

Cleaning House in a Suddenly Closed Society: The Genesis, Brief Life and Untimely Death of the Habitual Criminals Act, 1869

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CLEANING HOUSE IN A SUDDENLY
CLOSED SOCIETY:
THE GENESIS, BRIEF LIFE AND
UNTIMELY DEATH OF THE
HABITUAL CRIMINALS ACT, 1869

By MICHAEL W. MELLING*

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PROLOGUE

For most of the poor crime was what it always had been, a necessary way of supplementing income, and a way of life whose habits and practices had been evolved anciently in pre-police conditions. Still all but denied the camouflages, opportunities, mobility and education which were to be offered to the 20th. century populace, the Victorian offender found himself highly vulnerable to the evolving techniques of control. As the world of the respectable 'progressed', the 30 per cent or more at the base of the social pyramid, and from whom most crime was expected to emanate, were progressively subjected to all the controls which the ingenuity of the Victorian philanthropists and the Victorian State could devise. They had few resources to cope with them.

V.A.C. Gatrell¹

¹ Gatrell, "The Decline of Theft and Violence in Victorian and Edwardian England," in Gatrell, Lenman, and Parker, eds., *Crime and the Law* (London: Europa Publications, 1980) 335.

I. INTRODUCTION

They were essentially of the criminal class, and anyone who is familiar with the aspect of the inmates of Portland and Dartmoor will learn at once what is meant when I say this. They had the same low, retreating foreheads, the same eager cunning of their deep set eyes, the same hard-set, yet shifty contour of the mouth — a kind of mouth that you could see was one that could whine for mercy in one breath and refuse it in another.²

With these words a Victorian gentleman described in a letter to the *London Times* an encounter with members of the “hardened criminal class” of England in the late 1860s. His observations were made while on a fact-finding investigation of the “Criminal Haunts of South London”. In the same letter he recounted, with obvious distaste, stories of a woman “known in the neighborhood by the *soubriquet* of ‘Cast-Iron Poll’,”³ whose apparent celebrity was attributable to her having been the unfortunate object of no less than fifty-three convictions in the criminal courts of London.⁴

The popular admiration noted by this contemporary writer for people such as “Cast-Iron Poll” was, at that time, neither a rare nor a *naissant* phenomenon.⁵ The almost traditional admiration of the “professional” criminal, vestigially present to this day, should have come as no surprise to any well-to-do Englishman of the time, nor should it to us. However, for the propertied class in late nineteenth-century England, the prevalence, and less importantly the admiration, of the members of this category of offenders was of more than passing concern. This essay will deal with the reasons for this concern, and — more particularly — with one attempt, made in 1869, to alleviate it.

In late 1868 and early 1869, a flurry of letters to the Editor of *The Times* appeared on the subject of England’s “burgeoning criminal classes”.⁶ The letters, as shall be seen, were uniform in purpose: to provoke a response by the newly-elected Liberal Government of Prime Minister Gladstone to the problem of the “habitually criminal” class in England. Examples of its membership were cited: a woman convicted twenty times,⁷ a fifteen year old boy convicted thirteen times,⁸ a man convicted twenty-four times.⁹ A solicitor told the

² “N.A.W.” Letter to the editor, “The Criminal Haunts of South London,” *The London Times*, March 31, 1869 at 8, col. 6 [hereinafter *The Times*].

³ *Id.* at col. 5.

⁴ It is possible that this is the same woman who is the subject of a later letter, written by “A Gaol Chaplain,” who also had fifty-three previous convictions. See *The Times*, Aug. 4, 1869 at 4, col. 6.

⁵ See *supra* note 1, and *supra* note 2, at col. 5:

“Representative men and women of the chief classes of offenders against the laws may be found here [the South of London] in abundance — men and women who are literally looked up to with a dull sort of professional admiration as proficients in their trade.”

⁶ See, e.g., *The Times*, Nov. 4, 1868 at 5, col. 5; Nov. 6, 1868 at 4, col. 6; Dec. 7, 1868 at 5, col. 4; Dec. 17, 1868 at 10, col. 1; Jan. 7, 1869 at 5, col. 2; Jan. 9, 1869 at 7, col. 6; Jan. 12, 1869 at 5, col. 2; Jan. 13, 1869 at 5, col. 5; Feb. 2, 1869 at 8, col. 3; Feb. 27, 1869 at 9, col. 6; April 3, 1869 at 5, col. 4; May 27, 1869 at 11, col. 6; Aug. 4, 1869 at 4, col. 6.

⁷ *The Times*, April 3, 1869.

⁸ *Id.*

⁹ *Id.*

story of a twenty-three year old man who, under five aliases, succeeded in committing thirteen theft-related felonies, the last of which resulted “only” in a ten year sentence of penal servitude.¹⁰

One letter writer indicated that the 1868 Report of the Liverpool Gaol showed that 111 of its female inmates had more than thirty previous convictions, that one had seventy-one, that two had seventy-three, and that one had performed the rather impressive feat of having recorded 121 previous convictions.¹¹ Although, as will be shown below, almost none of these letters originated from other than interested members of the legal community, they evinced what was seen to be a popular concern for the present state of the law with respect to “habitual criminals”.

The response demanded was legislative. Further, it was to be directed towards a very specific object: the complete and efficacious control of recidivistic criminal offenders. It was the opinion of many of the letter writers that “[t]he great mass of the class here is simply incorrigible. Their hand is against every man; their life is one continuous conspiracy against the usages, property and safety of society.”¹² What was sought was comprehensive and strict legislation for the management of such offenders. Recidivistic offenders were thought of as members of an underground society, conspiratorial in nature,¹³ which operated unobstructed by the current law.¹⁴ A perceived impotence on the part of the existing law to solve this problem was a major impetus for reform.

Reform did come, in the *Habitual Criminals Act, 1869*,¹⁵ the specific piece of legislation on which this essay will concentrate. It received Royal Assent on November 11, 1869,¹⁶ and was proclaimed in force retrospectively to November 9, 1869. It remained in force only briefly, being repealed in its entirety by the *Prevention of Crimes Act, 1871*,¹⁷ which came into force on November 2, 1871.

¹⁰ *Supra* note 6, May 27, 1869.

¹¹ *Supra* note 6, April 3, 1869.

¹² *Supra* note 6, March 31, 1869, at col. 5. See also Radzinowicz and Hood, *Incapacitating the Habitual Criminal: The English Experience* (1980), 78 Mich. L. Rev. 1305, at 1308:

“[B]y all accounts, the criminal class was perceived as vast, self-contained, self-perpetuating, largely unreclaimable, implacably hostile, and alien to the interests of the state.”

¹³ See, e.g., *The Times*, March 31, 1869 at col. 5: “Thieves, it must be remembered, are a complete fraternity, and have a perfect organization among themselves.”

¹⁴ See, *id.* at col. 5: “It is the greatest error to suppose that all, or even a majority, of the criminal classes are continually passing through the hands of justice.”

¹⁵ *An Act for the More Effectual Prevention of Crime, 1869*, 32 & 33 Vict., c. 99 [hereinafter Act or 1869 Act].

The Act has been discussed in some detail by Sir Leon Radzinowicz and Dr. Roger Hood, *supra* note 12, at 1305-52. Their article is an excellent history of the legislative approach to habitual criminals in England over a period of 150 years. Some overlap with it is inevitable, though redundancy has been minimized by extensive cross-referencing. Repetition is resorted to only when it is essential to the paper.

¹⁶ See the House of Commons *Journals*, vol. 124 at 417. For a brief history of the Bill in the *Journals* see vol. 124 at 126, 129, 142, 216, 231, 250, 265, 284, 301, 313, 341, 364, 373, 394, 399, 403, 413, 417.

¹⁷ *An Act for the More Effectual Prevention of Crime, 1871*, 34 & 35 Vict., c. 112 [hereinafter the 1871 Act].

