat eleven times before the end of the Parliament of 1853 without completing its task. Again in 1854, a select

³³ For Brougham's involvement with the cause of the Commissioners, see LORD BROUGHAM, *LETTERS ON LAW REFORM TO THE RIGHT HONOURABLE SIR J.R.C. GRAHAM, M.P. SECRETARY OF STATE FOR THE STATE DEPARTMENT* 11-12 (3d ed. London 1843); see also his many speeches in Parliament, e.g., 131 *PARL. DEB.* (3d ser.) 346 (1854); 120 *id.* 343 (1852); 116 *id.* 122 (1851); 113 *id.* 954 (1850); 71 *id.* 953 (1843).

committee, "in despair, having got no further than the eighth or ninth proposition," was forced to abandon the effort as "beyond the reach of man."³⁴

The final blow came in 1854 when Lord Cranworth, the Lord Chancellor, sent the Offences against the Person Bill and the Larceny Bill to the judges for their comments, primarily on whether "they consider[ed] that the bringing the whole criminal law, as far as relates to offenses and their punishments, into one or more statute or statutes . . . would be a measure likely to produce benefit in the administration of criminal justice, or the reverse."³⁵ No other document expresses more emphatically the judiciary's deep and uncompromising hostility towards the very idea of codification. One cannot help feeling that the Lord Chancellor got the replies he had hoped for. Some of the specific criticisms of the details of the draft bills were no doubt correct, but most were pedantic and trivial. With respect to the very principle of codification, the judges could not have been more intransigent, more unequivocal, in their denunciation. "It [would be] practically impossible to frame and carry such a measure through Parliament,"³⁶ and, even if possible, "the law would be altered after two or three Sessions, and the code would thus become imperfect," said Chief Justice Jervis.³⁷ Nor did he find any advantage in preparing codes of part of the law; for him it had to be the whole law or nothing. Chief Baron Pollock called the repeal of common law implicit in the bill "quite uncalled for, inexpedient, and . . . [likely to] prove mischievous."³⁸ Far from bringing certainty to the law, codification would, he claimed, "furnish great room for doubt and uncertainty, which at present does not exist; . . . the abolition of the common law (a very serious and grave matter) might be productive of very dangerous consequences."³⁹

The very elasticity of the common law was regarded as its great advantage. As Baron Alderson noted:

It seems to me to be a very unwise thing to abolish the common law principles of decision, which can accommo-

³⁴ 140 PARL. DEB. (3d ser.) 718, 734, 723 (1856) (remarks of Sir Fitzroy Kelly).

³⁵ *Copies of the Lord Chancellor's Letters to the Judges, and of Their Answers, Respecting the Criminal Law Bills of the Last Session* (303), 53 PARL. PAPERS 389 (1854).

³⁶ *Id.* 393 (remarks of Jervis, J.).

³⁷ *Id.*

³⁸ *Id.* 394 (remarks of Pollock, C.B.).

³⁹ *Id.*

date themselves to the varying circumstances of the times, and thus, as it were, to stereotype them by Act of Parliament in verbal definitions, *many of them inaccurate*. This will leave the courts only to construe precise words, instead of adapting old principles to new cases as they arise.⁴⁰

Nor did the judges agree that a code would make the law more intelligible to laymen. "I cannot imagine any mode of framing it less calculated to effect that object," said Mr. Justice Cresswell.⁴¹ In sum, the bill was called not only "inexpedient,"⁴² but also "pernicious,"⁴³ likely to "create a mischief,"⁴⁴ and "worse than useless."⁴⁵

In his *History of the English Criminal Law*, Sir James Fitzjames Stephen called the English judges "the most authoritative body of judges known to history. In no other country has a small number of judges exercised over a country anything like so extensive and compact the undisputed power of interpreting written and declaring unwritten law, in a manner generally recognised as of conclusive authority."⁴⁶ With the uncompromising hostility of the judges to the proposed code, all hopes of arriving at a systematic scale of punishments were lost.

Despite a spirited and skilled reply by Greaves and Lonsdale, the barristers who had prepared the bills, the issue remained closed. The verdict was confirmed by the blunt statement of the influential Select Committee of the House of Lords: "The Committee are of opinion that it is inexpedient at present to press forward any Digest, except that of Statute Law, . . . on every account the step first to be made."⁴⁷ A commission was set up to consolidate all kinds of statutory law, and criminal law reform was thus pushed onto a different and narrower track. Greaves, as a member of the Statute Law Commission, tried to save from the wreckage whatever he could and whatever appeared to have a reasonable chance of adoption. The Punishment Bill of 1859, an attempt to consolidate

⁴⁰ *Id.* 397 (remarks of Alderson, B.) (emphasis in original).

⁴¹ *Id.* 409 (remarks of Cresswell, J.).

⁴² *Id.* 416 (remarks of Platt, J.).

⁴³ *Id.* 411, 415 (remarks of Erle, J.).

⁴⁴ *Id.* 8 (remarks of Parke, B.).

⁴⁵ *Id.* 399 (remarks of Alderson, B.).

⁴⁶ 3 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 355 (1883) [hereinafter cited as *HISTORY OF THE CRIMINAL LAW*].

⁴⁷ Report from the *Select Committee of the House of Lords to Consider the Nine Criminal Law Bills* (339), 21 HOUSE OF LORDS SESSIONAL PAPERS 1 (1854).

all punishments in one statute and to introduce a scale of penalties along the lines suggested by the Commissioners, was no sooner introduced than it was thrown out.⁴⁸ Following were a series of bills, dealing separately with offenses against the person, larceny, malicious damage, and other subjects and eventually leading to the Consolidation Acts of 1861.⁴⁹

The Offences Against the Person Act of 1861 is memorable because it marks a stage lasting over a hundred years in the movement for the abolition of capital punishment. The death penalty was abolished for attempted murder and some other serious crimes, leaving it in effect only for murder and high treason.⁵⁰ Otherwise, no major changes in the sentencing structure were accomplished. The maxima remained as inconsistent as ever. In vain Greaves lamented:

The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establishing any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences.⁵¹

Likewise, the discretionary powers of the courts remained as wide as ever. Parliament had set its face against the grand design.⁵²

Only one further attempt was made to resurrect the Code, this time, seemingly, with every prospect of success. The new optimism rested largely on the proven achievements of codification in India and on the skill and enthusiasm of Sir James Fitzjames Stephen. His *Digest of the Criminal Law*⁵³ had, said the Attorney General, Sir John Holker, "demonstrated the possibility of reducing, at all events, one most complicated branch of the law—I mean the crim-

⁴⁸ *Punishment: A Bill to Consolidate and Amend the Statute Law Relating to the Punishment of Offenders* (Bill 26), 2 PARL. PAPERS 245 (1859).

⁴⁹ GREAVES, *supra* note 2, at xxxi-lxii. See D. THOMAS, *THE PENAL EQUATION* 37-42 (1978).

⁵⁰ An Act to Consolidate and Amend the Statute Law of England and Ireland Relating to Offences Against the Person 24 & 25 Vict., c. 100 (1861). See 4 RADZINOWICZ, *supra* note 3, at 341-43.

⁵¹ GREAVES, *supra* note 2, at xlvi.

⁵² To trace the development of the parliamentary debates on the consolidation bills, see 164 PARL. DEB. (3d ser.) 370-74 (1861); 163 *id.* 1376-78, 930-34, 470; 161 *id.* 439-48; 160 *id.* 893-95 (1860); 159 *id.* 270-80; 158 *id.* 1200-04, 998-1001, 746-48; 156 *id.* 564-65, 253-55.

⁵³ J. STEPHEN, *A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS)* (1877).

inal law—into not only a reasonable, but an exceedingly narrow compass, and of rendering it easy of comprehension and perfectly intelligible.”⁵⁴

In 1878, the Conservative government entrusted Stephen with the task of preparing a bill. Hopes were raised further by the warm reception the project received in the *Law Magazine*,⁵⁵ the *Times*,⁵⁶ and *Law Times*,⁵⁷ at the National Association for the Promotion of Social Science,⁵⁸ and even by the Trade Union Congress.⁵⁹ The bill, instead of being subjected to the cumbersome processes of a parliamentary select committee, was remitted to a small and expert Royal Commission, another good omen. Lord Blackburn, the Chairman, was joined by Mr. Justice Lush, Sir James Stephen, and later Mr. Justice Barry. By involving judges at such a vital stage and thereby giving them a stake in the bill's success, it seemed that essential judicial goodwill might be secured.

The main aims of the bill, according to the Attorney General, were to make “punishment in all cases . . . proportionate to the guilt of the offender, and . . . fixed upon some reasonable and intelligible principle,” to abolish minimum punishments, and thus to extend the discretion of judges, enabling them “upon their view of the circumstances, to mitigate the punishment almost to any extent.”⁶⁰

Stephen's draft bill, by condensing so much of the law, succeeded in reducing the bewildering variety of maximum punishments laid down by statute and aimed to reduce many other anomalies through the abolition of the distinction between felonies and misdemeanors. The bill offered no radical review of maxima, however, merely a change here and there. Although some trivial offenses were to have lower maxima, more frequently penalties were increased for offenses formerly punished only mildly. Only to a limited extent did Sir James attempt to follow the earlier Commissioners in relating penalties more precisely to aggravating circumstances. For offenses against property he proposed varying the

⁵⁴ 239 PARL. DEB. (3d ser.) 1936, 1937 (1878).

⁵⁵ Mosely, *The New Criminal Code*, 4 LAW MAGAZINE & REV. (4th ser.) 31 (1878).

⁵⁶ *The Times* (London), Apr. 4, 1879, at 7, col. 4; *id.* July 10, 1878, at 9, col. 5.

⁵⁷ 65 LAW TIMES 80 (1878).

⁵⁸ Norton, *Opening Address*, 1878 TRANSACTIONS NAT'L ASS'N PROMOTION SOC. SCI. 12 [hereinafter cited as TRANSACTIONS].

⁵⁹ The Trade Union response was no doubt influenced by Stephen's lecture to the congress in February, 1877. See *A Penal Code*, 27 FORT. REV. 362 (1877).

⁶⁰ 239 PARL. DEB. (3d ser.) 1943 (1878) (remarks of Sir John Holker).

maxima according to the value of the property stolen, the characteristics of the offender, the locale of the crime, and the manner of committing the offense. Nevertheless, the overriding objective was to expand rather than confine judicial discretion. The courts were to be given wider powers by increasing alternatives to imprisonment at the lower end of the scale and, at the upper end, by allowing conversion of consecutive sentences of imprisonment into long terms of penal servitude.⁶¹

The Royal Commission's report revealed a few compromises and additions. Abandoning the attempt to relate maxima to the value of the stolen goods, they stated boldly, "it had been thought better that the legal limit of punishment ought not to depend on the mere value of [that] property."⁶² They recommended that the existing law of 1861 remain unaltered. When the bill, as revised by the Commissioners, was again presented to Parliament in 1879, the response was distinctly discouraging. As in the 1840's, members insisted that the House should not entrust legislation to commissioners but should "go clause by clause through the Bill, and examine its minutest details."⁶³ They then attacked the report for not reducing the maxima, for accepting the status quo too blindly, for giving too much discretion to inflict corporal punishment—indeed, for giving altogether excessive discretion to the judges,⁶⁴ a criticism repeated by *The Times*.⁶⁵

The bill might have weathered these objections, however, had not history repeated itself. A letter from Lord Chief Justice Cockburn claimed that he was still a firm believer in the expediency of a code; yet his response as a whole belied it.⁶⁶ He picked holes, mostly of an irritating, minor kind, in the provisions regarding punishment, and he sunk the project by insisting that the omission from the bill of offenses punishable on summary conviction was a

⁶¹ *Memorandum by Sir James Stephen, Showing the Alterations Proposed to Be Made in the Existing Law by the Criminal Code, if Amended, as Proposed by the Attorney General* (276), 63 PARL. PAPERS 159 (1878); *Criminal Code (Indictable Offences) Bill*, 2 PARL. PAPERS 5 (1878). See Mosely, *supra* note 55, at 31.

⁶² *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (2345), 20 PARL. PAPERS 169, 196-97 (1878-79).

⁶³ *Criminal Code (Indictable Offences) Bill*, 246 PARL. DEB. (3d ser.) 310, 325 (1879).

⁶⁴ *Criminal Code (Indictable Offences) Bill*, 246 PARL. DEB. (3d ser.) 1750, 1752 (1879).

⁶⁵ *The Times* (London), Apr. 19, 1879, at 11, col. 4.

⁶⁶ *Copy of Letter from the Lord Chief Justice of England, Dated the 12th Day of June 1879, Containing Comments and Suggestions in Relation to the Criminal Code (Indictable Offences) Bill* (232), 59 PARL. PAPERS 233 (1878-79).

radical defect. He noted that "what is wanted is a consolidation or code of law relating to crimes, no matter what may be the method of proceeding applicable to them."⁶⁷ Ironically, Stephen himself had claimed that summary offenses touched upon "ordinary life at an infinitely greater number of points than the more serious offences," and thus should be codified.⁶⁸ The Attorney General, who had excluded summary offenses on tactical grounds in order to get the bill through Parliament,⁶⁹ was thwarted by a Lord Chief Justice who believed that, if codification could not be carried out fully, it ought not be carried out at all.⁷⁰

Yet even if Stephen's Code had been accepted, the problem of constraining and guiding judges to achieve some uniformity in sentencing would have remained as acute as ever.

III. THE GROWING INVENTORY OF DISPARITIES

The anomalies, inconsistencies, and disparities in sentencing remained a stark reality. High Court judges were singled out for stricture. The sentencing practices of Mr. Baron Gurney and Mr. Justice Maule, for example, were so different that they "formed distinct codes of criminal jurisprudence." Mr. Baron Platt was criticized for lenient sentencing, for establishing his own "economy of punishment." Justice, it was said, was "less a matter of principle than a lottery." The magistrates were criticized even more severely: "what must be the inevitable consequences, when offenders are tried by numerous, fluctuating and consequently irresponsible body of men, who grow turnips, preserve pheasants and have stacks of corn and flocks of sheep of their own?"⁷¹ Comparing the sentences passed at the Old Bailey by Sir Forrest Fulton, the Common Serjeant, and those passed by Sir Henry Hawkins and Sir J. Matthew, *The Whitehall Review* claimed, "for precisely the same offences for which the Common Serjeant every session metes out sen-

⁶⁷ *Id.* 233-45.