In the minds of most members of the legal community, the 1869 Act was directed towards a class of offenders “who prefer the adventurous, exciting life of crime, with its short-lived entrancing pleasures when they have done a successful job, to the humdrum existence of ordinary people.”¹⁸ In the minds of the legislators, it was aimed more specifically at two types of offenders: convicts at large on ticket-of-leave licences,¹⁹ and persons convicted previously of criminal offences.

It was a powerful piece of legislation, and deliberately so. In the words of E.W. Knatchbull-Hugessen,²⁰ then Undersecretary of State for the Home Department, to the Lord Mayor of London, “[t]he Act has been formed with a view to the protection of the public from the degradations [sic] of detected offenders by restraining them from lapsing into their old habits of crime. For this purpose greatly increased powers have been entrusted to the police.”²¹ Its purpose was to monitor, at all times if possible, the location and activities of ticket-of-leave men and habitual criminals.²² It was intended, it seems, to be an adjunct to the provisions of the *Penal Servitude Act, 1864*²³ which provided stringent penalties for recidivistic offenders.

There were several reasons given, both in and out of Parliament, for the necessity of introducing such drastic legislation. They will be dealt with in detail below. Suffice it to say here that the five most common rationales were as follows. First, that the penal servitude system was ineffective in dealing with habitual offenders — in particular that it was unjustifiably lenient with them,²⁴ and insufficiently dreaded by them.²⁵ Second, that the release of convicts on licence and the end of transportation had contributed to a real and potential growth in the rate of crime.²⁶ Third, that there were no alternative means available of dealing with such offenders.²⁷ Fourth, that “public opinion”

¹⁸ Bromby, *Judicial Sentences and the Habitual Criminal* (1898), 14 Law. Q. Rev. 154 at 156.

¹⁹ On the “ticket-of-leave men” see Bartrip, “Public Opinion and Law Enforcement: The Ticket-of-Leave Scares in Mid-Victorian Britain,” in Bailey, ed., *Policing and Punishment in Nineteenth Century Britain* (London: Croom Helm, 1981) at 150-81.

The “ticket-of-leave men” were convicts who had been released on licence pursuant to one of the Penal Servitude Acts: *An Act to Substitute, in Certain Cases, Other Punishment in Lieu of Transportation*, 1853, 16 & 17 Vict., c. 99 (*Penal Servitude Act, 1853*); *An Act to Amend the Act of the Sixteenth and Seventeenth Years of Her Majesty, to Substitute in Certain Cases Other Punishment in Lieu of Transportation*, 1857, 20 & 21 Vict., c. 3 (*Penal Servitude Act, 1857*); *An Act to Amend the Penal Servitude Acts, 1864, 27 & 28 Vict., c. 47* (*Penal Servitude Act, 1864*).

²⁰ See Rae, *Dictionary of the National Biography*, vol. 22 (London: Smith, Elder) at 941-42 [hereinafter *DNB*].

²¹ Letter to the Lord Mayor, Nov. 20, 1869. Reported in (1869-70), 48 L.T. 52.

²² Defined loosely here, as suggested by the legislation, as a felon convicted at least twice.

²³ *Penal Servitude Act, 1864* [hereinafter the 1864 Act].

²⁴ See, e.g., Hoyle, *Crime in England and Wales* (London: Effingham, Wilson, 1876) at 10; *Royal Commission on Transportation and Penal Servitude, 1863*, P.P. XXI at 22-23.

²⁵ *Royal Commission*, *id.*

²⁶ See Burn, *The Age of Equipoise*, (London: George Allen & Unwin, 1964) at 181.

²⁷ See Cornish *et al.*, *Crime and Law in Nineteenth Century Britain* (Dublin: Irish Academic Press, 1978) at 22-40.

favoured the passing of such legislation.²⁸ And finally, that the present law was particularly inept in protecting property rights.²⁹ For these reasons (at least ostensibly), and in furtherance of the goals mentioned, the Act³⁰ was passed.

II. THE GENESIS OF THE 1869 ACT

We are persuaded that it is not for the interests or security of the community to treat the criminal class with savage rigour and barbarous injustice.³¹

The Editors of the *Law Journal* on the
Habitual Criminals Bill, 1869

Two questions immediately arise whenever an attempt is made to discover the reasons for a significant change in the legislative approach to a problem. First, how was the problem previously addressed? And second, what, if anything, about the problem has changed, so as to require an attempt at a new solution? The following analysis adopts this two-step approach.

A. *How was the problem of the recidivistic offender addressed prior to the 1869 Act?*

Crime is as old as mankind³² and it is not surprising that there were legal mechanisms in place to deal with "habitual criminals" and ticket-of-leave men prior to 1869. As has been noted above, it was the efficacy of these measures that was in question.

The eighteenth century remedies for controlling the "criminal class" were the gallows and transportation which, when employed, were a very effective means of preventing habitual criminality on an individual basis. However, capital punishment proved less and less popular with the public in the nineteenth century until, by the 1860s, it was applicable to very few offences.³³ It

²⁸ But see Bartrip, *supra* note 19, at 152, and his scepticism on the identifiability of any coherent "Public Opinion" in 19th. Century Britain: "The term 'public opinion' . . . is often the last refuge of ignorance."

Nevertheless, see Lord Houghton's comment, in the House of Lords, on second reading of the Bill, to the effect that the Government was only "obeying the voice of public opinion." 194 *Parl. Deb.*, H.C. (3d ser.), col. 710 (5 March 1869).

Also, *contra* Bartrip, see Burn, *supra* note 26, at 157 where he says that public opinion "was easily capable of being aroused to strong regulatory action" in matters of health or crime.

In the House of Lords, on first reading, the Earl of Kimberley, who introduced the Bill, cited "Considerable alarm being expressed in the public mind" as a reason for the Bill. See 194 *Parl. Deb.*, H.C. (3d ser.), col. 333 (26 Feb. 1869).

Also, at least one letter writer (to *The Times*) expressed the opinion that "the public mind is made up. The present state of things has existed long enough . . . Society at large must at least take some steps, if only in self-defence." *Supra* note 6, Jan. 12, 1869, at 5 col. 2.

²⁹ See, e.g., *supra* note 12, and the concern in the letters, *supra* note 6, for the numbers, especially, of habitual thieves. Very little evidence exists of a concern with violent crime during this period. It would seem that the punishment of habitual property offenders was uppermost in the minds of the legislators. See Section VI A, *infra*, for a discussion of this suggestion.

³⁰ *Prevention of Crimes Act, 1871*, *supra* note 17.

³¹ (1869), 4 L.J. 152.

³² Of course, "crime" is only as old as the criminal law.

³³ One author has estimated that capital punishment was being employed in only about twelve cases *per annum* in the late Victorian era. See Pike, *2 A History of Crime in England* (New Jersey: Patterson Smith, 1968) at 455.

was succeeded almost entirely by transportation.³⁴ Shipping convicts to Australia was almost as effective a way of preventing crime *in England* as was executing them.³⁵ As shall be seen, however, this solution had also become unavailable by the mid 1860s.³⁶

A more subtle means of controlling the criminal population was provided by the *Vagrancy Act*³⁷ of 1824, a proper treatment of the use and abuse of which is unfortunately beyond the scope of this paper. In short, this Act provided that persons "found in or upon any Dwelling House, Warehouse, Coach House, Stable or Outhouse, or in any inclosed Yard, Garden or Area, *for any unlawful Purpose*"³⁸ would be deemed to be Rogues and Vagabonds. The same fate befell: suspected persons or reputed thieves frequenting any River Canal, or Navigable Stream, Dock or Basin, or any Quay, Wharf or Warehouse near or adjoining thereto, or any Street, Highway or Avenue leading thereto, or any Place of Public Resort, or any Avenue leading thereto, or any Street, Highway or Place adjacent, *with intent to commit Felony*.³⁹ [Emphasis added.] This dubious distinction allowed committal of the offender to the House of Correction for three months (with or without hard labour).⁴⁰ In addition, any person twice found to be a Rogue and Vagabond was deemed to be an Incurable Rogue, and subject to imprisonment at Quarter Sessions.⁴¹ Although there is little direct evidence of the use of this legislation to monitor and control recidivistic offenders,⁴² the Incurable Rogues provision and the subsequent amendment to the *Vagrancy Act* incorporating the

³⁴ See Bartrip, *supra* note 19, at 152:

Since the early seventeenth century . . . transportation, first to the Americas, then largely to Australia, became an important ingredient in English penal policy.

See also Pike, *supra* note 33, at 456:

Transportation, once only a commutation of capital punishment, grew more and more into favour after the risings of 1715 and 1745, until it became the ordinary sentence upon conviction of those offences which, even in the earlier part of the nineteenth century were, nominally at least, punishable by death.

³⁵ See Davis, "The London Garotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in Mid-Victorian England," in Gatrell *et al.*, *supra* note 1, at 195, where it is argued that transportation theoretically benefited all concerned:

the convict who was inculcated with the habits of honest toil and the moral fibre to sustain them; the mother country which was rid of her worst law breakers; and the Colonies which were provided with a source of forced immigration and cheap labour.

³⁶ *Supra* note 19, at 152:

During the 1840's, however, there was growing apprehension from the Australian Colonies to continued transportation This breakdown in transportation created, or at least, greatly exacerbated, the problems, so often posed in the press and learned journals of the period, of how to dispose of the criminal population.

³⁷ *An Act for the Punishment of Idle and Disorderly Persons, and Rogues and Vagabonds in that Part of Great Britain called England*, 1824, 5 Geo. IV, c. 83.

³⁸ *Id.* s. 4.

³⁹ *Id.* The *Habitual Criminals Act*, 1869 would later strengthen this provision by making proof of an overt act unnecessary in proving the required intent; see s. 9 of the Act, *supra* note 15.

⁴⁰ *Id.*

⁴¹ *Id.* s. 5.

⁴² For a suggestion that the *Vagrancy Act*, 1824 was used in this way see text accompanying note 299, *infra*.

provision facilitating proof of the intent to commit felony in the 1869 Act suggest that it was intended, at least in part, to fulfill this role.⁴³

As another type of solution, there is evidence to suggest that individual police forces had developed systems for the registration of criminals within their own districts. The lack of consistency and uniformity in record-keeping hampered any attempt to monitor criminals moving from one district to another.⁴⁴ Nevertheless, this *ad hoc* registration system was well established prior to the 1869 legislation.⁴⁵

Three provisions of the *Penal Servitude Act, 1864* are of particular significance here, as they provided for substantial mechanisms of control over recidivistic offenders. First, the 1864 Act provided for mandatory, monthly, in-person reporting by holders of ticket-of-leave licences⁴⁶ to the police, and mandatory notification of change of address to the Chief of Police⁴⁷ — non-compliance with either of which resulted in forfeiture of the licence,⁴⁸ and return to penal servitude. It has been argued that these requirements put the “teeth” of enforcement into the existing ticket-of-leave legislation.⁴⁹

Second, the 1864 Act conferred upon the police the power to arrest without warrant any licence holder “whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence.”⁵⁰ This was a potentially significant supervisory power.

Third, and perhaps most important, the 1864 Act provided for a mandatory seven year sentence of penal servitude to be passed on any offender convicted of a felony punishable by penal servitude if he had been previously convicted of a felony.⁵¹ This could only have served as a very effective means by which to rid society of twice-convicted felons for substantial periods of time.

Perhaps predictably, the severity of this section was not universally approved and some courts began looking for, and in certain cases finding, ways to evade it.⁵² However, there is no doubt that, when employed, this section served the related goals of preventing and deterring, at least on an individual basis, “habitual” criminality.

⁴³ The necessity for further research in this area is obvious.

⁴⁴ Mr. Bruce, Secretary of State for the Home Department, in 198 *Parl. Deb.*, H.C. (3d ser.), col. 1257 (4 Aug. 1869).

⁴⁵ *Id.*

⁴⁶ *Penal Servitude Act, 1864*, *supra* note 19, s. 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *E.g.*, by Bartrip, *supra* note 19, at 169-70. However, as has been suggested above, this system was substantially emasculated by the lack of a national and uniform registration system. See, *e.g.*, a letter to the Editor of *The Times*, March 13, 1869 at 11, col. 2, by Col. James Fraser, Commissioner of Police for the Metropolis, who blames the inability of the large number of police forces to work together for the inefficiency of supervision under the *Penal Servitude Act, 1864*.

⁵⁰ *Penal Servitude Act, 1864*, *supra* note 19, s. 6.

⁵¹ *Id.* s. 2.

⁵² See, *e.g.*, *R. v. Summers* (1869), 1 C.C.R. 182, 17 Weekly Rep. 384. To the same effect see Radzinowicz and Hood, *supra* note 12, at 1334.

These, therefore, were the principal means by which English law had sought to deal with the problem of the recidivistic offender, prior to 1869. It should also be noted here that England's police, who had been undergoing continuous development since 1829, became, in theory at least, uniform throughout the country in 1856. While organized, sophisticated and professional police forces did not automatically appear in that year, especially in the provinces, this event laid the groundwork for uniform and pervasive law enforcement and crime detection. It thereby contributed to the operations of the pre-1869 mechanisms for controlling recidivistic offenders.

B. *What changed the problem so as to require a new solution?*

The first steps towards reform in a legal system are often taken by disaffected parties within the system, who undertake singlehandedly, or in concert with a number of like-minded individuals, to press for legislative action. Such interested lobby groups are often formed on an *ad hoc* basis to deal with particular problems. They exist today and, from all indications, have existed as long as has the institution of Parliamentary Government.

It was such a small, interested group that was responsible, Davis has argued, for the movement in early Victorian society towards the "reformatory" model of punishment.⁵³ Similarly, it was a minority of "interested" and concerned citizens that provided the impetus for reform which culminated in the enactment of the 1869 legislation. In support of this submission it is instructive to examine in more detail the barrage of letters to *The Times* alluded to above.⁵⁴

The most persistent writer was Mr. Thomas Barwick-Lloyd Baker,⁵⁵ who ran the Hardwicke Reformatory for boys and was a Magistrate in Gloucestershire. Mr. Baker's main complaint was that the legal system had no means of dealing with crime until it had been committed and that, as a result, the police were powerless to prevent crime. On December 7, 1868 he wrote a letter in which he developed a suggestion that was to become a dominant theme in his later letters, that "it is most desirable the police should have power to deal with a known thief before he has committed the crime instead of after."⁵⁶ The solution for Baker was obvious — an extended period of police supervision with mandatory monthly reporting.⁵⁷ Since the latter was already in place under the 1864 Act,⁵⁸ Baker's "pitch" was really for extended supervision, commencing with the end of the convict's penal servitude.

⁵³ See esp. Davis, *supra* note 35, at 193. In her discussion of the genesis of the *Security From Violence Act*, Davis refers to those who use "public concern" to secure the implementation of measures agreeable to them as "moral entrepreneurs." This analysis, found at 198-99, is similar to the "interested persons" theory advanced here.

⁵⁴ See, *supra* note 6. Radzinowicz and Hood, *supra* note 12, at 1309-11 deal with the efforts by contemporary letter writers, reformers and journal editors to provoke action on the habitual criminals issue.