⁶⁸ Stephen, *Suggestions as to the Reform of the Criminal Law*, 2 NINETEENTH CENTURY 737, 737 (1877).

⁶⁹ *Criminal Code (Indictable Offences) Bill*, 239 PARL. DEB. (3d ser.) 1936, 1940 (1878) (remarks of Sir John Holker).

⁷⁰ *Criminal Code (Indictable Offences) Bill—Question*, 247 PARL. DEB. (3d ser.) 1281 (1879).

⁷¹ *The Seventh Criminal Law Report*, 30 LAW MAGAZINE (1st ser.) 1, 46, 47 (1843). See *Crimes and Criminals*, 42 LAW MAGAZINE (1st ser.) 1 (1849); *Criminal Law Reform*, 33 LAW MAGAZINE (1st ser.) 87 (1845). See also *Penal Discipline and Remedies for Crime*, 43 LAW MAGAZINE (1st ser.) 19 (1849). This article suggests that "the judicial corps . . . adopt a standard of sentences, so that gross disparities should be thenceforth avoided." *Id.* 99.

tences of fourteen years, and occasionally the cat in addition, the other Judges are giving only from twelves months' to five years' imprisonment." ⁷² This was no exaggeration; in 1895 Asquith, when Home Secretary, noted that "[t]he flagrant inequality of the present system is nowhere more strikingly exhibited than at the Central Criminal Court." Consequently, he reduced one sentence from fourteen years to eight, two sentences of ten years to five, and another of eight years to three.⁷³

Complaints centered around two main issues. The first was "the reprehensible leniency with which so many offenses against the person are punished, and the needless, . . . absurd severity with which those against property are punished."⁷⁴ This criticism was directed not so much against the penalties set down by law but against the view taken by the courts, especially magistrates' courts and quarter sessions. Some magistrates, said William Reade, "appear to think two or three pounds a heavy punishment for savage assault, while they adjudicate constantly on petty larceny by giving the full sentence of imprisonment under the Criminal Justice Act."⁷⁵ In three consecutive editorials, *The Times* pressed for more severe penalties for violence, to be imposed by higher courts and not by summary jurisdiction.⁷⁶ They praised the sentences of twenty years' penal servitude imposed by Mr. Justice Mellor on the Northern Assize and criticized the much more lenient sentences handed down by Baron Cleasby.⁷⁷

A similar concern was voiced in Parliament, sometimes about the lenient sentences imposed for wife beating,⁷⁸ sometimes about

⁷² *The Way of Escape by Death*, THE WHITEHALL REV., Jan. 26, 1895, at 5; see Sir Forrest Fulton's Sentences, THE WHITEHALL REV. May 4, 1895, at 13.

⁷³ Asquith's Memorandum of 25 March 1895, reprinted in *Inequality of Duration of Prison Sentences for Similar Offences*, Home Office Memorandum [H.O.] 45/9699/A50087/10 (1889-98). See S. CAVE, ON THE DISTINCTIVE PRINCIPLES OF PUNISHMENT AND REFORMATION 4 (London 1857).

⁷⁴ Reade, *Punishment of Crimes of Violence*, 23 LAW MAGAZINE & L. REV. (2d ser.) 95, 96 (1867). Note also Barwick Baker's comment that "public opinion was content that the knocking down of an old man and kicking him about the head and face till he was insensible should be met by two months' imprisonment, while the stealing 1 £ worth of goods from a shop would entail a three months' sentence." T. BAKER, *What Better Measures can be Adopted to Prevent Crimes of Violence Against the Person*, in WAR WITH CRIME 19, 20 (1889).

⁷⁵ Baker, *supra* note 79, at 35.

⁷⁶ *The Times* (London), Dec. 14, 1874, at 9, col. 3-4. See *id.*, Jan. 11, 1875, at 9, col. 4; *id.*, Oct. 24, 1874, at 9, col. 3.

⁷⁷ *The Times* (London), Dec. 14, 1874, at 9, col. 3-4.

⁷⁸ *Criminal Law—Assaults Upon Women and Children—Legislation*, 257 PARL. DEB. (3d ser.) 1025 (1881); *Criminal Law—Assaults on Women—Resolution*, 219 PARL. DEB. (3d ser.) 396 (1874).

harsh sentences on housebreakers and petty thieves and lengthy terms of ten or twenty years for persistent thieves.⁷⁹ The Home Secretary was asked to remit two sentences of ten years' penal servitude, one for stealing a purse containing two shillings and four pence, the other for stealing an overcoat.⁸⁰ Likewise, at Liverpool Assizes "persons charged with small offences [had] been sentenced to seven years' penal servitude for stealing a coat."⁸¹ In contrast, the Home Secretary was asked about a man named Lowe sentenced to twelve months' imprisonment "for brutally assaulting and stabbing and then robbing a lady walking in a field in the neighborhood of her residence. . . . [S]he was seized by the throat, knocked down, and violently assaulted, and when she resisted, a knife was used, and after being seriously stabbed in two places, she was robbed of £4 or £5."⁸² Referring to a number of cases illustrating the inequality among sentences, a resolution was introduced in the Commons:

That the administration of the law in cases of outrage upon the person has long been a reproach to our Criminal Courts. That outrages and assaults of the most brutal character, especially upon married women, even when they cause a cruel death, are commonly punished less severely than small offences against property. That the admission of the crime of drunkenness as an extenuation of other crimes is immoral, and acts as an incentive to persons about to commit outrages to wilfully deprive themselves of the guidance of reason.⁸³

In 1878 the Howard Association sent a deputation to the Home Office with a memorandum drawing attention to "the serious irregularities which pervade the whole system of sentences generally, from those for the gravest of crimes down to those for petty offences." The variety in sentences was attributed to "the personal opinions of the judges."⁸⁴ The Association urged more severe

⁷⁹ *Law and Justice—Surrey Sessions—Sentences*, 266 PARL. DEB. (3d ser.) 1224 (1882).

⁸⁰ *Sentences at the London County Sessions*, 346 PARL. DEB. (3d ser.) 321-22 (1890).

⁸¹ *Severe Sentences*, 342 PARL. DEB. (3d ser.) 1254-55 (1890); *Criminal Law—Excessive Sentence—Mary Cole*, 274 PARL. DEB. (3d ser.) 459-60 (1882).

⁸² *Criminal Law—Inadequate Sentences*, 263 PARL. DEB. (3d ser.) 1255, 1256, 1258 (1881).

⁸³ *Criminal Law—Inequality of Sentences*, 261 PARL. DEB. (3d ser.) 1880, 1881 (1881). See *Sentences at Liverpool Assizes*, 170 PARL. DEB. (4th ser.) 634 (1907); D. MACFARLANE, *CRIMINAL CONTRASTS. PROPERTY VERSUS PERSON* (1884).

⁸⁴ *Inequality of Sentences*, [1878] ANNUAL REPORT 4 (Howard Ass'n).

treatment for assaults and willful cruelty in line with that for common offenses against property. Francis Peck, Secretary of the Association, drew a vivid comparison between cases of brutal personal violence punished by fines or a few months' imprisonment and thefts punished by penal servitude.⁸⁵

Secondly, concern was expressed about the lack of consistency in dealing with those recidivist property offenders whose crimes were frequent but of no great gravity. Barwick Baker, that indefatigable philanthropist and campaigner for a reformatory and preventive policy for habitual criminals, complained constantly of the haphazard nature of sentences: short penalties followed each other randomly, interspersed occasionally, and then only by chance, with a long spell of penal servitude. From a Quarter Sessions calendar he quoted:

"No. 5, E.J., with five previous convictions (two of them penal servitude), nine months. . . . No. 7, C.B., fourth conviction (once reformatory, once penal servitude) twelve months. . . . No. 17, W.J., once to a reformatory, once three months, once three years, now fifteen months. And so on throughout the calendar of above a hundred."⁸⁶

Baker favored steeply increasing the certainty of receiving a long sentence. For recidivists, for example, he proposed an initial sentence of one week or ten days on bread and water, followed by twelve months on the next occasion, then seven years' penal servitude, and, for the fourth offense, penal servitude for life "or for some such long term as shall enable him to be released on ticket-of-leave, but kept for the greater part of his life under surveillance."⁸⁷

Certainly some minor offenders were dealt with harshly. The Howard Association complained when at Anglesey Assizes a man with two minor previous offenses was sentenced to seven years' penal servitude for stealing a hen.⁸⁸ William Tallack joined issue with his friend Barwick Baker, favoring a gradual but certain cumulation of

⁸⁵ Peck, *The Miscarriage of Justice*, 32 CONTEMP. REV. 100 (1878).

⁸⁶ Baker, *What Means Is It Desirable to Adopt to Prevent the Passing of Sentences Inadequate to the Proper Repression of Crime?* 1865 TRANSACTIONS, *supra* note 58, at 203, 205.

⁸⁷ *Id.* 207.

⁸⁸ *Cumulation of Sentences—Neither Scylla nor Charybdis*, [1874] ANNUAL REPORT 5-6 (Howard Ass'n). See *Criminal Law—Sentence for Stealing a Turnip*, 256 PARL. DEB. (3d ser.) 361 (1880) (17-year-old unemployed boy sentenced to 14 days' hard labor for stealing turnip from a field). Later that year, Sir William Harcourt, the Home Secretary, promised to look into the case of a woman sentenced to 21 days for smuggling one-quarter of an ounce of tobacco to her husband in prison.

punishment for subsequent convictions. He was appalled by the enormous sentences given some unfortunate thieves and described many astounding examples of the "irregular and arbitrary" sentences imposed on recidivists:

C., for stealing a garden fork, was sentenced to ten years' imprisonment and five years' supervision. He had already, for stealing a rabbit-gin, had seven years' imprisonment and two years' supervision. The circumstance of his having undergone four minor committals to jail previously, does not justify the preposterous harshness of the subsequent seventeen years' detention, with seven years' further supervision for two such trifling thefts. There is a monstrous disproportion and cruelty in such gigantic outbursts of passion on the part of legal "Justice" so-called. . . .

F., . . . For stealing a piece of canvas, he was sentenced to twelve years' penal servitude, to be followed by seven years' supervision. He had already undergone six minor detentions in jail and three sentences of penal servitude, amounting to twenty-two years, and including one of ten years for stealing a shovel. So that this poor weak creature has been committed to thirty-four years of imprisonment, with seven years' supervision, all for petty thefts; whilst few of the most atrocious ruffians, violators, or burglars, of England, have had half such an amount of punishment meted out to them.⁸⁹

A few thefts of "herrings, chickens or boots," soon accrued sentences of a dozen or twenty years, "[a] most disproportionate, unmerciful, and even crime-producing procedure."⁹⁰

Lord Herschel put the problem in a nutshell when explaining the two contradictory theories that operated in the courts:

[T]he theory applied in some parts [is] that you ought to take practically no notice of previous convictions in meting out the sentence for any particular offence; and in others the theory has been applied that previous convictions ought very materially to increase the sentence in case of subsequent conviction.⁹¹

⁸⁹ W. TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 170-74 (1st ed. 1889).

⁹⁰ *Id.*

⁹¹ 2 *PARL. DEB.* (4th ser.) 1306, 1308 (1892). See 47 *PARL. DEB.* (4th ser.) 1229, 1229-35 (1897) (discussion of proposed court of criminal appeal).

Lord Coleridge, the Lord Chief Justice, admitted to following the first, inflicting punishment "for the particular offense for which the prisoner is being tried before me," while some of his colleagues, he said, accepted "different guiding thoughts."⁹²

Although the trend was without doubt to seek a more uniform means of punishing recidivists by longer terms of confinement, notable opponents existed. Sir Henry Hawkins said that he had known instances of five years of penal servitude imposed for a second conviction of stealing from outside a shop, when one month would have been more than enough for a first conviction and two or three months for a second. "As often as a man steals let him be sent to prison, and it may be for each offence the time of imprisonment should be somewhat slightly increased, but not the character of the punishment."⁹³

The recorder of Liverpool, Francis Hopwood, achieved notoriety in the late 1880's and early 1890's by his insistence that sentences should be short and by his implacable opposition to heavy penalties for petty recidivists. In his charges to the grand jury, he claimed that he had saved nearly 2,500 years of imprisonment under his recordership by decreasing the average sentence from one year, one month, and six days to two months and twenty-two days.⁹⁴ At the same time, crime in Liverpool had decreased. To Hopwood, crime was a product of want and misery demanding "mercy and calm judgments"; long sentences meant extermination and not punishment for petty theft and pilfering.⁹⁵ To what extent Hopwood's policy was itself responsible for this fall in offenses is now difficult to assess. At the time he was heavily criticized both in

⁹² 343 PARL. DEB. (3d ser.) 924, 943 (1890). See 336 PARL. DEB. (3d ser.) 1003 (1889) (debate on sentencing inequalities); see also W. FISHBACK, *RECOLLECTIONS OF LORD COLERIDGE* (1895). Fishback quoted from a prison register: "A, 5 years in reformatory for having unlawful possession of an album; . . . D, 5 years penal servitude for stealing 7 shillings and 6d." He continued,

[w]hen the Chief-Justice read this, his face flushed with indignation and he said "I can not understand these ferocious penalties inflicted by the local magistrates—what would they do in cases of crime with violence?" In view of this he let the prisoner off with a mild sentence of four months for burglary.

Id. 60-61.

⁹³ 2 *THE REMINISCENCES OF SIR HENRY HAWKINS BARON BRAMPTON* 282-83 (R. Harris ed. 1904). See Hawkins, *Crime and Punishment* (pt. 1), 8 *NEW REV.* 617 (1893).

⁹⁴ *Liverpool Courier*, Jan. 15, 1890.