⁵⁵ See Holzendorff, *An English Country Squire as Sketched at Harwicke Court, Gloucestershire*, translated by Gebhard (Gloucester, 1878); Aitken in *DNB*, *supra* note 20, at 106-107; Parker, *The Juvenile Court Movement* (1976), 26 U.T.L.J. 140 at 150-53, 160, 162 and 169; Radzinowicz and Hood, *supra* note 12, at 1323-24.

⁵⁶ Dec. 7, 1868, *supra* note 6, at col. 4.

⁵⁷ *Id.* Professor Parker has noted Sir Walter Crofton's influence on Baker, *supra* note 55, at 150. The influence is obvious in Baker's views on supervision and reporting, see, *infra* note 70.

⁵⁸ Section 4.

Dissatisfaction existed not only with the length of supervision under the 1864 Act, but with the severity, or rather the lack thereof, of sentences generally. Complaints were made that at least some members of the judiciary were exercising their traditionally broad sentencing discretion far too much in favour of convicted offenders. In addition, it was said, in permitting this impropriety the law betrayed its need for strict reform. Of course, whether and to what extent such "leniency" actually existed would have been almost impossible to determine. But it was obviously perceived to exist. In a letter dated November 4, 1868, a "Chairman of the Quarter Sessions" blamed the defects in the existing system of crime repression on the inadequate sentences passed upon convicts, especially by Police Magistrates.⁵⁹ Baker, showing his concern for the leniency accorded recidivists, suggested that the aim of sentencing should not be to retaliate on a case-by-case basis for the criminal's wrong to society, but to react to the threat that the offender posed considering the *cumulative* damage he had caused to society.⁶⁰ This suggestion was echoed in a letter by G.L. Fenwick, then Chief Constable of Chester, who in addition to calling for extended supervision, recommended that a progressively more severe scale of punishment be adopted to deal with offenders who returned to the courts.⁶¹

In order to "flesh out" his proposals for police supervision, Baker wrote again to *The Times* on 17 December 1868 this time to suggest the establishment of "a central authority controlling, and a register recording, the movements of convicts on licence,"⁶² and to call for legislation to deal specifically with other recidivistic offenders. His specific recommendation that a register be established and that a felon be required to demonstrate an honest living when called to do so is a suspicious foreshadowing of the actual provisions of the 1869 Act.⁶³

Mr. Baker's efforts were not limited to writing letters. *The Times* of 11 January 1869 contains a report of a meeting of the Justices of the Gloucestershire Quarter Sessions, at which Mr. Baker urged and achieved the adoption of a proposal he had drafted for legislation respecting "professional criminals", which was to be forwarded to the Home Office.⁶⁴ Mr. Baker came well prepared with data showing that, of those convicted in England of a first offence, one in five were later convicted of a second. Of those twice convicted, one in two were convicted a third time. Of three time convicts, one in two were convicted again. And a full two-thirds of four time convicts were subject to a fifth conviction.⁶⁵ The proposal recommended shorter sentences of penal servitude, coupled with much longer periods of police supervision, and the establishment of a central register of convicts.⁶⁶

It is interesting to note that Conservative M.P. Sir George Jenkinson⁶⁷ was present at this meeting. He was destined to loom large in the Commons'

⁵⁹ Nov. 6, 1868, *supra* note 6, at col. 6.

⁶⁰ Feb. 2, 1869, *supra* note 6, at col. 3.

⁶¹ *Id.*

⁶² Dec. 17, 1868, *supra* note 6, at col. 1.

⁶³ See s. 8.

⁶⁴ *The Times*, Jan. 11, 1869 at 10, col. 2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Boase, *Modern English Biography*, vol. II (London: Cass, 1965) at 79 [hereinafter *MEB*].

debates on the soon-to-be-introduced bill. Foreshadowing his later speeches in Parliament, he expressed his desire for the “stricter repression of crime,” and suggested that the surveillance period should be unlimited in length.⁶⁸

Baker and Jenkinson were not the only “interested persons” pushing for reform. Two deputations were led to the Home Office to induce Home Secretary Bruce⁶⁹ to act on the issue of the “criminal class”. The first of these was led by Sir Walter Crofton,⁷⁰ the man in charge of the Irish criminal registration system, on 15 December 1868.⁷¹ He urged upon Secretary Bruce:

First, that the Irish system of registration should be extended to England, so that criminals on emerging from prison with a ticket-of-leave should be kept under surveillance . . . secondly, that if persons twice convicted of a felony should afterwards be found to be without any honest means of livelihood, they should be liable to arrest.⁷²

These recommendations should be vaguely reminiscent — they were exactly those proposed by Baker. In response Secretary Bruce promised Crofton “the attention of the Government.”⁷³ If the eventual form of the legislation is to be any indication, Crofton certainly received the promised attention, as both of these suggestions were adopted in the 1869 Act.

The link between this deputation and the eventual form of the Act is, it is suggested, more than coincidental. During the House of Lords debates on second reading of the Bill, Lord Houghton⁷⁴ accused the Government of misleading Parliament as to the origin of the bill: “The real author of this Bill is Sir Walter Crofton. It is the embodiment of the principles which he has urged very strongly upon England for some years.”⁷⁵ There exists sufficient evidence, given Crofton’s deputation, Baker’s proposal at the meeting in January of 1869 and their other related activities, for a strong suspicion that they had a hand in the legislation.⁷⁶

In early February of 1869 the second deputation was led by three Liberal Members of Parliament: Mr. Harvey Lewis,⁷⁷ Mr. John Locke⁷⁸ and Mr. John Holmes.⁷⁹ Speaking for the deputation, Professor Marks quoted statistics to

⁶⁸ *Id.*

⁶⁹ See *DNB*, *supra* note 20, at 322-25.

⁷⁰ See *Who Was Who*, vol. I (London: Adam & Charles Black, 1929) at 170 [hereinafter *WWW*]; Parker, *supra* note 55, at 150; Radzinowicz and Hood, *supra* note 12, at 1336, 1338-339.

⁷¹ See *The Times*, Dec. 16, 1868 at 7, col. 3.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Saunders, in 13 *DNB*, *supra* note 20, at 465-68; Reid, *The Life, Letters and Friendships of Richard Monckton Milnes, First Lord Houghton* (1890).

⁷⁵ 194 *Parl. Deb.*, H.C. (3d ser.), col. 709-710 (5 March 1869).

⁷⁶ See, *supra* notes 55 and 70, for Crofton and Baker’s related activities. Note in particular that Crofton, Baker and Matthew Davenport Hill, *infra* note 200, who were the “prime agitators” in the process of turning public and parliamentary attention to the “habitual criminals issue,” were all active in the Social Science Association. Without crying “conspiracy”, we can safely conclude that the efforts of each toward goals desired by all of them were probably discussed and approved of by the others.

⁷⁷ Liberal MP for Marylebone.

⁷⁸ Liberal MP for Southwark. Former City Pleader for Southwark.

⁷⁹ Liberal MP for Hackney.

Home Secretary Bruce in support of the group's claim that the number of crimes committed by convicts-at-large was increasing.⁸⁰ Bruce denied any such increase except in the past three years, which he attributed to economic depression.⁸¹ He assured the deputation that the Government was at that very moment considering legislation to bolster the police's powers and efficiency, and to "make the laws dealing with criminals more stringent and more effective."⁸²

Thus, a small group of interested individuals succeeded in influencing the newly-elected Government to act on an issue of concern to them, largely in a manner suggested by them. This is hardly surprising.⁸³ It merely suggests that part of the answer to the question of what change in the problem of the habitual offender necessitated change in the law is to be found in the personalities and interests of those who administered the law and dealt with that problem on a daily basis. Perhaps it was more those personalities and interests that changed than the problem itself. In any case, it seems that these personalities and interests were factors relevant to the genesis of the 1869 Act.