⁹⁵ *Excessive Sentences*, *The Times* (London), Jan. 12, 1892, at 14, col. 4 (Hopwood's spirited letter). See Hopwood, *Crime and Punishment* (pt. 2), 8 *NEW REV.* 620 (1893); *The Recorder of Liverpool on Cruelty in Punishment*, 94 *LAW TIMES* 131 (1892).

the national and local press for claiming credit for the decrease, for this "burlesque of justice."⁹⁶

IV. THE HOME OFFICE INTERVENES

A fresh initiative to find a solution came from the Home Office. The catalyst was Sir Edmund Du Cane, the acknowledged architect and supreme commander of the Victorian prison system. In an article published in the respectable *Fortnightly Review* in 1883, he challenged some of the basic assumptions and objectives of prevailing sentencing practices.⁹⁷ His article had all the more impact because no one could accuse him of sentimentality. He was identified with stern discipline, rigidity, uniformity, and faith in the deterrent force of penal discipline. He was opposed, therefore, to all arbitrariness in the enforcement of punishment, to any pain which exceeded that necessary to achieve its purpose, and he believed that punishment should apply equally to all subjected to its misery. His attack was aimed at what he regarded as excessive, inexplicably disparate sentences.

Du Cane based his argument for reconsideration of the length of prison sentences on three grounds. First, he pointed out that the actual length of time spent in confinement under penal servitude was in fact much longer than was that for offenders confined under equivalent terms of transportation: "a crime punished by fifteen years' entails now at the least two years and eight months and a week more imprisonment than it did thirty years ago."⁹⁸

Second, he showed that sentences of both penal servitude and ordinary imprisonment were grouped in certain intervals, the intermediate periods of time hardly ever used:

⁹⁶ For some characteristic contemporary comments, see *Liverpool: Criticisms of Recorder in Passing Light Sentences*, H.O. 45/9710/A51112 (1889-1902); 94 *Law Times* 123 (1892); *Liverpool Courier*, Jan. 15, 1890; *The Punishment of Criminals*, *St. James Gazette*, Jan. 28, 1890; *Shorter Prison Terms*, *The Times* (London), Oct. 2, 1978, at 13, col. 5 (letter of Mrs. Elisabeth Searle, quoting contemporary criticisms). Hopwood's approach was criticized implicitly by Stewart, *The Gradation of Punishment*, 18 *LAW MAGAZINE & REV.* (4th ser.) 169 (1893). Stewart, in turn, was taken to task by Francis Peek, the Howard Association chairman, who wanted principles laid down for the treatment of habitual offenders. *The Times* (London), Dec. 19, 1894, at 12, col. 2. The recent report of the Home Secretary's Advisory Council on the Penal System infers that Hopwood's sentencing practice at least did not lead to an increase in crime. HOME OFFICE, *SENTENCES OF IMPRISONMENT 27-28, 187-90* (1978). For a similar point of view, see *Shorter Prison Terms*, *The Times* (London), Oct. 2, 1978, at 13, col. 5 (letter of Mrs. Elisabeth Searle). Neither of these recent treatments answers, however, all the counterarguments raised by Hopwood's contemporary critics.

⁹⁷ Du Cane, *The Duration of Penal Sentences*, 39 *FORT. REV.* 856 (1883).

⁹⁸ *Id.* 858.

There appear to be certain favourite periods, five years, seven years, ten years, fifteen years, twenty years, and life—while sentences of nine, eleven, thirteen, sixteen, seventeen, eighteen, nineteen, and all the years between twenty years and life are hardly ever inflicted. . . . [I]t cannot be supposed that there are not more than fifty-four under sentence of six years who may have required more than five years and yet who need not have had so long a sentence as seven years.⁹⁹

Du Cane was particularly bothered by the absence of any power to sentence between the maximum of two years' imprisonment and the minimum, five years' penal servitude. Now that the local prisons were under central control, he believed that a satisfactory regime could be devised for such intermediate periods of confinement. From both a humane and economic point of view Du Cane considered excessive sentences an evil:

[E]very year, even every month and every week to which a prisoner is sentenced beyond the necessity of the case, entails an unjustifiable addition to the great mass of human sorrow

. . . .

. . . If it should be possible to reduce the average length of sentence by only one year the saving to the public in money (besides all the pain and sorrow to the individuals affected) would amount . . . to £43,000 per annum"¹⁰⁰

The prison population would thus be reduced from 10,300 to about 9,000.

Third, Du Cane believed that sentence length should be fixed on more scientific principles, that "the assignment of the periods of sentences, which are intended to cure moral maladies, should be made the subject of as careful study and as clear rules as those which govern the administration of drugs, which are intended to cure physical maladies."¹⁰¹

Behind Du Cane's critique was scorn for those who mechanically and slavishly followed a sentencing system without considering the real consequences for the individuals involved. This stern Victorian believed in a uniform and deterrent prison discipline

⁹⁹ *Id.* 859-60.
¹⁰⁰ *Id.* 860-61.
¹⁰¹ *Id.* 860.

and had no desire to see pain inflicted for one day longer than duty made necessary. He expressed his belief that

[t]he more scientific apportionment to their object of the duration of sentences under the existing law can be effected without parliamentary action, and there is every reason to believe that those whose duty it is to administer the criminal law would welcome any authoritative exposition of the principles which should regulate their practice and produce so much uniformity as the circumstances admit.¹⁰²

Du Cane sent this article, supplemented by a novel statistical analysis of sentencing variations, to Godfrey Lushington, the Assistant Secretary, and asked him to place them before the Home Secretary. The memorandum produced a difference of opinion between the two senior officials. Liddell, the Permanent Secretary, advised that no action be taken. To circulate Du Cane's paper would appear to be dictating to the judges and magistrates, and that the Home Secretary should never do. He recalled his predecessor's maxim, "[d]on't give orders unless you can enforce them." He also poured cold water on the statistics used by Du Cane to prove sentencing disparities. The average length of sentences served varied enormously at different prisons. At Winchester, for example, the average was 303.01 days, at Oxford 145.97 days. These figures did not necessarily mean that longer sentences were served at Winchester; they could mean simply that this prison contained a higher proportion of prisoners sentenced from assizes and quarter sessions who, as a general rule, incurred longer sentences. Only after a detailed study of the offenses committed could a fair comparison be made.

Lushington's attitude, while critical, was more encouraging. Whatever the drawbacks of the evidence, obviously insufficient thought had been given the subject. He advised the Home Secretary to send Du Cane's letter to Lord Selbourne, the Lord Chancellor. The reply to the letter was most sympathetic; he asked for thirty printed copies for distribution to each judge likely to go circuit. Lord Selbourne was impressed and puzzled by the widely disparate averages in length of sentence: "What can be more extravagant [W]hat reasonable explanation can be given of these figures?" He felt that the Home Secretary should himself send copies to chairmen of quarter sessions.¹⁰³

¹⁰² *Id.* 863.

¹⁰³ *Copies of Minutes and Correspondence on the Question of the Length of Sentences in Criminal Cases*, H.O. 45/9699/A50087/2 (1889-98). See Corre-

Liddell had his way nonetheless, and the evidence of disparity was excised. Du Cane's letter was then printed and, with a lengthy memorandum from the Home Secretary, Sir William Harcourt, was sent officially to the Lord Chancellor in December, 1884. Harcourt supported Du Cane, not only on the basis of the letter, but also with the statistics and arguments contained in the Annual Report of the Commissioners. Harcourt's memorandum showed, however, a more fundamental and broader view of the forces which shape the movement of crime, a belief that the system of penalties played a more limited role than commonly assumed.

In the twenty years following the end of sentences of transportation, the numbers sentenced to penal servitude and imprisonment declined almost continuously. This trend, and particularly the reduction in the proportion of young people in prison, was attributed to the Education Acts, the reformatory and industrial schools, and the advance of temperance. The fluctuations in crime rates and numbers of paupers were no longer so closely correlated, leading Harcourt to believe in "a solid and stable improvement in the moral staple and fibre of the population In a great degree crime has ceased to be the inevitable concomitant of want." These changes, he claimed, were reflected in the improvement of the conduct of prisoners, evidenced by a marked decline in the incidence of prison punishments. His letter evinced a belief in social progress which naturally brings an improvement in conduct: "It may, therefore, I think, be safely concluded, that we have successfully tapped the fountains of crime, and that the labour and the expense to which we have gone in the improvement of the social soil, has not been without its results." Harcourt conceded that the crime increase of the 1860's had been justifiably met with more severe punishment; by the same token, "it is surely not less reasonable to consider whether severity may not be relaxed, when crime over long periods of time is shown to be steadily on the decrease." In consequence, he wanted, first, a "material" shortening of sentences in "ordinary cases," a more effective approach for reforming and deterring criminals. Second, he claimed that, because the enforcement of punishment in the prisons had gained "greater equality and identity," the main object now was "harmony and uniformity in the extent of punishment and amount of the sentences." This concern led him to a modest but practical proposal: after consultation with the judges, "any general rules . . . subject of course

spondence on the Administration of Criminal Law, *Sentences and Punishments—Memoranda*, H.O. 45/18479/565861/5 (1884).

to the necessary exceptions in particular cases . . . should be safely laid down so as to lead to greater uniformity in practice.”¹⁰⁴

In a letter a year later to Lord Chief Justice Coleridge, Harcourt urged “the cause of mercy at the bar of the judges.” He went so far as to cast doubt on the value of any sentence over five years in length on the grounds that few judges realized what long sentences meant in practice.¹⁰⁵ Although the response of the Lord Chancellor and the Lord Chief Justice to these initiatives is not known, the Home Secretary and his adviser clearly found a powerful opponent in Sir James Stephen. He scorned the ideas that sentencing could be more lenient and that general rules could be devised to ensure greater uniformity. Believing in the deterrent effect of punishment, Stephen saw the reduction in crime as the result of effective policy, the opposite inference from that drawn by the Home Secretary, his old debating opponent at Cambridge. “The proposal to diminish [the] severity [of punishment] because it appear[ed] to be obtaining its object . . . [was, to Stephens,] unintelligible.”¹⁰⁶ The fact that those who administered the prisons were not impressed by the effectiveness of long sentences cut no ice with him, for “punishment is not intended to benefit the sufferer. It is distinctly intended, to a certain extent, to injure him for the good of others.”¹⁰⁷

Stephen’s main attack, however, was upon the idea that rules could be devised to constrain judges’ exercise of discretion. First, and perhaps foremost, he believed that, if judges were to act in a concerted way, “they would be assuming a power which the Constitution has not given, and does not mean to give them.”¹⁰⁸ Second, he claimed that unless all discretion were extinguished, “there will always be room for more or less good or bad fortune in meeting with stricter or more indulgent judges. So long as a given punishment is not unusually severe, the criminal sentenced to it

¹⁰⁴ Correspondence on the Administration of Criminal Law, *Sentences and Punishments—Memoranda*, H.O. 45/18479/565861/7-11. See I. A. GARDINER, *THE LIFE OF SIR WILLIAM HARCOURT* 410-11 (1923). Unfortunately, Harcourt’s memorandum contained some statistical errors which were pointed out by Sir Henry James and which led Harcourt to withdraw it from circulation.

¹⁰⁵ In March, 1885, the indefatigable Du Cane wrote another lengthy memorandum, this time for Lord Coleridge. The document was praised by the Home Secretary, but was considered an expression of “the views of Sir E. Du Cane not as official opinion of Secretary of State.” *Inequality of Duration of Prison Sentences for Similar Offences. Proposed Inquiry by Royal Commission*, H.O. 45/9699/A50087 (1889-98) [hereinafter cited as *Inequality of Duration of Prison Sentences*].

¹⁰⁶ Stephen, *Variations in the Punishment of Crime*, 17 *NINETEENTH CENTURY* 755, 756 (1885).

¹⁰⁷ *Id.* 757.

¹⁰⁸ *Id.* 766.

has no right to complain, and the public need not be disturbed.”¹⁰⁹ Third, he saw no middle ground between unfettered discretion and a rigid code in which punishments were defined exactly in relation to the circumstances of crimes. Here, turning completely against the assumptions of the Commission in the 1840’s, he claimed that no absolute relation between punishment and crime “will tell you in any particular case how much of the one will be needed to prevent the other.”¹¹⁰ Stephen could see no way to articulate in advance all the shades and circumstances of crime; no way to define an offense so narrowly to exclude circumstances of widely varying character; no way to test all the factors that should aggravate or mitigate a sentence; and no way to avoid the reintroduction of minimum sentences, with all their attendant rigidity.

Stephen believed that such a fixed code would be even more arbitrary than the existing system and even more likely to create injustice. He claimed that the judges acted upon a customary scale “which, to a great extent, concealed the absence of any principle, and superseded the necessity for one.”¹¹¹ Believing in the value of custom which would reflect the moral evaluation of crimes, he felt that in reality discrepancies were far fewer than imagined. He illustrated his point by attempting to show that he could predict, on the basis of his experience, the penalties which could normally be expected for a whole range of crimes.¹¹² These norms existed and ought to be allowed to develop naturally out of custom and the prevailing tone of public feeling; they ought not be contrived and enforced.¹¹³

Stephen’s opinion was by no means unique. Others like Sir Edward Fry found it difficult to believe that a fixed scale could possibly ensure equity of punishment:

What is this true proportion? When can you affirm that punishment A is to punishment B as offence A is to offence B? If a woman ought to receive six months’ imprisonment for embezzling her master’s money, how many months’ imprisonment ought a man to undergo for beating his wife? That is a rule-of-three sum which I have never

¹⁰⁹ *Id.* 759.

¹¹⁰ *Id.* 761.

¹¹¹ *Id.* 763.

¹¹² *Id.* 768-74.

¹¹³ *Id.* 766-67.

been able to answer, and which I know of no direct and simple method of answering.¹¹⁴

V. ESTABLISHING STANDARDS

Many other Victorians, while rejecting the grand design of a classical code and accepting the necessity for wide judicial discretion, believed that substantial uniformity could be achieved by some other means. One such means was agreement among the judges on the purposes of punishment or at least on some basic norms to be applied to each type of offense. Another was creation of a court to review sentences, setting standards for all other courts to follow.

Edward Cox was a pioneer of the first of these approaches, and his work was directed for a long time towards its development and application. As early as 1871, he suggested to a meeting of the National Association for the Promotion of Social Science that the reason for disparity was that the judges had not laid down any principles of punishments. Cox therefore proposed an annual conference of judges and magistrates to decide on a uniform standard for at least the most frequent crimes.¹¹⁵ At the next meeting, he put forward a scheme of principles of punishment based on his belief in the value of wide discretion, "with sufficient reference to rules" so that sentences were not arbitrary but "in pursuance of some principle applicable to the case." His rules were, in essence, simple:

[B]y affixing a certain punishment to the offence as a general rule, when nothing appears either to increase or reduce its criminality, and then having a scale of additions or reductions for such attendant considerations, I think it would be very possible to construct a scale of punishments which would materially assist in guiding the judgment of the Judge, and produce more uniformity than exists at present in the punishments inflicted by the various tribunals.¹¹⁶

¹¹⁴ Fry, *Inequalities in Punishment*, 14 NINETEENTH CENTURY 517 (1883). See A. FRY, A MEMOIR OF THE RIGHT HONOURABLE SIR EDWARD FRY, G.C.B. 82-87 (1921).

¹¹⁵ See Pulling, *By What Principles Ought the Amount of Punishment Other Than Capital to be Regulated?*, 1871 TRANSACTIONS, *supra* note 58, at 288 (comments by Cox in the discussion following the paper).

¹¹⁶ Cox, *What is the Primary Purpose of Punishment—to Deter or to Reform?*, 1872 TRANSACTIONS, *supra* note 58, at 207, 211.

Cox developed these ideas in his book *The Principles of Punishment*, but the subject seems to have been above his head. His classification of types of offenses, categories of criminals, and circumstances of crimes is confusing. Nevertheless, he did attempt to spell out those aggravating and mitigating circumstances that should determine the kind and proportion of punishment in order to attain its main purpose, graduated deterrence.¹¹⁷ Such efforts were regarded as academic exercises, however, and were wasted on the vast majority of the judiciary and magistracy.¹¹⁸

In 1889 and 1890, in a final endeavor to bring about uniformity through legislation, moves were made to secure a Royal Commission. The Commission, however, was not appointed, nor was the legislation passed. The Home Secretary, Henry Matthews, rejected these attempts because of his belief that wide discretion was necessary to fit punishment to the "infinitely varying circumstances of crime." He was convinced that "[n]othing but the teaching of experience will by degrees bring Judges of all classes to discover by tentative process what scale of punishment is the most efficacious in preventing crime."¹¹⁹ The Lord Chancellor, Lord Halsbury, rejected the view that punishment should be settled by the state.¹²⁰ Both clearly regarded sentencing as the sole business of judges and were hostile to any external investigation that might lead to legislative regulation. Neither Matthews nor Halsbury objected to the judges thrashing out some of their differences; had the judges ever reached agreement, however, neither would have supported attempts to embody that agreement in laws or formal rules. As *The Times* commented, an interchange of opinions to arrive at a common understanding among judges was to be greatly preferred to "any effort to secure cast-iron uniformity by precise legislative enactments."¹²¹ This idea received further impetus when the

¹¹⁷ E. COX, *THE PRINCIPLES OF PUNISHMENT AS APPLIED IN THE ADMINISTRATION OF THE CRIMINAL LAW BY JUDGES AND MAGISTRATES* (1877).

¹¹⁸ For examples of such criticism, see COX, *What is the Primary Purpose of Punishment—to Deter or to Reform?*, 1872 *TRANSACTIONS*, *supra* note 58, at 207, 210 (comments of Matthew Davenport Hill); *id.* 215 (comments of Barwick Baker).

¹¹⁹ *Penal System and Convict Discipline*, 336 *PARL. DEB.* (3d ser.) 1003, 1026-27 (1889). See *Inequality of Duration of Prison Sentences*, *supra* note 105. The idea of a commission was instigated by the Society of Chairmen of Quarter Sessions. *Id.* 1. Lord Esher also moved for a royal commission. *Administration of the Law*, 347 *PARL. DEB.* (3d ser.) 32 (1890). The Home Secretary, however, was supported by *The Times*. *The Times* (London), May 25, 1889, at 13, col. 4.

¹²⁰ *Criminal Sentences*, 343 *PARL. DEB.* (3d ser.) 937-42 (1890). The remark was made in response to Lord Herschell's motion for an inquiry into sentencing. *Id.* 924.

¹²¹ *The Times* (London), May 25, 1889, at 13, col. 4.

judges themselves, meeting in 1892, recognized the concern aroused by "the great diversity in the sentences passed by different Courts in respect of offences of the same kind," and recommended a court to review sentences.¹²²

Some, like Sir Henry Hawkins, still believed in the possibility of establishing some general principles that would ensure an equality of approach,¹²³ but opinion seems to have swung sharply in favor of a more mechanical solution, "standardization." One proposal, for example, was that six Queen's Bench judges review the average sentences imposed and set them out in a table which would then be subject to periodic review. Any deviations from these normal "starting-points" would have to be justified in open court.¹²⁴

When Lord Chief Justice Alverstone and a committee of Queen's Bench judges eventually met in 1901, they did not go as far as this.¹²⁵ They felt that disparities in sentences "had been much exaggerated" and that, in reality, "nothing in the sentences of the Judges of the High Court of Justice . . . indicated the existence of any established difference of principle or of general practice." Nevertheless, for the sake of "conveni[en]ce" and "public advantage," they did suggest "a standard of punishment . . . which should be assumed to be properly applicable, unless the particular case under consideration presented some special features of aggravation or of extenuation."¹²⁶

¹²² *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases* (127), 71 PARL. PAPERS 173, 179 (1894). In cases of rape of young children, similar offenses were receiving in some instances two years' imprisonment or five years' penal servitude, and, in others, twenty years' imprisonment or penal servitude for life. Some judges evidently believed that an outrage on a child was graver than rape of an adult, because the child was defenseless and the act unnatural; others would punish rape of an adult more severely believing the consequences graver and more permanent. Some judges, "perhaps not taking sufficiently into consideration that the family are accustomed to sleep together in one bed" visited with special severity the misconduct of a parent. *Cases of Rape on Children Under 16. Memorandum on Principles Which Should Govern Decisions*, H.O. 45/9739/A55202 (1893). For further discussion of the proposed court of review, see notes 133-57 *infra* & accompanying text.

¹²³ See Hawkins, *supra* note 93, at 619. For Hawkins' reply to the inquiry set in motion under the auspices of the International Congress of Comparative Law in 1900, see Crackanthorpe, *The Criminal Sentences Commission up to Date*, 52 NINETEENTH CENTURY 847, 852-53 (1902). See also *Studies in Criminal Sentencing*, 19 LAW Q. REV. 136 (1903) (responses to Crackanthorpe's Commission's inquiries).

¹²⁴ Crackanthorpe, *Can Sentences be Standardised?*, 47 NINETEENTH CENTURY 103, 113-14 (1900).

¹²⁵ *The Judges' Memorandum of 1901 on Normal Punishments*, H.O. 144/A60866/3 (1901), reprinted in R. JACKSON, *ENFORCING THE LAW* 391 (2d ed. 1972).

¹²⁶ R. JACKSON, *supra* note 125, at 391.

The judges established "normal punishments" for six general categories of offenses: offenses against property without violence; offenses against property with violence to property; other offenses relating to property; offenses against property with violence to the person; offenses against the person; and a general category of other offenses. Within each category, norms were laid down for a total of twenty-six particular offenses or groups of similar offenses, virtually all serious crimes. Moreover, for some of the offenses, particularly offenses against property, distinctions were drawn between different categories of offenders: between juveniles and adults, between first offenders and those with previous convictions, and between the occasional recidivist and the habitual or professional criminal. In many instances, the judges also endeavored to distinguish between shades of gravity of the offense in terms of aggravating or extenuating circumstances accompanying its commission. Then, in a businesslike way, they laid down the quantum of punishment to be imposed. For example, the following punishments were provided for larceny:

a. *In the case of a first offence—*

For juveniles under 16, no term of imprisonment.

For adults, a discharge upon recognisances, or a short term of imprisonment.

b. *In the case of subsequent convictions—*

In intervals of honest conduct, imprisonment for from 6 to 12 months.

If the prisoner whilst at liberty has been making crime his source of livelihood, penal servitude from 3 to 5 years.¹²⁷

Burglary, said to be mostly the work of professional criminals, was to be punished, if a serious offense and not the first conviction, by three to five years' penal servitude. Those burglaries which in reality differed little from petty larceny were, however, to be treated as ordinary theft. A second conviction of robbery with violence would receive a sentence of penal servitude, for not less than five years if the crime had resulted in serious bodily hurt or had been committed by several in concert. Felonious wounding or inflicting grievous bodily harm with intent was to be punished by imprisonment for eighteen months or by penal servitude not exceeding five years. The sentences for rape were varied according to both the

¹²⁷ *Id.* 392-93.

age of the victim and accompanying aggravations. Rape of a female over thirteen years of age by a gang, by a parent or a master, or accompanied by brutal violence would be punished with greater severity than the five to seven years for less egregious cases. Sodomy between consenting adults warranted three years' penal servitude, but such an offense by an adult on a youthful or unwilling victim would receive a maximum of ten years.¹²⁸

In general, the memorandum reaffirmed and gave authority to the view that recidivists should receive longer sentences even when they would thereby be punished more severely than one who committed a more serious crime. The first offender convicted of violence would get a longer sentence than the first-time thief, but in some cases far less than the thief with a long record.¹²⁹

Never before had the judges of England made such a concerted effort to lay the foundations for a consistent sentencing policy. The judges felt that their scheme would be to the public advantage, and one might naturally have expected, therefore, that the printed memorandum would have been made known to the quarter sessions, the chronic breeding ground of inequalities. A memorandum from Sir Edward Troup, Permanent Under-Secretary at the Home Office makes clear, however, that the document never reached recorders of quarter sessions, though Troup believed the judges thereafter did "guide themselves to some extent in their sentences."¹³⁰ Tighe Hopkins pointed out, however, that some five thousand persons had power to pass sentences, sentences which were, despite the pronouncement of the judges, "an affair of pitch-and-toss."¹³¹

¹²⁸ *Id.* 394-96.

¹²⁹ *Id.*

¹³⁰ See Undated Memorandum by Troup, *Standardisation of Sentences*, H.O. 144/A60866/3 (1901). The failure of the judges' memorandum to have an impact where most needed was noted ten years later when the establishment of a legal commission was proposed to ascertain average penalties which should be imposed for each offense on first, second, or subsequent convictions. De Vere, *Discretion in Penalties*, 27 LAW Q. REV. 317, 323 (1911).

¹³¹ T. HOPKINS, *WARDS OF THE STATE* 219 (1913). Such criticisms must be seen in context. Since the middle of the nineteenth century the trend had been unmistakably towards mitigation of punishment in general and of lengthy detention in particular. In 1840 a fifth of those sentenced in higher courts had been transported. By 1913 less than a tenth received penal servitude. There was a virtual eclipse of very long sentences. In 1840 nearly a quarter of those transported got terms of over ten years; by the turn of the century, less than one per cent were imprisoned for so long, and by 1912 only a half dozen. Sentences gravitated towards the minima allowed by law. In 1893 the minimum term of penal servitude was reduced to three years. By 1900, forty per cent received no more than this minimum, ten years later as many as sixty-five per cent. A mass of indictable offenses, mostly larceny, which hitherto could be dealt with only at assizes and quarter

Debate on the judges' memorandum in Parliament would have been unconstitutional, public comment by the Home Secretary unwise. The records of the Home Office provide, however, a fascinating glimpse of the reactions of the senior officials, who felt particularly competent to give an opinion because of their daily work: "constant consideration and comparison of the sentences passed by all the different courts in England and Wales"; frequent communications from all levels of the judiciary "which illustrate the principles on which punishment is actually awarded"; thousands of applications each year from the general public on behalf of particular criminals; communications with the police and others interested in crime; and some four or five thousand petitions from criminals themselves, "many of which are extremely valuable as throwing light on the question from another side." These officials drew up standards for penalties which differentiated more subtly among the circumstances accompanying each type of offense and which applied to a wider variety of cases. They viewed the judges' standards for violent and sexual crimes as too low, particularly because serious crimes of this kind had not declined, while the public continued to demand severe punishments. In their opinion, the community would suffer in the long run with the proposed scale. They objected even more strongly to the standards set for habitual or professional property offenders. The judges had felt that lenient treatment of these criminals had gone too far, but their solution was regarded by the Home Office as altogether too weak. Three or five years' penal servitude for the inveterate thief, who thereafter would be released to prey upon the community, was an unacceptable burden for the police in their struggle to protect society. The senior officials believed that, in the case of larcenies from the person or other thefts by criminals "making a living" by dishonesty, the amount stolen was of minor importance. When a thief had already received sentences of twelve months or more, "it would be logical to prevent him preying on society for a prolonged period," for example, five or seven years. If, afterwards, the thief was convicted again and "[could not] show that he [had] ever made an effort to

sessions, were moved to the jurisdiction of the magistrates' courts, and therefore to a lower scale of punishment. In 1860, when the movement for summary jurisdiction had already made considerable progress, four out of ten convicted of an indictable offense were still sentenced by the higher courts. By 1913, when probation and allied measures had been added to the resources of the courts, the proportion had dropped to one in six. So pervasive was the trend away from imprisonment that in summary courts as well the proportion imprisoned shrank from nine-tenths in 1860 to only one-half in the first decade of the twentieth century. This shrinking in the scale of punishments must inevitably have brought a narrower range of sentencing disparity.

make an honest living," ten years, or even the maximum of fourteen, would be justifiable in the interests of society.

The officials of the Home Office, however, would have preferred a new form of sentence, perhaps an indeterminate sentence which would solve the endless complaints about disparate sentences for recidivists while, at the same time, remove them from society for at least seven years.¹³² The problem was to distinguish the truly habitual criminals from occasional petty offenders. In 1894 the Gladstone Committee, recommending "some kind of cumulative sentence of detention," claimed that punishing habitual offenders for the particular offense of which they were convicted was useless because "the real offence is the wilful persistence in the deliberately acquired habit of crime." The Committee envisioned not a mere increase of punishment, but a new form of sentence ensuring longer detention under less onerous conditions. The Prevention of Crime Act of 1908 introduced a two-stage system under which the term of penal servitude imposed for a particular offense was followed by preventive detention in a special institution for a period of between five and ten years. Though falling short of the indeterminate sentence desired by many reformers and the Home Office, it nevertheless introduced a new principle into the sentencing structure.