However, as has been suggested above, those calling for, and involved in, the enactment of the legislation gave three main reasons for its necessity: the failure of the ticket-of-leave system, the lack of alternative courses of action and the presence of a significant criminal class at large. It should immediately be noted that the second reason really reduces to an argument based on the cessation of transportation, since no one really expected, in 1869, that capital punishment or life imprisonment were politically acceptable means of alleviating the problem at hand.

The first reason may be dealt with briefly here, as it has been the subject of a thorough investigation, albeit in another context, elsewhere.⁸⁴ Peter Bartrip has argued that, in the years following 1855, the previously sympathetic attitude of Parliament towards the ticket-of-leave men began to change, partially as a result of a "public outcry" against them that had been virtually created by the English press.⁸⁵ He refers to the magnification of a small number of serious crimes committed by ticket-of-leave men into a national crisis "by newspapers which saw good copy in crime in general and ticket-of-leave scares in particular."⁸⁶

In addition to the artificially-created fear⁸⁷ of ticket-of-leave men was the

⁸⁰ *The Times*, Feb. 4, 1869 at 5, col. 5.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Part I, *supra*.

⁸⁴ By Bartrip, *supra* note 19.

⁸⁵ *Id.* at 157-65.

⁸⁶ *Id.* at 158.

⁸⁷ See Burn, *supra* note 26, at 181:

. . . there was also an increasing anxiety about the incidence of serious and violent crime. Much of it was due to the provisions of S. 9 of the Penal Servitude Act of 1853 which allowed the release on revocable licence of convicts under sentence of transportation or undergoing the alternative or substituted sentence of penal servitude. These persons, the ticket-of-leave men of contemporary fiction and drama, assumed the dimension of a national menace, the bogey of the respectable citizens; for a time almost every discharged convict, whether licenced or not, had to bear the approbation which the ticket-of-leave man attracted.

above-noted dissatisfaction of individuals in the legal system with the length and efficacy⁸⁸ of police supervision. These two perceived problems with the regime of the 1864 Act were part of the circumstances that changed the "nature of the problem", and necessitated, in the minds of Parliamentarians, legislative action.

Perhaps the most commonly advanced justification for the introduction of legislative change was the cessation of transportation. The move away from transportation began with the *Penal Servitude Act, 1853*, which substituted penal servitude for transportation for the majority of felonies.⁸⁹ Transportation was virtually halted by the 1857 Act of the same name, which technically abolished it altogether. Thus, since at least 1853,⁹⁰ England had been absorbing, as opposed to disposing of, the vast majority of its convicted felons. Needless to say, the effect of this was cumulative, as felons were continuously released.⁹¹ The average number of convicts released *per annum* averaged two thousand.⁹²

Concern over the cessation of transportation, and the concomitant accumulation of criminals on English soil was forthcoming from several contemporary sources. *The Royal Commission on Transportation and Penal Servitude, 1863*⁹³ concluded that the reasons for the growth of crime in England were defects in the present system of punishment and the "accumulation of convicts in the post-transportation era."⁹⁴

Evidence of this concern may also be found in Parliament and is, in fact, the reason most often cited in the debates for introducing the Bill.

On first reading of the Bill in the House of Lords, the Earl of Kimberley⁹⁵ outlined for the House the statistics with respect to the diminution of the

⁸⁸ On the efficacy issue see Davis, *supra* note 35, at 197: "The ticket-of-leave system, especially, came under concerted attack as an impotent method of controlling released convicts."

⁸⁹ *Supra* note 19. Section 4 provided the substitution procedure:

Transportation	Penal Servitude
7-10 years	4-6 years
10-15 years	6-8 years
over 15 years	6-10 years
life	life

Transportation could be ordered only for felonies punishable by transportation for over fourteen years, or for life (s. 1). The Court had discretion to substitute penal servitude for transportation where the felony was punishable by transportation for over fourteen years (s. 3).

⁹⁰ Davis, *supra* note 35, argues that England had in fact been absorbing a majority of her convicts long before 1853, since not all sentences of transportation were carried out, due to the reluctance of the Australian Colonies to accept transported convicts.

Bartrip, *supra* note 19, at 155 shows that between 1848 and 1852, of the 16,229 convicts sentenced to transportation, 10,963 were transported. He quotes the *Select Committee of the House of Commons on Transportation, 1856*, P.P. XVII, Appendix 1.

See also Bartrip, *supra* notes 34 and 36, on the effects of cessation.

⁹¹ Not counting, of course, those who returned to prison or were otherwise out of circulation.

⁹² See Bartrip, *supra* note 19, at 153; Davis, *supra* note 35, at 195.

⁹³ Bartrip, *supra* note 19, at P.P. XXI.

⁹⁴ *Id.* at 22-23.

⁹⁵ See Saunders in *DNB*, Second Supplement (1901-1911), *supra* note 20, at 695-99.

number of convicts being transported since 1853.⁹⁶ He then identified the recent complete cessation of transportation (*circa* 1865) as “a special reason for completely scrutinizing and seeing whether we cannot improve our system,”⁹⁷ and stated that “for five hundred convicts a year to remain in the country involves a considerable increase of the criminal population.”⁹⁸ The Earl of Carnarvon,⁹⁹ during the debate on second reading, expressed his concern that the worst was yet to come. Since the cessation had been relatively recent, he argued that the full extent of its effect would not yet have been realized.¹⁰⁰

The explicit recognition by the legislators of the deleterious effect of cessation indicates strongly that it was a major aspect of the perceived change in the problem of the habitual offender. Both the effect that cessation was perceived to have had on the level of crime in the late Victorian era, and that which it did in fact have, are discussed by several historians.¹⁰¹ While opinions differ as to what, if any, effect cessation actually had on the level of crime, there is no disagreement as to the effect that it was perceived to have had: a substantial increase in the level of crime.¹⁰²

The third reason often given for a change in the legislative approach to habitual criminals is a corollary of the previous two — the presence in England of a large “criminal class” which was, so to speak, “on the loose”. The facts on this are unclear,¹⁰³ but some indication of the size of the problem can be gleaned from the limited data.¹⁰⁴ *The Times* report on the “Criminal Classes at Large”¹⁰⁵ estimated that in 1866 there were 113,566 criminals at large in England and Wales, being defined as “known thieves”, “receivers of stolen goods”, “suspected persons”, “prostitutes” and “vagrants”.¹⁰⁶ Of

⁹⁶ 194 *Parl. Deb.*, H.C. (3d ser.), col. 333 (26 Feb. 1869).

⁹⁷ *Id.* at col. 337.

⁹⁸ *Id.* This appears to be something of a tautology. Nevertheless, it shows a concern that the end of transportation was contributing to the growth of a criminal class that needed to be restrained.

⁹⁹ See Lee in 9 *DNB*, *supra* note 20, at 642-52; Davis, *supra* note 35, at 199.

¹⁰⁰ 194 *Parl. Deb.*, H.C. (3d ser.), col. 703 (5 March 1869).

¹⁰¹ See Burn, *supra* note 26, at 181. See also, generally, Bartrip, *supra* note 19; Davis, *supra* note 35; and Radzinowicz and Hood, *supra* note 12 at 1308.

¹⁰² See, e.g., Radzinowicz and Hood, *id.* :

As long as transportation provided the means for flushing large numbers of England's convicts to the antipodes, there was no necessity to consider how to control or incapacitate them at home. The refusal of Australia's eastern colonies to accept more convicts at the end of the 1840's, combined with the rapid growth of the cities and the expansion and consolidation of the police, made the phenomenon of crime appear more real and more tangible. The perception of a mass of offenders at home, moving about and yet anonymous, fostered an escalating fear of a criminal or dangerous class and a resolve to do something drastic about it.

¹⁰³ See the “fifth reason” in Part VI B, *infra*.

¹⁰⁴ Radzinowicz and Hood, *supra* note 12, at 1308-309 for a useful section on the contemporary sources of surveys on the numbers of criminals at large during this period.