This act was part of a wider movement to give the courts power to differentiate among distinctive categories of offenders and to apply to them protective, reformatory, and curative measures. In a parallel development, the Habitual Inebriates Act of 1898 provided a new measure of prolonged detention, not exceeding three years, in a state inebriate reformatory. The statute was aimed at three groups: those convicted of offenses committed under the influence of drink or for which drink was a contributing cause; those found by a jury to be habitual drunkards; and those convicted summarily of similar offenses at least three times in the preceding twelve months. In some ways this development was even more significant. Preventive detention was aimed unashamedly at protection of the public, whereas inebriate reformatories were inspired by the belief that the offenses were an expression of a curable disease. The Mental Deficiency Act of 1913, similarly a pioneering piece of legislation, attempted to contain and treat in special institutions mentally de-

¹³² See *Standardisation of Sentences*, H.O. 144/A60866/3 (1901) (memoranda by Mr. Dryhurst, Mr. H. B. Simpson, and Mr. Murdoch). A particularly valuable memorandum by Mr. Simpson includes a handwritten summary of sentences suggested by the judges and by the Home Office and the reply of Sir Kenelm Digby.

fective persons of dangerous or violent propensities. An order for institutional care or guardianship—the very terminology was characteristic—was for an initial period of one year, renewable upon medical certificate for any number of successive five-year periods. In practical terms, neither of these measures made any headway at all. A pitiful three dozen offenders were sentenced to an inebriate reformatory in 1913.

The movement for segregating offenders on the basis of age started much earlier but came to fruition in the same period. Lord John Russell had set up a separate prison for juveniles at Parkhurst in 1835, an experiment which did not prove successful. The efforts of Mary Carpenter, Matthew Davenport Hill, Joshua Jebb, and others resulted in the Reformatory School Act of 1854. Until passage of the Children Act of 1908, however, juveniles under the age of sixteen could still be sentenced to prison. Efforts to extend the reformatory principle at least to the age of eighteen were strongly resisted on the ground that treating young adults in this way would be wrong. The Gladstone Committee, faced with strong evidence that the majority of habitual criminals were “made” before the age of twenty-one, proposed a new sentence to “cut recidivism off at the roots.” Their idea, an extended term of confinement under strict discipline and training in a halfway house, something between a prison and a reformatory, proved so successful during experiments that it was embodied in the Prevention of Crime Act of 1908. A relatively indeterminate sentence was thus established for young offenders aged sixteen to twenty-one advanced in crime. This system, Borstal detention, was quickly recognized throughout the world as the most progressive and promising development in the treatment of young adult offenders.

At the other end of the spectrum, attempts were made to move first offenders out of the traditional penal framework. The Summary Jurisdiction Act of 1879 gave courts the power to discharge an offender convicted of a trifling offense without proceeding to conviction. The Probation of First Offenders Act of 1887 went further. It empowered the courts to release on recognizance, subject to good behavior, first offenders convicted of larceny or false pretenses under certain extenuating circumstances—youth, good character, no prior record, or triviality of offense. Probation officers were not appointed until 1907, and then, with the Probation of Offenders Act, courts could place offenders of any sort under the supervision of these officers. Probation and allied measures made a tremendous stride. By 1900, they accounted for a quarter of all

those summarily convicted of an indictable offense; thirteen years later the ratio had risen to six-tenths. The ideas and practices of social work were thus transplanted into the criminal justice system. Probation and Borstal detention marked a constructive attempt to avoid the sterility and contamination of short-term imprisonment, and the ungrudging welcome they received reflected their harmony with the philanthropic spirit and growing social consciousness of the times.

This evolution was not confined to England. Similar developments, often influencing each other, took place in many other parts of the world. Elmira kindled the imagination of Sir Evelyn Ruggles Brise when he was considering the establishment of the Borstal system. When Sir Herbert Samuel introduced his bill on probation, his eyes were on the innovations already implemented in the United States. The juvenile courts set up in 1908 belonged squarely to the vast child-saving crusade sweeping across the United States. Similar laws were passed in France and Belgium, and the draft penal codes of Switzerland, Denmark, and Norway contained analogous proposals. During this period, the positivists Cesare Lombroso, Enrico Ferri, and Raffaele Garofalo, with their new concepts of dangerousness and legal responsibility, advocated radical departures from the traditional system of punishment. The influential International Association of Criminal Law led by Von Liszt, Emil Garçon, Adolph Prins, and Van Hamel, though much less extreme than the positivists, sponsored similar solutions. Even the International Prison Commission, so much more cautious because of its governmental nature, followed the lead and passed, at their congress in Washington in 1913, a unanimous resolution proclaiming their faith in the indeterminate sentence.

Nevertheless, these measures ran counter to deeply held notions of justice. The classical tradition of criminal law, itself a reflection of the liberal state, was too firmly entrenched. There remained a revulsion to long sentences out of proportion to the gravity of the crime, whatever the offender's past record or future prognosis. The juxtaposition within the same sentencing structure of the classical tenet of just proportion and the positivist credo of social defense was bound to produce conflicts in attitude and disparity in practice.

VI. REMEDY BY APPEAL

By the end of the protracted and tortuous movement to establish a court of criminal appeal, no one was quite sure how many bills had been presented. The proposal was debated on at least

a dozen occasions, and thirty, forty, or maybe as many as fifty bills were introduced.¹³³ Sixty-three years passed between Fitzroy Kelly's bill of 1844 and the establishment of the Court of Criminal Appeal by the Act of 1907. The arguments for and against were repeated with monotonous regularity. The protagonists and antagonists came from various quarters and sometimes changed sides. Bills were presented by both private members and governments with equal lack of success. Some home secretaries bitterly opposed the idea of a court of criminal appeal while others welcomed the possibility of shifting discretion from their office to a court. Many lawyers, including most of the judges and lord chancellors, were opposed to the end as a matter of principle; others felt just as strongly the other way. Despite the depth of feelings aroused on both sides, attendance at debates was often desperately thin, perhaps because the subject was regarded as so technical that only the cognoscenti experienced with the Home Office and the law could weigh the arguments. The subject was thus left to hang in uneasy abeyance rather than be heavily defeated whenever brought forward. Something more than mere logical argument was needed to tip the scales.

The objective of the reformers was to better guarantee against wrongful conviction of the innocent. A subsidiary aim, and one which emerged much later, was to provide a way of altering inappropriate sentences and of establishing greater uniformity in sentencing standards.

In the early nineteenth century, few remedies stood between a convicted criminal who claimed innocence and enforcement of the sentence. If a mistake had been made on a point of law, the judge, at his own discretion, might reserve the case for his fellow judges. The hearing was in private, the decision was not explained, and the only possible remedy was recommendation of a pardon. Even after establishment of the Court of Crown Cases Reserved in 1848, which gave judgments in public and could declare innocence rather than merely recommend an ambiguous pardon, the major fault remained: leave had to be obtained from the very judge who had made the error.¹³⁴ Efforts to create a court of criminal appeal did not stop,

¹³³ According to Sir Michael Havers, more than 30 attempts to pass such a bill were made before 1907. See B. RYAN & M. HAVERS, *THE POISONED LIFE OF MRS. MAYBRICK* 272 (1977). During the debates of 1907, Lord Ashbourne mentioned that some 40 or 50 previous bills had been introduced on the subject. 179 *PARL. DEB.* (4th ser.) 1471, 1477 (1907). For a brief review of this inevitably repetitive legislation, see Phillips, *Appeal in Criminal Cases*, 1 *LAW MAGAZINE & REV.* (3d ser.) 132 (1872).

¹³⁴ 97 *PARL. DEB.* (3d ser.) 963 (1848) (remarks of Sir James Graham); see *Report from the Select Committee on the Criminal Law Administration Amendment*

however, with remedying this fault. The demand was for an appeal of the facts which led to conviction, an appeal based on the conduct of the trial and the decision of the jury, an appeal to challenge the interpretation of the evidence and to introduce new facts pointing towards innocence. Few would have disagreed with Charles Sprengel Greaves that the facts were far more important to the question of guilt or innocence than were points of law, which were often matters of legal technicality. He thought it perverse that a clerical mistake could be the basis for an appeal, whereas the substance of the trial remained inviolate.¹³⁵

Several questions were at issue: whether those convicted of criminal offenses should have the same rights as civil litigants; whether, in fact, any proven errors of judgment could justify the expense and dangers of reform; and whether a court could better right supposed wrongs than the royal prerogative of mercy.¹³⁶

Proponents of criminal appeals consistently pointed to an "unjust incongruity"¹³⁷ aptly summed up in the poignant question, "[i]f it were right that a man should have [the] power of appealing before a court of justice could adjudge him to pay a sum of money, what pretence was there for saying he ought not to have it before he was condemned to death?"¹³⁸ Opponents claimed that the process in criminal trials was different. The law was being invoked not to settle a dispute between two litigants, but to make an accusation. Careful investigation and sifting of the evidence was guaranteed by criminal procedures: the preliminary hearing, the grand jury, and the jury verdict itself under rules giving the prisoner the benefit of

Bill, 16 PARL. PAPERS 425 (1847-48). Evidence was given by Lords Denman, Lyndhurst, and Brougham, Charles Sprengel Greaves, Sir Fitzroy Kelly and other lawyers, Baron Parker, and Baron Alderson. Written comments were received from eleven judges. Lord Chief Justice Denman told the Committee: "supposing the Judge has made a Mistake, it is against all Principle to leave it in his Breast to have it revised or not." *Id.* 471.

¹³⁵ *A Report on Criminal Procedure by Charles Sprengel Greaves, Esq., One of Her Majesty's Counsel; to the Lord Chancellor* (456), 50 PARL. PAPERS 81, 128-30 (1856); *Report from the Select Committee on the Criminal Law Administration Amendment Bill*, 16 PARL. PAPERS 439 (1847-48); *Eighth Report of Her Majesty's Commissioners on Criminal Law*, 14 PARL. PAPERS 161, 246-51 (1845) (Greaves' evidence). The Commissioners themselves concluded: "the law of England is at present very defective as regards the means afforded for the correction of errors in criminal proceedings, and especially such as are frequently and are indeed almost necessarily incident to the trial by jury." *Id.* 179. The Court for Crown Cases Reserved did not hear more than 20 appeals per year. 1 HISTORY OF THE CRIMINAL LAW, *supra* note 46, at 312.

¹³⁶ Compare W. RIBTON, *NEW TRIALS IN CRIMINAL CASES* (London 1853) with H. POLAND & H. COHEN, *THE CRIMINAL APPEAL BILL* (1906) EXAMINED (1906).

¹³⁷ 75 PARL. DEB. (3d ser.) 12 (1844) (remarks of Sir Fitzroy Kelly).

¹³⁸ 127 PARL. DEB. (3d ser.) 965 (1853) (remarks of Mr. Butt).

any doubt. In a sense, the trial was itself an appeal against accusation.¹³⁹ Furthermore, delay in reaching judgment in civil cases was of no consequence, but in criminal cases "it was of the last importance to the public that that punishment should follow quickly upon crime [because] . . . [p]unishment lost half its efficiency . . . if long delayed." Lingered prosecutions would sap punishment of certainty and rapidity. Would not all sentenced to death appeal? By the time the appeal had been heard or a new trial held, would not six or even more months have passed? Would not keeping a man in suspended terror for so long be an act of barbarity? Would not the inevitable result be abandonment of capital punishment? Those who promoted appeals were thus accused of trying indirectly to repeal the death sentence.¹⁴⁰ Arguments of expediency were also advanced. A right to appeal would open the floodgates, bringing the administration of justice grinding to a halt. Twice as many judges would be needed and would have to sit for double the legal year. At the very least, some means would have to be found to restrict the number of cases appealed.¹⁴¹

The very idea of an appeal on questions of fact threatened deeply held beliefs concerning the role and integrity of the jury. Those who opposed a court of criminal appeal argued to the end that the greatest safeguard for the innocent was juries' knowledge that their decisions were final. The conduct of the trial and the directions of the judge reminded them of this awesome responsibility.

¹³⁹ Report from the Select Committee on the Criminal Law Administration Amendment Bill, 16 PARL. PAPERS 425, 470 (1847-48) (Lord Denman's evidence). As late as 1906, the Lord Chief Justice, Lord Alverstone, disputed the usefulness of the analogy between civil and criminal cases. 157 PARL. DEB. (4th ser.) 1078-79 (1906).

¹⁴⁰ See Joint Memorandum of 18 October 1906 of Messrs. Chalmers and Troup on Court of Criminal Appeal Bill, *Appeals in Criminal Cases*, H.O. 45/10377/139064/12 (1906-07).

¹⁴¹ 1 HISTORY OF THE CRIMINAL LAW, *supra* note 46, at 315-17. See Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (2345), 20 PARL. PAPERS 169, 205-08 (1878-79). For the views of James Fitzjames Stephen, see J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (1863). For criticism of this book, see Book Review, 121 EDINBURGH REV. 109 (1865). See Mosely, *supra* note 55, at 53-57; Book Review, 159 EDINBURGH REV. 332, 358-61 (1884) (J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND). The formula finally accepted in 1907 was aimed at reconciling these concerns. Appeal would be granted only on leave from the court of criminal appeal or on the certificate of the local judge. The Home Secretary could also refer to the court any petition for mercy to be dealt with as an appeal or could refer it for the court's opinion. On the opposition to a right to appeal, see H. POLAND & H. COHEN, *supra* note 136; The Times (London), Apr. 5, 1906, at 8, col. 1 (letter from Poland). For Home Office estimates of the effects of unlimited appeals, see Memorandum on Court of Criminal Appeal Bill, *Appeals in Criminal Cases*, H.O. 45/10337/139064/1 (1906-07).

ity. If they knew in doubtful cases that the matter would be reviewed by another tribunal, they would surely tend to convict. Overruling juries also raised a constitutional issue. The royal prerogative only extended mercy, but a court of appeal would determine guilt or innocence without having before it the witnesses seen and heard by the jury. The campaigners for criminal appeals denied that juries would be so callous, but many were impressed by the constitutional argument and thus favored new trials rather than hearings by appellate judges alone. This view was opposed in turn by those who believed that putting a person at risk before a jury for a second time was contrary to the traditions of British justice.