¹⁰⁵ See *The Times*, July 11, 1868 at 12, col. 6, and Oct. 26, 1868 at 4, col. 6 respectively.

¹⁰⁶ The breakdown for 1866 is as follows:

Known thieves:	22,806
Receivers:	3,075
Suspected Persons:	28,580
Prostitutes:	25,914
Vagrants:	33,191

these, 14,496 were considered "habitual criminals".¹⁰⁷ The report notes a 14.9 percent increase in the number of criminals-at-large in the Metropolis over the previous year. However, the number of "habitual criminals" at large in England and Wales had declined by 2.6 percent over the past year. The only increases in the numbers of habitual criminals were recorded in the classes of "known thieves" and "receivers".

The effect of these statistics is more clear when they are expressed as *per capita* figures. One of every 222 inhabitants of London was a person of known bad character. London, in addition, had the smallest *per capita* figure in the country. The worst figures belonged to pleasure areas such as Brighton, Bath, Dover and Scarborough.

The Times report of 1866 also dealt with the numbers of convicts released on tickets-of-leave. As has been noted above, this figure amounted, on average, to two thousand *per year*.¹⁰⁸ Not including 1864, for which no data was available, 17,219 convicts were released on licence between 1856 and 1867.

In 1867, the total number of criminals-at-large had decreased to 112,403.¹⁰⁹ No figures were available for the percentage of these who were considered "habitual". There was no significant rise in the number of known thieves. Again, London had the lowest "criminal *per person*" ratio, and the pleasure towns had the highest. It should be borne in mind that if these figures do not seem astronomical in themselves, they could be interpreted as such in a society used to "exporting" criminals. In fact, it appears as though they were. In introducing the Bill on first reading, the Earl of Kimberley referred to the criminal class as "a great army",¹¹⁰ even though he conceded, as did Mr. Bruce in the Commons,¹¹¹ that there had been no great increase in crime.¹¹² Thus it was not so much a growth in the *number of crimes* as the sheer size of the *published numbers of criminals* that generated concern.

These three factors — the failure of the ticket-of-leave system, the cessation of transportation and the presence of a large criminal class — were, for those with the means to change the law, seen as evidence of a change in the nature of the problem of the "habitual criminal" that rendered continued

¹⁰⁷ Breakdown:

Thieves:	2,734
Receivers:	199
Suspected Persons:	2,290
Prostitutes:	5,554
Vagrants:	3,719

¹⁰⁸ Breakdown:

1861 - 1,645	1865 - 2,425
1862 - 2,380	1866 - 2,253
1863 - 1,764	1867 - 1,793
1864 - N/A	Total (1856-1867 not incl. 1864) - 17,219

¹⁰⁹ Breakdown:

Thieves:	22,889
Prostitutes:	25,619
Suspected Persons:	28,378
Vagrants:	32,558

¹¹⁰ 194 *Parl. Deb.*, H.C. (3d ser.), col. 338 (26 Feb. 1869).

¹¹¹ 198 *Parl. Deb.*, H.C. (3d ser.), col. 1253 (4 Aug. 1869).

¹¹² 194 *Parl. Deb.*, H.C. (3d ser.), col. 336 (26 Feb. 1869). Kimberley in fact concedes that, relative to the growth in the general population, crime was decreasing.

reliance on the existing methods of dealing with recidivistic offenders inadvisable. In the minds of those with influence therefore, legislation was necessary.

C. *The Legislative Change: A Brief History of the Habitual Criminals Bill in Parliament.*

On February 19, 1869 Sir George Jenkinson questioned Home Secretary Bruce in the House of Commons.¹¹³ He referred to a report in *The Times* concerning a man named George Roberts, who had been sentenced, for his most recent offence, to a term of only three months hard labour, despite the fact that he had a long criminal record. Jenkinson stated that this case was an abrogation of the principle that "the rights of society and of peaceable and ordinary men must take precedence over the alleged rights of criminals . . . who were at war with all mankind."¹¹⁴ His question was whether Mr. Bruce was planning to introduce legislation to repress the criminal population. Bruce, after doubting the reliability of the report of the Roberts case, stated that, while there was a system of supervision already in place to deal with this problem, legislation would soon be introduced "to make that system of supervision more effectual."¹¹⁵

Pursuant to this assurance, notice of the Habitual Criminals Bill was given in the House of Lords by the Earl of Kimberley on 22 February 1869.¹¹⁶ Interestingly, he explained that the Bill, which was originally scheduled to be introduced in the Commons, had been transferred to the Lords due to the lack of business available to be dealt with in the upper House.

The Bill was presented on February 26¹¹⁷ by the Earl of Kimberley. He announced that it was a "fresh" and innovative means for dealing with an old problem, and was not brought forward in response to any panic.¹¹⁸ Kimberley explained that the Government saw no denial of justice in providing a separate code of law for recidivists. He stated that they should, to a certain extent, "be under a disability."¹¹⁹

The first Lord to speak in reply was the Earl of Shaftesbury,¹²⁰ who was never particularly supportive of the Bill. Shaftesbury was an evangelical reformer — the classic upper class humanitarian. He was responsible for much of the factories legislation of the 1830s and 1840s, and was decidedly in favour of liberalizing measures, such as the reform of trade union legislation.

He stated his belief that a lot of the "criminals" that the Bill purported to deal with were, in fact, capable of reform, and that it was too wide in its ap-

¹¹³ 194 *Parl. Deb.*, H.C. (3d ser.), col. 147 (19 Feb. 1869). See also *The Times*, Feb. 20, 1869 at 6, col. 5.

¹¹⁴ 194 *Parl. Deb.*, H.C., *supra* note 113, at 148.

¹¹⁵ *Id.* at col. 150.

¹¹⁶ 194 *Parl. Deb.*, H.C. (3d ser.), col. 199 (22 Feb. 1869).

¹¹⁷ 194 *Parl. Deb.*, H.C. (26 Feb. 1869), *supra* note 28.

¹¹⁸ *Id.* at col. 337.

¹¹⁹ *Id.* at col. 340.

¹²⁰ See Blakie in 4 *DNB*, *supra* note 20, at 1058-62; Bready, *Lord Shaftesbury and Social and Industrial Progress* (London: Allen & Unwin, 1926); Battiscombe, *Shaftesbury, A Biography of the Seventh Earl* (London: Constable, 1974); Best, *Shaftesbury* (London: Batsford, 1964).

plication.¹²¹ In addition, he expressed the opinion that the actual numbers of “habitual criminals” in England had been exaggerated by Kimberley. After further debate, the Bill was read for the first time.

The Bill came up for second reading on March 5. A short debate ensued. Lord Portman¹²² alluded to the omission from the Bill of misdemeanants, whom he considered to be a “large class of criminals”.¹²³ Lord Romilly¹²⁴ regretted that the Bill made no provision for taking children away from thieves which he saw as being beneficial as both a punishment and a deterrent of second-generation criminality.¹²⁵ Shaftesbury expressed concern that the pervasive supervision provided for by the Bill would be an obstacle to the ability of the convict to find and maintain employment.¹²⁶ He also voiced his opinion, again, that the Bill was too wide. He suggested that its object was to repress *habitual* crime, not crime in general.¹²⁷ After this and other debate, the Bill was read a second time.

On March 15 the Bill went to a Committee of the whole House.¹²⁸ Part III of this paper will discuss the several amendments that were made at that time. Lord Houghton expressed his displeasure and concern with the fact that the judiciary had not been consulted in drafting the Bill. Despite this objection, the Bill was accepted as amended by the Committee.