The strength of the arguments for appeal ultimately rested upon proof or reasonable inference that innocent people were being convicted and their grievances not adequately remedied by the prerogative exercised by the Home Secretary. By its very nature, the case was not easy to prove. Proponents of the bills inevitably had to rely upon instances of reprieves and recommendations of pardon or commutation. Nevertheless, a stream of cases was brought before the House. Some of them became causes célèbres; others equally bad slipped from public memory. There was Sir Frederick Pollock's sensational evidence presented to the Criminal Law Commissioners in 1835. Then there were the cases of Mr. Barber, Dr. Smethurst, Edmund Galley, Pelizzioni, Jackson and Greenwood, Habron, and Mrs. Maybrick.¹⁴² Attempts were made to show that these were not isolated incidents but merely the tip of the iceberg.¹⁴³ In 1883 the Attorney General, Sir Henry James, said that the Home Secretary had set free over the last three years twelve persons convicted of the gravest crimes: "In every one of these cases, facts long concealed had come almost miraculously to light."¹⁴⁴ Sir John Walton, Attorney General in 1907, also claimed that "the number of the

¹⁴² The literature on the Maybrick case is enormous. For a contemporary account, see *THE NECESSITY FOR CRIMINAL APPEAL* (J. Levy ed. 1899). For a modern reassessment, see B. RYAN & M. HAVERS, *supra* note 133. Sir James Stephen, who as the trial judge was so closely and tragically involved, said afterwards, "it was the only case [questioning the sentence] in which there could be any doubt about the facts." *THE NECESSITY FOR CRIMINAL APPEAL*, *supra* note 142, at 464.

¹⁴³ *Second Report*, *supra* note 9, at 265 (Pollock's evidence); *id.* 273-74 (Aldeiman James Harmer's evidence); *id.* 285-87 (Edward Archer Wile's evidence); see N. SIBLEY, *CRIMINAL APPEAL AND EVIDENCE* 266-305 (1908); 3 *HISTORY OF THE CRIMINAL LAW*, *supra* note 46, at 438-65; I. A. TODD, *ON PARLIAMENTARY GOVERNMENT IN ENGLAND* 585-88 (2d ed. 1887); Neuman, *The Case Against Capital Punishment*, 52 *FORT. REV.* 322, 326-27 (1889). The parliamentary debates also provide useful background. *E.g.*, 296 *PARL. DEB.* (3d ser.) 1123-24 (1885) (remarks of Mr. Hopwood).

¹⁴⁴ 277 *PARL. DEB.* (3d ser.) 1183 (1883).

victims of judicial miscarriage during the last few years has not been inconsiderable."¹⁴⁵

Curiously all this failed to cut much ice with opponents of a court of criminal appeal. Some persisted in the view that miscarriages of justice, even if they existed, were so rare that they did not justify a general right of appeal. In a frequently cited speech against appeal, Sir George Cornwall Lewis, the Home Secretary, charged that not one practical grievance had been shown; if nobody could "affirm the frequency of wrong convictions by juries in criminal cases . . . the whole groundwork of the proposed measure fails."¹⁴⁶ The most telling response was that all the grievances that had come to light had been swiftly dealt with by the Home Secretary, often on the basis of evidence and by informal processes that greatly assisted the appellant and would not even have been acceptable in a court of law. Barber, Smethurst, and the others could not have been saved by a court but were saved by the exercise of the royal prerogative.¹⁴⁷ The opponents hung onto their belief that the prerogative was preferable to appeal, was employed without fault, and was more merciful. Lord Palmerston, for example, claimed that it afforded "every possible security which human institutions can afford for freedom from unjust punishment."¹⁴⁸ Sir Horace Walpole told the Royal Commission on Capital Punishment in 1864 that his experience in the Home Office had convinced him that "justice [is] most perfectly administered [there] . . . and can be exercised by no one so well as the Home Secretary."¹⁴⁹

¹⁴⁵ 172 PARL. DEB. (4th ser.) 1009 (1907). For earlier claims, see 96 PARL. DEB. (3d ser.) 1299 (1848) (remarks of Mr. Ewart); 75 PARL. DEB. (3d ser.) 11-23 (1844) (remarks of Sir Fitzroy Kelly). In 1898 a Home Office official suggested in a memorandum that, in "a certain number of cases, . . . [but] not very many, . . . it is clear that there is ground for believing that there has been a miscarriage of justice." Attached to the memorandum is a fascinating list of cases. Memorandum of March, 1898, of Mr. Digby, *Court of Criminal Appeal Bill*, H.O. 45/9894/B17943C/2 (1895-1900).

¹⁴⁶ 156 PARL. DEB. (3d ser.) 411 (1860).

¹⁴⁷ For a discussion of the royal prerogative and the distinctions between free pardon, conditional pardon, remission of sentence, and reprieve or respite from punishment, see E. TROUP, *THE HOME OFFICE* 55-72 (1925). For a discussion of the exercise of the royal prerogative, see I. A. TODD, *supra* note 143, at 554-69; *Return of Instances Since 1860 in Which Appeal Has Been Made on Behalf of Persons Convicted of Capital Offences to the Home Secretary, for the Exercise of the Royal Prerogative of Pardon or Mitigation of Sentence . . . and the Result* (437), 76 PARL. PAPERS 391 (1881). From 1860 to 1880, only six persons received a free pardon, whereas 210 had sentences commuted.

¹⁴⁸ 127 PARL. DEB. (3d ser.) 980 (1853).

¹⁴⁹ *Report of the Capital Punishment Commission* (10438), 21 PARL. PAPERS xvii (1866). See 127 PARL. DEB. (3d ser.) 990-92 (1853) (remarks of Sir George

Another argument against appeals was that the Home Office would be reluctant to exercise the prerogative in cases of rejected appeals. The advantages of the prerogative would thus be lost. Prisoners had greater ease of access to the Home Office: they had only to send a petition, which cost nothing. In contrast, an appeal required a lawyer and inevitably involved costs. A system of appeals would, therefore, merely favor the rich.¹⁵⁰ The Home Office also had the advantage that its power was limited to dispensing pardons and mercy. If appeals were allowed, the right of appeal for the prosecution could not be denied, and what could be more dangerous to the innocent?

Those favoring appeal could not accept the argument that the prerogative was a satisfactory substitute. Evidence submitted to the Home Secretary was not properly tested. Indeed, it was examined in secret, and reasons for decisions were never made known, except when the Home Secretary rose to defend himself in the House.¹⁵¹ More importantly, the prerogative was being abused: it had been extended beyond its proper role to become an irregular appellate jurisdiction. "[Justice] should be done in the name of justice, not in the name of mercy," said Lord Penzance. "Mercy begins where justice ends; and this is a system of eking out imperfect justice by irregular mercy."¹⁵² A pardon was "almost an insult" to an innocent man and left him with the stigma of conviction.¹⁵³ The Home Secretary and trial judge were thus, said Sir James Stephen, "in a position at once painfully and radically wrong, because they are called upon to exercise what really are the highest judicial functions."¹⁵⁴

The debate lingered on for fifty years before a proposal emerged to give an appellate court the power to alter sentences independent of the power to reverse convictions. The idea was taken up by the

Grey). For a critique, see speech by H. G. Palmer, *Suggestions for the Amendment of the Laws in Criminal Cases*, read before the Law Amendment Society (1864).

¹⁵⁰ This argument was forcefully advanced by Lord Chief Justice Alverstone. 157 *PARL. DEB.* (4th ser.) 1082 (1906). Others noted that granting costs for appeals would be anomalous because they were not granted for trials of first instance. See 156 *PARL. DEB.* (3d ser.) 426 (1860).

¹⁵¹ Home Secretary Bruce did so on a number of occasions. *E.g.*, 200 *PARL. DEB.* (3d ser.) 420-22, 2098-2109 (1870); 195 *PARL. DEB.* (3d ser.) 1358-62 (1869); see 1 H. BRUCE, *LETTERS OF THE RIGHT HONOURABLE LORD ABERDARE* 325 (1902).

¹⁵² 200 *PARL. DEB.* (3d ser.) 1150 (1870).

¹⁵³ EIGHTH REPORT OF HER MAJESTY'S COMMISSIONERS ON CRIMINAL LAW, 14 *PARL. PAPERS* 181 (1845). See 277 *PARL. DEB.* (3d ser.) 1190 (1883) (remarks of Sir Henry James).

¹⁵⁴ 1 *HISTORY OF THE CRIMINAL LAW*, *supra* note 46, at 313.

judges. At their meeting in 1892, they recommended establishment of a court to review sentences with full powers to alter sentences that were "wrong." Such a court seems to have been accepted as a means of securing "the great object [which] is to procure a greater uniformity than exists" through the "examples and reasons" to be given for decisions by the appellate tribunal.¹⁵⁵ Although the Home Office dealt with a large number of petitions complaining of severe sentences, they had not attempted to use the prerogative of mercy on any large scale in order to promote uniformity of sentence. Yet officials felt that perhaps twenty percent of the sentences had a reasonable chance of being reduced or remitted.¹⁵⁶ The only contentious issue was whether sentences should ever be increased to "level up" those the court considered too lenient. Although opponents found the idea "repugnant to all Englishmen," a dangerous power, and an attempt to counteract humane sentences, it was accepted primarily on more pragmatic grounds—as a deterrent to frivolous appeals.

The judges did not propose that power be given the court to hear appeals of convictions. They were adamant in their belief that appeals would undermine the role of the jury and they would go only so far as to allow the proposed court to consider cases referred by the Home Secretary.¹⁵⁷ A bill introduced in 1897 and based on the judges' recommendations made no progress because appeals of sentences were regarded as of secondary importance in comparison with appeals of wrongful convictions. And once the judges reached agreement in 1901 on a standard for normal penalties, they no longer felt that an appellate court to review sentences was necessary.

Exactly sixty years had passed when this circle of arguments was made irrelevant by the case of Adolph Beck. The case exposed errors at all stages of the criminal process and destroyed confidence in the ability of the system of checks and balances to protect the

¹⁵⁵ *Return of Report of the Judges in 1892 to the Lord Chancellor, Recommending the Constitution of a Court of Appeal and Revision of Sentences in Criminal Cases* (127), 71 PARL. PAPERS 173, 179 (1894). See Memorandum of March, 1898, of Mr. Digby, *Court of Criminal Appeal Bill*, H.O. 45/9894/B17943C/2 (1895-1900).

¹⁵⁶ According to Mr. Simpson, the Chief Clerk, over four thousand petitions were filed each year. *Select Committee on the Poor Prisoners Defence Bill*, 7 PARL. PAPERS 628 (1903). See *Appeals in Criminal Cases*, H.O. 45/10337/139064/1 (1906-07); *id.* 45/10337/139064/3; *Discussion Prior to Passing of Criminal Appeal Act*, H.O. 45/10328/133496 (1905-06). Mr. Gladstone stated that 1,186 petitions relating to sentences in 850 cases were filed in 1905. In addition, some of the 1,013 petitions relating to convictions in 674 cases also raised questions regarding the sentence. 174 PARL. DEB. (4th ser.) 590-91 (1907).

¹⁵⁷ See *The Times* (London), May 18, 1895, at 14, col. 3 (unusual letter from Lord Russell, the Lord Chief Justice, to Sir Henry James).

innocent. In 1896 Beck was convicted of committing a series of frauds on women. He was also identified as John Smith, who had already served a sentence for similar offenses. He was sentenced to seven years' penal servitude. He protested his innocence and petitioned the Home Office but received no reply until, in 1898, his solicitor pressed the Home Office to reopen the case. This they did and discovered that a medical examination of Smith by a prison doctor in 1879 had revealed that he had been circumcised. Orders were given to examine Beck, who was found not to have been circumcised. The Home Office then consulted the trial judge for the first time but did not tell him the full facts. They curiously decided not to interfere in the case but to allot Beck a new number and letter indicating that he had no previous conviction. They failed, however, to communicate to the prosecutor or the police the evidence that Beck was not Smith. In 1904, three years after being released, Beck was again convicted of similar offenses and was saved from further imprisonment only by the fortuitous arrest of the convict Smith. Beck was granted two pardons and offered compensation of two thousand pounds, later increased to five thousand.¹⁵⁸

The Committee of Inquiry found two major faults. One was the refusal of the judge at the first trial to reserve a point of law on Beck's identity. They thus recommended a right of appeal on matters of law but regarded wider appeal on the facts to be too controversial and outside their competence. The other and, according to the Committee, more important error was the failure of the Home Office to "detect the flaw and redress the wrong." Judges would always be fallible and evidence of identity unsafe, but "it ought to be possible, not to say reasonably certain, that a miscarriage from one or both of these causes should be capable of redress by the reviewing authority." The Committee found that less serious cases were reviewed by subordinate officials without legal training and therefore recommended improvement of the staff and procedures. They stopped, however, well short of a condemnation of the Home Office.¹⁵⁹

The whole inquiry has been called a whitewash.¹⁶⁰ Certainly the public and press were not satisfied. Meetings were called, let-

¹⁵⁸ The literature on the Beck case is enormous. *E.g.*, N. SIBLEY, *supra* note 143; E. WATSON, *THE TRIAL OF ADOLF BECK* (1924).

¹⁵⁹ *Report of the Committee of Inquiry into the Case of Adolf Beck* (4296), *PARL. PAPERS* 465, 471, 482 (1905).

¹⁶⁰ For a glimpse of the reaction to the Committee's report, see 118 *LAW TIMES* 100, 182-83, 207-09, 316-18, 346-47, 507 (1904-05).

ters sent by the hundreds to prominent members of Parliament, and a press campaign initiated. This pressure, this overwhelming lack of confidence in the status quo, forced the government to act. As the Lord Chancellor, Lord Loreburn, recognized, "instances of error . . . [had] stirred the public mind."¹⁶¹

Many who had been opposed to criminal appeal changed their minds. Most notable among these was the Attorney General, Sir John Walton, who said that the Home Office after investigation "could not be held by any jurist to correspond in any satisfactory degree to a tribunal of criminal appeal."¹⁶² The Home Secretary, Herbert Gladstone, felt that the balancing of the relative advantages and disadvantages of the Home Office and a court had been made irrelevant. The position of the Home Secretary had become "almost unbearable." He was subject to constant critical attacks in the press and was unable to reply or give explanations to "keep the public straight." Furthermore, continual reiteration of the few Home Office errors was leading people "to believe that miscarriages of justice are of every-day occurrence."¹⁶³ The Court of Criminal Appeal thus came into being not because of one argument of principle overriding another, but through political necessity borne of a traumatic experience.

With great circumspection, the Court of Criminal Appeal began to tackle its task of identifying the circumstances in which it should interfere with sentences. In 1908, its first full year, the court heard twenty-eight appeals out of the 145 applications. In fourteen, sentences were altered. In the following five years up to the outbreak of war, applications for appeal increased to over four hundred a year, but the number actually heard by the court averaged only sixty-six. In just over thirty cases a year, sentences were reduced. The court used its power to increase a sentence only once.

From early on, the Lord Chief Justice made clear that

the Court would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence. It was not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less severe.¹⁶⁴

¹⁶¹ 154 *PARL. DEB.* (4th ser.) 992-93 (1906). See 179 *PARL. DEB.* (4th ser.) 1472 (1907).

¹⁶² 175 *PARL. DEB.* (4th ser.) 227 (1907).

¹⁶³ *Id.* 193, 194.

¹⁶⁴ *Rex v. Sidlow*, 1 *Crim. App.* 28, 29 (1908).

When the experienced recorder of Birmingham imposed the maximum sentence of five years' penal servitude for an offense of wounding which arose from a drunken altercation between neighbors and which caused no permanent injury, the court thus observed that "[it] could not interfere because some people would have inflicted a lighter sentence of, say, four or three years' penal servitude. The learned Recorder evidently thought it an extraordinarily bad case."¹⁶⁵ Following this line of reasoning, the court upheld a series of long sentences of penal servitude. Henry Gorman, for example, had been sentenced to fourteen years' penal servitude for thrice stabbing his wife, who recovered in three weeks. The sentence exceeded that for any analogous offense mentioned in Criminal Appeal Reports and seemed unreasonable in comparison with the eighteen months' hard labor imposed for a more serious stabbing. Moreover, the applicant was only twenty-five years old and had no previous convictions. The court nevertheless rejected the appeal, stating,

it is quite impossible to lay down any standard as to what is a proper punishment for the offence of wounding with intent to do grievous bodily harm. . . . The question depends on the circumstances attending each particular case. In this case it appears to the Court that if there is a standard it has been somewhat raised, but very properly so.¹⁶⁶

Similarly, twelve years' penal servitude was not held excessive in principle for unlawful carnal knowledge of girls under thirteen years of age.¹⁶⁷

Not until 1912 did the court change its policy and try to set some benchmarks for sentencing serious offenses. Ten years' penal servitude for unlawful carnal knowledge was thus reduced in two cases to seven and five years.¹⁶⁸ A professional burglar's ten-year sentence was decreased to six; earlier, twelve years had been upheld for a first offense.¹⁶⁹

The court also began to develop and apply some general rules, among which were the following: the maximum penalty should be

¹⁶⁵ *Rex v. Heaps*, 1 Crim. App. 106, 107 (1908); *see Rex v. Concannon*, 1 Crim. App. 229 (1908); *Rex v. Peters*, 1 Crim. App. 141 (1908).

¹⁶⁶ *Rex v. Gorman*, 2 Crim. App. 187, 189 (1909).

¹⁶⁷ *Rex v. Smith*, 4 Crim. App. 166 (1910); *Rex v. Wilson*, 3 Crim. App. 8 (1909).

¹⁶⁸ *Rex v. Simmonds*, 9 Crim. App. 51 (1913); *Rex v. Jillson*, 8 Crim. App. 12 (1912).

¹⁶⁹ Compare *Rex v. Brooks*, 8 Crim. App. 111 (1912) with *Rex v. Spencer*, 1 Crim. App. 37 (1908).

reserved for the worst cases in any class of crime;¹⁷⁰ generally, the first term of penal servitude should be the minimum of three years;¹⁷¹ penal servitude should not as a rule be imposed for a first offense except an exceptionally serious one;¹⁷² allowance should be made if the offender's previous convictions were of a different character from the current offense;¹⁷³ sentences of offenders with long records should be mitigated if they conducted themselves well since their last discharge from prison;¹⁷⁴ a sentence should not be lengthened merely because the accused "brazen[ed] it out" by persisting in protests of innocence;¹⁷⁵ a government informant should be rewarded with a much lower sentence.¹⁷⁶

Such guidelines were relatively easy to establish; the court hesitated to take a stand, however, on more fundamental questions of penal principles. A sizable percentage of the appeals involved a long sentence imposed for a relatively trivial offense by a prisoner with many previous convictions. Such cases required balancing proportionality against prevention. At first the court allied itself with the preventive principle. When short sentences had had no effect, penal servitude would be imposed, even in attempts at reformation.¹⁷⁷

Jane Elizabeth Maurice, for example, had been sentenced to five years' penal servitude and two years' police supervision for stealing a penny from a collecting box which she had obtained from a hospital. She had been carrying out similar "frauds" for twenty-four years, had been convicted several times, and had served a sentence of three years' penal servitude. The court held:

[T]he amount which a prisoner had succeeded in [stealing] is not the criterion in a case of this kind. Previous sentences had proved ineffectual, and the Chairman was entitled to pass a sentence on the principle of keeping her out of mischief for a long time. If the principle . . . is right, the Court will not enquire whether the sentence is

¹⁷⁰ *Rex v. Harrison*, 2 Crim. App. 94, 96 (1909); *see Rex v. Alden*, 8 Crim. App. 175 (1913).

¹⁷¹ *See Rex v. Street*, 4 Crim. App. 88, 89 (1910).

¹⁷² *Rex v. Kervorkian*, 7 Crim. App. 96 (1911); *see Rex v. Caroubi*, 7 Crim. App. 153 (1912).

¹⁷³ *Rex v. Parsons*, 7 Crim. App. 76 (1911); *see Rex v. Raybould*, 2 Crim. App. 184 (1909).

¹⁷⁴ *Rex v. Connor*, 9 Crim. App. 131 (1913); *Rex v. Myland*, 6 Crim. App. 135 (1911).

¹⁷⁵ *Rex v. Newman*, 9 Crim. App. 134, 136 (1913).

¹⁷⁶ *Rex v. James*, 9 Crim. App. 142 (1913).

¹⁷⁷ *Rex v. Dowling*, 3 Crim. App. 63 (1909).

one which they themselves would have thought well to pass.¹⁷⁸

Similarly, the court upheld sentences of three years' penal servitude for stealing some pawn tickets, a piece of lace, and a purse valued at one shilling and six pence;¹⁷⁹ for stealing a coat;¹⁸⁰ for stealing boots;¹⁸¹ for stealing cigars valued at fifty-five shillings;¹⁸² and for obtaining two pounds with a worthless check.¹⁸³ Five years was upheld for the theft of two odd boots¹⁸⁴ and eight years reduced to five to set the standard for obtaining one pound by a trick.¹⁸⁵

By 1910, however, the court, perhaps influenced by the availability of preventive detention for habitual criminals, began to retreat from this policy. Such severe sentences for small crimes left no latitude for punishment of grave offenses. Eighteen months' hard labor for stealing a quart of milk was thus reduced to three months' hard labor;¹⁸⁶ five years for stealing a vest and pair of drawers was cut to twelve months;¹⁸⁷ five years' penal servitude for stealing goods worth fourteen and fifteen shillings was too severe whatever the record of the offender.¹⁸⁸ Penal servitude was thus no longer to be imposed for a petty offense.¹⁸⁹ Recidivism was not enough to justify prolonged punishment: the objective gravity of the deed was to be the limiting factor.

The enunciation of general guidelines and principles may well have acted as a rough guide for the judges of the King's Bench, but exactly how far they infiltrated the courts of quarter sessions is uncertain. In any case, so few sentences were interfered with that the vast array of disparate decisions remained unaffected. The court never set itself to the task of completely eradicating these inconsistencies but acted only when a sentence was blatantly based on a wrong approach. Its role was thus far removed from that of the court to review sentences which the judges had so confidently

¹⁷⁸ *Rex v. Maurice*, 1 *Crim. App.* 176, 177 (1908).

¹⁷⁹ *Rex v. Rees*, 1 *Crim. App.* 83 (1908).

¹⁸⁰ *Rex v. Thornton*, 2 *Crim. App.* 315 (1909).

¹⁸¹ *Rex v. Dowling*, 3 *Crim. App.* 63 (1909).

¹⁸² *Rex v. Arnold*, 1 *Crim. App.* 27 (1908).

¹⁸³ *Rex v. Crawford*, 2 *Crim. App.* 305 (1905).

¹⁸⁴ *Rex v. Stutter*, 5 *Crim. App.* 64 (1910).

¹⁸⁵ *Rex v. Woodman*, 2 *Crim. App.* 67 (1909).

¹⁸⁶ *Rex v. Ray*, 3 *Crim. App.* 129 (1909).

¹⁸⁷ *Rex v. Simmonds*, 6 *Crim. App.* 246 (1911).

¹⁸⁸ *Rex v. Martin*, 9 *Crim. App.* 168 (1913).

¹⁸⁹ *Rex v. Williams*, 7 *Crim. App.* 51 (1911); *Rex v. Bennett*, 6 *Crim. App.*

imagined in 1892 would solve the problem of disparity at all levels of the administration of justice.

The royal prerogative still remained the best hope for a prisoner seeking a reduction in sentence. In 1910 the Home Office shortened for one reason or another 181 imprisonments; sixty-seven of these, twice the number of sentences cut on appeal, were "simple mitigations of sentence."

VII. THE CHURCHILLIAN ONSLAUGHT

When Winston Churchill came to the Home Office in Asquith's liberal government in 1910, it must have looked as if recent legislation had sufficiently reshaped the sentencing structure. Much had already been accomplished to reshape sentencing practices. Yet, with his characteristic flair and vitality, Churchill brought a questioning mood and fresh ideas.

The Court of Appeal had begun already to set sentencing standards, but Churchill did not regard its efforts as likely to have sufficient impact upon the judiciary. Home Office officials had predicted that the Court of Appeal would reduce the importance of the royal prerogative in remitting sentences, a prediction that had proved unfounded. Under Gladstone's home secretaryship, 203 sentences were mitigated in 1909; under Churchill, the number rose to 395 between February, 1910 and July, 1911.¹⁹⁰ Churchill thus took it upon himself to examine the criminal calendars to assess "the whole stream of our criminal punishments."¹⁹¹

His approach rested basically upon classical notions of justice, that the penalty should be proportionate to the crime. Unlike his predecessors, Churchill did not sit back and wait for pleas of mercy; he actively sought out injustices. Sir Francis Hopwood of the Colonial Office had encouraged him to inject the Home Office "with something of the 'quality of mercy.'"¹⁹² He was advised to "keep an eye on the sentences passed by fat headed people and reduce them fearlessly whether they emanate from the Ermine or only the 'great unpaid.'"¹⁹²

In October, 1910, Churchill visited Pentonville prison, and, "with a view to drawing public attention in a sharp and effective manner" to the evil of imprisoning youths for trifling offenses, he

¹⁹⁰ 28 PARL. DEB., H.C. (5th ser.) 669 (1911).

¹⁹¹ 19 *id.* 7351 (1910).

¹⁹² 2 R. CHURCHILL, WINSTON S. CHURCHILL 1138 (1969) (Companion Volume, pt. 2).

immediately ordered the release of a number of them.¹⁹³ He aimed by such exemplary actions to use the prerogative as a means of guiding judicial sentencing practices. Churchill was heavily criticized for not consulting with the judges who had passed sentence on those released.¹⁹⁴ He insisted that he was under no obligation to do so, although he did consult whenever possible. Churchill appeared to care little for the constitutional niceties of the relationship between the executive and the judiciary. Indeed, the press severely criticized him for executive interference in areas considered to be the responsibility of judges. The controversy came to a head when he attacked the judges in 1911 for bias “[w]here class interests are involved.”¹⁹⁵

In his early days at the Home Office, Churchill called for a special report on the “very inadequate” sentence passed on Annie Connolly at the Salford Hundred Quarter Sessions. Connolly, while drunk, had thrown pepper in the eyes of another woman after ill feelings had arisen between their families. She was ordered to keep the peace and be of good behavior for six months and was released on her own recognizance after paying five pounds. Churchill wanted the magistrate rebuked:

[H]e is unfit to hold his position [I]t is, in my opinion, one of the most brutal and unnatural crimes a woman could commit, and certainly six months hard labour was richly deserved. . . . The most awful disparity between the punishments inflicted for the most trivial offences against property and the gravest offences against the person was never more strikingly illustrated.

Sir Edward Troup, the Permanent Secretary, tactfully reminded Churchill of the independence of the judiciary. Nevertheless, a letter was sent to the chairman of quarter sessions to which he replied, “if you had seen and heard the witnesses you would have approved the sentence.”¹⁹⁶

¹⁹³ 27 PARL. DEB., H.C. (5th ser.) 255 (1911); see 21 *id.* 1534, 1854; The Times (London), Oct. 3, 1910, at 3, col. 1.

¹⁹⁴ 46 LAW J. 411 (1911).

¹⁹⁵ See *Musing Without Method*, 189 BLACKWOOD'S MAGAZINE 565, 570-72 (1911); 46 LAW J. 162, 177, 349-50, 374 (1911); 131 LAW TIMES 95 (1911); 112 SATURDAY REV. 353-54 (1911); 55 SOLICITORS J. & WEEKLY REP. 561, 562 (1911); The Times (London), June 3, 1911, at 9, col. 5. Even before Churchill's remarks, some commentators had expressed the view that the Home Secretary should be a lawyer. 45 LAW J. 115, 116 (1910); 128 LAW TIMES 377, 378 (1910). See also 46 LAW J. 651, 653 (1911) (welcoming appointment of a lawyer, Reginald McKenna, as Churchill's successor).

¹⁹⁶ H.O. 144/194175.

Churchill also checked the assize calendars and asked for reports on eleven sexual offenders, nearly all convicted of sodomy. For most, he sought sentence reductions. Of one, sentenced to ten years' penal servitude, he remarked: "The prisoner has already received two frightful sentences of 7 years penal servitude, one for stealing lime-juice and one for stealing apples. It is not impossible that he contracted his unnatural habits in prison." On another, sentenced to fifteen years, he consulted F. E. Smith, a prominent Conservative member who might have been expected to hold a different view. He agreed with Churchill, however, that seven years would have been adequate. The sentence was reduced accordingly.