The Committee reported its amendments to the House on April 16,¹²⁹ and further amendments were made to the Bill at that stage. It was read for the third time, without debate, on 8 April 1869. Mr. Bruce presented the Bill to the Commons on April 12, and it was read for the first time without debate. No debate accompanied second reading on July 26 either. The Bill was first debated in the Commons in Committee on August 4.¹³⁰

Mr. Bruce began the debate by introducing the legislation’s policy to the House. He said that the Bill was neither a response to a jump in crime,¹³¹ nor did it substantially change the existing law, except as it provided for a register of convicts on tickets-of-leave.¹³²

Sir Charles Adderly¹³³ immediately took issue with the latter claim, and stated his concern that the Commons was being asked, in effect, to “rubber-stamp” the Lords’ Bill at a time when three-quarters of the House had left

¹²¹ 194 *Parl. Deb.*, H.C. (26 Feb. 1869), *supra* note 28, at col. 346.

¹²² See Boase in 16 *DNB*, *supra* note 20, at 199.

¹²³ 194 *Parl. Deb.*, H.C. (5 March 1869), *supra* note 28, at col. 692.

¹²⁴ See Hamilton in 17 *DNB*, *supra* note 20, at 186-87.

¹²⁵ 194 *Parl. Deb.*, H.C. (5 Mar. 1869), *supra* note 28, at col. 694.

¹²⁶ *Id.* at col. 697.

¹²⁷ *Id.* at col. 702.

¹²⁸ 194 *Parl. Deb.*, H.C. (3d ser.), col. 1309 (15 March 1869).

¹²⁹ 195 *Parl. Deb.*, H.C. (3d ser.), col. 222 (6 April 1869).

¹³⁰ 198 *Parl. Deb.*, H.C., *supra* note 111.

¹³¹ *Id.* at col. 1255.

¹³² *Id.* at col. 1257.

¹³³ See de Montmorency in *DNB*, Second Supplement (1901-1911), *supra* note 20, at 17-20; Pemberton, *The Life of Lord Norton 1814-1905, Statesman and Philanthropist* (London, 1909).

town for the holidays.¹³⁴ He disagreed that the Bill was not novel, and insisted that it changed the law in four fundamental ways: (1) it gave the police power to arrest on mere suspicion, (2) it put the onus of proof on the accused in certain circumstances, (3) it created a new test for crime which was to be considered "habitual", and (4) it made surveillance a part of sentencing as opposed to a condition of suspended punishment. Mr. Newdegate¹³⁵ and Mr. Thomas Chambers¹³⁶ joined in Adderly's concern over the reversal of the onus.¹³⁷

Chambers was one of the more skeptical members of the Committee. He quoted the Official Returns for England to show that almost all types of crime were in fact decreasing in incidence,¹³⁸ and concluded that "there was nothing at present in the shape of enormous increase in crime calling for the application of extraordinary measures."¹³⁹ However, he refused to take issue with the Bill in a general way, "recommended as it was by Her Majesty's Government."¹⁴⁰

The Conservative Member for Oxfordshire, Joseph Warner Henley,¹⁴¹ stated that legislation as severe as this was self-defeating, since jurors would often reach a verdict of acquittal in the face of the evidence in order to spare the accused the mandatory penalty.¹⁴² Radical M.P. George Hadfield¹⁴³ voiced concern from another viewpoint, objecting to the Bill *in toto* on the grounds that it was unduly severe.¹⁴⁴ He saw the Bill as "a departure from the more humane tendencies of the criminal legislation of recent years,"¹⁴⁵ and continued on to say that "our criminal jurisprudence has been too severe; it was not framed on the principles of mercy, or with the object of reclaiming offenders . . . the provisions of this Bill (are) repugnant to the English people."¹⁴⁶

Following further debate, the Bill was accepted in Committee as amended by the Commons. The Committee reported on August 5 and, after a short debate, the report was accepted by the House.¹⁴⁷ The Bill was considered on August 6, without debate, and was read for the third time. The Commons amendments were reported to the Lords on August 9,¹⁴⁸ and accepted by them after a brief debate. The Bill received Royal Assent on 11 August 1869, the last day of the session.

¹³⁴ *Supra* note 111, at col. 1260.

¹³⁵ See Boase, 2 *MEB*, *supra* note 67, at 1119.

¹³⁶ See Rigg in 22 *DNB*, *supra* note 20, at 410.

¹³⁷ *Supra* note 111, at col. 1267 and 1268 respectively.

¹³⁸ *Id.* at col. 1268.

¹³⁹ *Id.* at col. 1268-69.

¹⁴⁰ *Id.* at col. 2169.

¹⁴¹ See Hooper in 9 *DNB*, *supra* note 20, at 416.

¹⁴² *Supra* note 111, at col. 1271.

¹⁴³ See Boase in 8 *DNB*, *supra* note 20, at 876; Boase, 2 *MEB*, *supra* note 67, at 1271.

¹⁴⁴ *Supra* note 111, at col. 1273.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 198 *Parl. Deb.*, H.C. (3d ser.), col. 1368 (5 Aug. 1869).

¹⁴⁸ 198 *Parl. Deb.*, H.C. (3d ser.), col. 1469 (9 Aug. 1869).

III. THE METAMORPHOSIS OF THE BILL¹⁴⁹

“A heavy baggage of repressive measures.”¹⁵⁰

Sir Leon Radzinowicz and
Dr. Roger Hood, on the 1869 Act

A. *The Process*

As might be indicated by the above examples of general criticisms, the Bill was not passed without resistance. Specific objections taken by members of both Houses to the provisions of the Bill will be considered here, by concentrating on eight particular clauses that were subject to debate and, in some cases, amendment in one or both Houses.¹⁵¹

1. Revocation of Ticket-of-Leave Licences

One clause of the Bill gave any constable the power to arrest, without warrant, a convict at large on licence “whom he suspects of getting a livelihood by dishonest means.”¹⁵² If such a person, when brought before a Magistrate, failed to establish that he was not thus earning his living, his licence would be revoked and he would be committed to convict prison. It was specifically in reference to this provision of the Bill that the Earl of Kimberley justified the creation of a “different code” for habitual criminals, in which they would be put “at a disability”.¹⁵³

Objections to this clause were strenuous in both Houses. Despite Kimberley’s assertion that it did not change the law with respect to licence holders, but merely strengthened it,¹⁵⁴ members of the Lords expressed alarm on two grounds. Lord Romilly was shocked to see the onus of proof reversed and placed on the accused, especially given the present rule of law that the accused could not, strictly speaking, give evidence on his own behalf.¹⁵⁵ Lord Hylton¹⁵⁶ and the Earl of Shaftesbury objected to the clause on the basis that it allowed arrest on the heretofore unheard of ground of “suspicion”.¹⁵⁷ Hylton said that the power to arrest on suspicion would hamper the convict’s prospects for finding and maintaining employment.¹⁵⁸ He said that such a provision, especially when combined with the monthly reporting required by the 1864 Act, would be the virtual end of the possibility of gainful employment for convicts.

¹⁴⁹ No attempt will be made here to consider all of the amendments made to the Bill. Only those of major significance will be recounted. The choice of amendments for purposes of discussion is mine.

¹⁵⁰ Radzinowicz and Hood, *supra* note 12, at 1340.

¹⁵¹ One of the great “errors” in the 1869 Act, the last minute application (by the House of Commons) of its provisions to Scotland and Ireland, will not be considered here, although it became the subject of considerable discussion at the time of repeal. See 200 *Parl. Deb.*, H.C. (3d ser.), col. 568, 570 (24 March 1870).

¹⁵² See the report of the Bill in *The Times*, March 3, 1869 at 9, col. 5.

¹⁵³ See, *supra* note 119.

¹⁵⁴ 194 *Parl. Deb.*, H.C. (26 Feb. 1869), *supra* note 28, at col. 341. Also, see note 168, *infra*.

¹⁵⁵ 194 *Parl. Deb.* (5 March 1869), *supra* note 28, at col. 693. This anomaly is noted in Burn, *supra* note 26, at 192.