Churchill then tried to articulate a standard:

Only circumstances of rare and peculiar aggravation would, in my opinion, be sufficient to justify a sentence of over 10 years' penal servitude for a single offence unaccompanied by danger to life. Where wealth is deliberately employed to the systematic corruption of minors; where force is used with such brutality as to produce permanent injury; where there is vile treachery, as in the case of a schoolmaster, or where there is evidence of habitual concentration of a man's main activities upon criminal intercourse of this character, then that limit may be exceeded. But for isolated acts of bestiality, even when accompanied by violence amounting to rape, and where the full offence is committed, 7 years penal servitude would appear to me the standard sentence which should be borne in mind.¹⁹⁷

Churchill undertook a reappraisal of the norms that the judges had agreed upon in 1901¹⁹⁸ and thus sought views on means of securing greater uniformity of sentencing. He was anxious to know what sentences had been imposed in practice and wondered, "[h]as not the time come for new maxima?" Two of Churchill's ideas, a royal commission to consider the problem and a Board of Assimilation, were quickly dropped. The latter was intended to be more like the court of review suggested by the judges in 1892 than the Court of Appeal in existence since 1907. Troup observed that, while the Court of Criminal Appeal had laid down principles in several cases, it had not been able to develop standards to be fol-

¹⁹⁷ H.O. 144/197967.

¹⁹⁸ See notes 125-29 *supra* & accompanying text.

lowed by other courts because prisoners with low sentences never appealed. The court thus had no opportunity to raise sentences considered too lenient. The Home Office considered the judges' memorandum of 1901 inadequate. The memorandum was out of date because it predated the Probation and the Prevention of Crimes Acts. In addition, its impact had been limited: judges followed it only to a limited extent, and it had never been communicated to recorders and chairmen of quarter sessions. Moreover, the memorandum dealt separately with a number of offenses of rare occurrence, such as fraudulently impersonating a prisoner; yet it treated common offenses, such as larceny, embezzlement, and false pretences, "as though the names alone were enough to indicate the gravity of the offence."¹⁹⁹

Churchill eventually put forward his own scheme for distinguishing between offenses by degrees of seriousness. It was not much more than a rudimentary list: offenses of the first degree were those against life; offenses of the second degree, against the person; offenses of the third degree, against property; and offenses of the fourth degree, against morals. Within each category, offenses were distinguished according to their gravity, and appropriate penalties were suggested. A separate scheme of penalties was provided for petty crimes; occasional criminals should not be imprisoned unless the offense was serious enough to justify at least a month's imprisonment. For the habitual petty offender, a rather complicated system of cumulation was suggested to ensure "disciplinary detention in a suitable institution for not less than one and not more than two years."²⁰⁰

Churchill's idea was to create a scale of offenses and penalties more in line with the social harms they created. He made no headway. As one of his civil servants pointed out, his proposal could be construed as an attempt to dictate sentences to the judges. A draft letter explaining these ideas to the Lord Chief Justice was still in the file when Churchill left the Home Office. His successor, Reginald McKenna, when asked by Troup if he would like to take up the matter, replied curtly, "I cannot undertake to deal with the question at present."²⁰¹ The subject was dropped.

Churchill was far more successful in applying his principles to concrete instances of injustice, and he had ample opportunity when sentences of preventive detention began to be imposed. The Act

¹⁹⁹ See *Standardisation of Sentences*, H.O. 144/A60866/4 (1901).

²⁰⁰ *Id.*

²⁰¹ *Id.*

of 1908 had left the definition of habitual criminal rather vague, and therefore the police and the Director of Public Prosecutions had considerable latitude in bringing cases to court, as did the courts in sentencing. Churchill immediately saw the danger and lost no time in acting vigorously, and impetuously. The Act was frequently used the first year it was in force. Up to July, 1910, the police made applications to prosecute 439 defendants as habitual offenders, 305 of which were allowed by the Director of Public Prosecutions. One hundred seventy-four persons were convicted as habitual criminals and sentenced to terms of penal servitude and preventive detention of at least eight years.²⁰² In Churchill's view, the Act was already being used too widely and too capriciously. It was being applied to criminals who under no stretch of the imagination could be regarded as dangerous. When introducing the measure in Parliament in 1908, Herbert Gladstone had stressed that it was intended for professional, not petty, criminals.²⁰³ What did Churchill find in practice?

On the case of the unfortunate James Wright, sentenced to three years' penal servitude and five years' preventive detention for stealing food, Churchill commented: "The calendars show me scores of cases exactly similar or worse where 6 months or less is inflicted. It was a mere fluke that this man fell under the sledge hammer of prosecution as an 'habitual.'" He called it a "hateful sentence" on a man who stole for sustenance, not profit. The Director of Public Prosecutions sought to justify his decision. Wright had ten previous convictions: he was "a systematic thief, stealing food wherever he knew it to be stored, and keeping it in a larder, of his own creation, against present and future requirements." Penal servitude had already failed to deter him, and, therefore, at the age of twenty-five, he needed to be reclaimed. The Director of Public Prosecutions was under the impression that preventive detention was intended to be reformatory as well as punitive. Even Churchill's subordinates believed that Wright would be "better off" in preventive detention than "leading . . . life . . . varied at short intervals by a few months in a local prison." Churchill was not convinced. He wrote:

No doubt it is very annoying that people should be guilty of a succession of petty thefts, but the injury to society is not serious, and the thefts are punished one by one as they occur. . . . [T]he appalling leap to 8 years of prison,

²⁰² 19 PARL. DEB., H.C. (5th ser.) 1351 (1910) (remarks of Mr. Churchill).

²⁰³ 190 PARL. DEB. (4th ser.) 497-500 (1908).

for an offence which—even when committed by a man of bad character—is constantly and usually met by a sentence of a few weeks cannot be reconciled with any system of dispassionate justice.

The preventive detention was remitted entirely, and the sentence reduced to eighteen months.²⁰⁴

Wright's case passed unnoticed, but a storm revolved around David Davies, known as the "Dartmoor Shepherd." Davies had been convicted nine times since 1870 for various offenses against property. His prior sentences totalled over thirty-seven years of penal servitude. On trial in 1909 for theft of two shillings from an offertory box in a church, he was found guilty as an habitual criminal and sentenced to three years' penal servitude and ten years' preventive detention. Both Lloyd George and Winston Churchill made political capital out of the case, accounting for its notoriety. The Home Office minutes described the case as "a case for preventive detention if ever there was one" and concluded that Davies would be better off looking after sheep on Dartmoor than doing a series of short sentences. Churchill was appalled: "The sentence is unrelated to human reason at any point. It is less an act of barbarity than a hiatus." The penalty bore absolutely no relation to the offense. Churchill astutely analyzed the vicious circle which Davies had entered:

Perhaps a more severe view may sometimes be taken of a man's latest offence because of the very heavy sentences which have been imposed in the past without effecting any reformation. If this is true, one harsh sentence may become an excuse for others, and the dose may be progressively increased without proper reference in each case to the actual guilt of the offence or to the character of the offender.²⁰⁵

Although Davies, after his release under special conditions, immediately disappeared and continued to commit crime until his death in 1929, the case does not detract from the principle Churchill tried to lay down. He was convinced that the Director of Public Prosecutions should reserve the Act for dangerous or professional offenders, not petty criminals, however persistent. The Act should be "applied without hesitation to dangerous and brutal

²⁰⁴ H.O. 144/175716. Wright, who in 1906 had been classified a weak-minded convict unfit for early release, was later declared insane and a "pauper lunatic."

²⁰⁵ H.O. 144/106362; H.O. 144/10086.

criminals, whose passions of predatory violence or ferocious lust render them a peril and an affront to civilised society," but never to such as the Dartmoor Shepherd.²⁰⁶ Churchill thus felt that no one who was under the age of thirty and no one who had not previously been sentenced to penal servitude should be indicted as a habitual offender. Moreover, "his criminal record should show he is a danger to society. Violence in crime would be an adverse factor here. His general mode of life should reflect hopelessness. Any spell of honest work would count favourably. The new crime ought to be a serious offence."

Sir Charles Matthews, the Director of Public Prosecutions, accepted the instructions with bad grace. Like many others, including most Home Office officials, he thought the net of the Act should be thrown wider to effect certainty of long confinement for persistent recidivists. As Simpson, Chief Clerk at the Home Office, noted:

There must be an infinite variety in the facts that bring a man within the Act, but if it is once established that a criminal . . . will be sent to penal servitude for 3 years and preventive detention for 5 years, unless there are special reasons for making the term longer, it will be a most important step in securing a more uniform treatment of men who live by preying on society.

Churchill sarcastically replied, the "argument is Draconic in its flavour. A universal death penalty would equally remove all the disparities that exist between sentences: and compared with Preventive Detention would be cheaper and far more efficacious."²⁰⁷

Churchill's officials feared that the regulations would be so tightened that all those indicted as habitual criminals would escape prosecution.²⁰⁸ Nevertheless, Churchill insisted that action be taken and threatened that, if he could not regularize and mitigate the operation of the Act by administrative means, he would "subject the whole system to drastic legislative amendment."²⁰⁹ The result was the circular of 1911 which reiterated that the Act's purpose was to deal only with professional, hardened criminals.²¹⁰ The impact was immediate. In 1910, 177 men had been sentenced to

²⁰⁶ H.O. 144/106362; *The Times* (London), Jan. 27, 1911, at 9, col. 2.

²⁰⁷ H.O. 144/194478.

²⁰⁸ H.O. 45/10589/184160.

²⁰⁹ H.O. 45/105851/184160/25a.

²¹⁰ See *Report of the Commission of Prisons and Directors of Convicted Prisoners*, 39 *PARL. PAPERS* 355-57 (1911).

preventive detention; the following year the number slumped to fifty-three and never rose again.

At root, Churchill felt an innate sense of injustice at the capriciousness of a system which rested upon a provincial policeman's whim whether to prosecute a hapless recidivist as a habitual criminal.²¹¹ The case of Princeps provides a good illustration. Princeps was not charged as a habitual, but Churchill thought his case indistinguishable from others brought under the Act. The Chief Constable admitted that he had "inadvertently overlooked" the Act. Churchill noted, characteristically: "He forgot! It slipped his memory. It was an accident: the mere caprice of fortune. And Alfred George Princeps who was on the verge of a life sentence got off with 18 months." Above all, Churchill had a liberal's deep distrust of the use of drastic penal powers for preventive purposes. He insisted that punishment was then too heavy: "There is a great danger of using smooth words for ugly things. Preventive detention is penal servitude in all its aspects."²¹² Though technically inaccurate, the statement showed that, for Churchill, loss of liberty could not be camouflaged with minor improvements in conditions of confinement.

Likewise, writing about proposals for indeterminate sentences for "weak minded criminals," he said emphatically:

I am opposed in principle to indeterminate detention except on purely medical grounds. . . . There must be an appeal by the relatives or friends of the patient in certain circumstances to a wholly unofficial medical authority independent of the Government of the day. Otherwise the power of unlimited detention on grounds of weak-mindedness might be used as a political weapon to remove inconvenient persons. The danger is perhaps not so real as it would have been some generations ago, but it must be guarded against in some rigorous manner.²¹³

From the beginning, Churchill intended to be a reforming Home Secretary. His plans went far wider than executive action on sentencing. He submitted to the Cabinet, for example, pro-

²¹¹ H.O. 144/194478.

²¹² 19 PARL. DEB., H.C. (5th ser.) 1352 (1910).

²¹³ H.O. 144/193548. Churchill's view on indeterminate sentencing is all the more unusual because preventive detention, when first introduced in Parliament, was intended to be indeterminate, and support for that view had continued. See Clayton, *The Working of the Prevention of Crime Act*, 68 NINETEENTH CENTURY 307 (1910).

posals to minimize short prison sentences, which included among other things: extended use of probation; time to pay fines; a "defaulter's drill" in place of imprisonment for sixteen to twenty-one year olds; suspension of short sentences, to be served only if greater than a month; and curative institutions for habitual drunkards, vagrants, "habitual brawlers," and petty offenders who had committed a specified number of offenses within a year.²¹⁴ Churchill also aimed to abolish the ticket-of-leave system of police supervision and replace it with a proper agency for after-care. He supported the Borstal system but, as in the case of preventive detention, insisted that the Borstal detention be reserved for those whose current offense justified such long confinement. Churchill also turned his attention to prison conditions. He abolished the worst excesses of solitary confinement, made rules for the treatment of political prisoners, and drew up a scheme for classification of prisoners.²¹⁵

In his memorable speech on the Home Office Supply in July, 1910, Churchill eloquently identified the balance of considerations which should guide the penal system of a progressive country:

We must not allow optimism, or hope, or benevolence in these matters to carry us too far. We must not forget that when every material improvement has been effected in prisons, when the temperature has been rightly adjusted, when the proper food to maintain health and strength has been given, when the doctors, chaplains, and prison visitors have come and gone, the convict stands deprived of everything that a free man calls life. We must not forget that all these improvements, which are sometimes salves to our consciences do not change that position. The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a con-

²¹⁴ H.O. 45/10520/138276/66. Churchill sought the advice of Beveridge and Sidney Webb on his idea of curative institutions. Webb stressed that a detention colony ought only be introduced as part of a larger scheme to deal with the unemployed.

²¹⁵ The correspondence between Galsworthy and Gladstone, Churchill, and the officials of the Home Office makes exciting reading. H.O. 45/13658/185668; Prison Commission File 7/310; *id.* 7/309; *id.* 7/308; see 2 R. CHURCHILL, *supra* note 192, at 1148-53, 1190-91; LETTERS FROM JOHN GALSWORTHY 1900-1932, at 172-74 (E. Garnett ed. 1934); H. MARROT, *THE LIFE AND LETTERS OF JOHN GALSWORTHY* 245-68 (1936); NATION, May 8, 1909; NATION, May 1, 1909. For a critique of Galsworthy's influence, see Clayton, *The Home Secretary and Prison Reform*, 69 NINETEENTH CENTURY 58 (1911).

stant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.²¹⁶

Sir Edward Troup, the Permanent Secretary, wrote: "Once a week or oftener, Mr. Churchill came to the office bringing with him some adventurous or impossible projects; but after half an hour's discussion something was evolved which was still adventurous but not impossible."²¹⁷ Winston Churchill did not stay long enough at the Home Office to make a far-reaching impact, but sufficiently long to bring new ideas and challenge many assumptions. Yet as England entered upon the contemporary phase of its penal history it continued to face the very problems of sentencing which had been so sharply perceived but not solved by the Victorians.

²¹⁶ *Home Office Supply (Report)*, 19 PARL. DEB., H.C. (5th ser.) 1343, 1354 (1910).

²¹⁷ V. BONHAM CARTER, *WINSTON CHURCHILL AS I KNEW HIM* 220-21 (1967).