¹⁵⁶ See Archbold in 10 *DNB*, *supra* note 20, at 977.

¹⁵⁷ *Supra* note 155, at col. 696 and 699 respectively.

¹⁵⁸ *Id.* at col. 696.

Shaftesbury thought that this clause was potentially dangerous due to the possibility of unscrupulous police officers using it as a licence to harass those ticket-of-leave licence holders they were not particularly fond of.¹⁵⁹ This was especially true, in his opinion, with a police force as comparatively young as was England's at the time.

Presumably to alleviate these types of concerns, Kimberley offered a compromise in Committee. He proposed an amendment which required the written authority of the Chief Officer of the relevant police district to arrest on suspicion.¹⁶⁰ This amendment was accepted. A further amendment by Lord Grey¹⁶¹ to require notice to the convict as a precondition of arrest failed in Committee.¹⁶²

Lord Hylton and Lord Houghton both pleaded with the House to strike the clause altogether, as it militated entirely against the purpose of the ticket-of-leave system — to give convicts an opportunity to return to an honest life.¹⁶³ Their pleas, however, went unheard, and the clause was agreed to.

The clause, however, was subjected to one very important amendment in the House of Commons. Mr. Bruce agreed to an amendment suggested by Mr. Gathorne Hardy,¹⁶⁴ substituting the words "has reason to believe" for the word "suspects".¹⁶⁵ Thus, the test which had to be satisfied in order to arrest a convict without warrant was strengthened in two ways; the Chief Officer had to provide written authority for the arrest, and the requirement of "suspicion" was raised to one of "reasonable belief".¹⁶⁶

While the proposed test of "suspicion" was arguably less stringent than the test of "reasonable suspicion" that had been in place under the 1864 Act,¹⁶⁷ the test of "reasonable belief" that appears in the 1869 Act is probably not novel.¹⁶⁸ It is also important to note here that the Commons removed from this clause the reverse onus on the accused, and required that the Magistrate have it proved to him by the prosecutor that there were reasonable grounds for the belief that the accused convict was earning his living by dishonest means. This amendment was also incorporated into the 1869 Act.¹⁶⁹

2. Supervision and Reporting

The original Bill contained no provision regarding reporting conditions for ticket-of-leave licence holders. Had the Bill passed into law unamended in

¹⁵⁹ *Id.* at col. 699.

¹⁶⁰ 194 *Parl. Deb.*, H.C. (3d ser.), col. 1310 (15 March 1869).

¹⁶¹ See Carr in *DNB*, vol. 22, *supra* note 20, at 786-89.

¹⁶² *Supra* note 160.

¹⁶³ *Id.* at col. 1313.

¹⁶⁴ See Woods in *DNB*, Second Supplement (1901-1911), *supra* note 20, at 88-91; Gathorne-Hardy, *Gathorne-Hardy, First Earl of Cranbrook, A Memoir* (London, 1910).

¹⁶⁵ *Supra* note 111, at col. 1274.

¹⁶⁶ This is the predecessor of the modern test for arrest powers: belief on reasonable and probable grounds.

¹⁶⁷ Section 6.

¹⁶⁸ *I.e.*, it is doubtful whether any real distinction can be drawn between "reasonable belief" and "reasonable suspicion", although one definitely can be drawn between either of these and bare "suspicion".

¹⁶⁹ Section 3.

this respect, the monthly reporting clause of the 1864 Act would have remained in force.¹⁷⁰ However, such was not destined to be the case.

The Earl of Shaftesbury stated that, according to the information he had received the monthly reporting requirement had been “an absolute failure”,¹⁷¹ and that, due primarily to its undesirable effects on the convicts’ prospects for honest employment, it would be unwise to continue it. Although one Lord doubted whether the measure had, in fact, failed,¹⁷² Kimberley moved to alleviate Shaftesbury’s concern by stating that he and Mr. Bruce, who was to present the Bill to the Commons, had agreed that the reporting condition could be dispensed with when the convict was employed.¹⁷³

The Lords, however, were apparently not satisfied with this undertaking, and Kimberley introduced an amendment on re-Committee to abolish monthly reporting for licence holders altogether.¹⁷⁴ This amendment became part of the Act of 1869, and repealed the monthly reporting provision in the 1864 Act.¹⁷⁵

The most contentious issue here, however, was not the reporting of licence holders, but the supervision of twice-convicted criminals. The Bill dealt with this issue in two ways. First, it provided that a twice-convicted felon was subject on sentencing, in addition to any other penalty he might receive, to supervision by the police for seven years.¹⁷⁶ Second, the supervised convict would be guilty of an offence punishable by a year’s imprisonment with or without hard labour if: a) it appeared to a Magistrate that there were reasonable grounds for believing that he was gaining his living by dishonest means, b) he was found in circumstances that satisfied a Magistrate that he was about to commit a crime, or c) he was found in a dwelling house, shop, place of business, or in certain other areas, without being able to account, to the satisfaction of the Magistrate, for his presence there. This is a particularly interesting provision as it made certain acts offences for convicts which, if committed by other citizens, would be not be crimes.¹⁷⁷

This was novel legislation. The 1864 Act had not provided for supervision of twice-convicted felons, restricted as it was in this respect to licence holders. Nor had any other act. In addition, that supervision had become part of the sentence the convict received, as opposed to a condition of his release on licence, was innovative.

Objections to the supervision requirement were many and varied. Shaftesbury again stressed that it was a threat to employment.¹⁷⁸ Houghton doubted that it could serve in any way to “uproot the criminal classes”.¹⁷⁹ Sir

¹⁷⁰ Section 4.

¹⁷¹ 194 *Parl. Deb.*, H.C. (5 March 1869), *supra* note 28, at col. 697.

¹⁷² The Earl of Carnarvon, *id.* at col. 704.

¹⁷³ *Id.* at col. 713.

¹⁷⁴ 195 *Parl. Deb.*, H.C., *supra* note 129, at col. 223.

¹⁷⁵ Section 4.

¹⁷⁶ In the Bill this only applied where he was not sentenced to “death or penal servitude.” This stipulation was removed from the text of s. 8 of the Act, but not from the sidenote accompanying it. This will be discussed in Part IV, A, 2, *infra*.

¹⁷⁷ See Davis, *supra* note 35, at 209-210.

¹⁷⁸ 194 *Parl. Deb.* (5 March 1869), *supra* note 28, at col. 697.

¹⁷⁹ *Id.* at col. 709-10.

Charles Adderly, in the Commons, said that police supervision should be a last resort, and that, in particular, it should only be employed when the actions of the Prisoners' Aid Societies failed.¹⁸⁰ These objections did not prove entirely fruitless. Mr. Bruce suggested an amendment in the Commons that removed the mandatory aspect of the seven year requirement and replaced it with the discretion of the Court to order a lesser period.¹⁸¹ This amendment was accepted, and subsequently incorporated into the Act.¹⁸²

One of the more interesting developments in this clause was the move to a reverse onus where the twice-convicted felon was suspected of earning his living by dishonest means. This eventually became part of the Act.¹⁸³ This is surprising, as the reverse onus had been specifically expunged from the parallel clause respecting ticket-of-leave licence holders. Thus, while the Bill was "watered down" during passage with respect to licence holders, it was strengthened as it applied to twice-convicted felons. However, the procedural safeguard of requiring the written authorization of the Chief Officer was adopted in the latter situation¹⁸⁴ as it had been in the former.

3. Punishment for Thrice-Convicted Felons

One of the more Draconian provisions of the Bill was the clause that provided for a mandatory sentence of seven years penal servitude for any person convicted of a felony, upon proof that he had twice previously been convicted of felonies.¹⁸⁵ This clause was, as might be expected, the subject of considerable argument, and Mr. Bruce's eventual agreement to its deletion¹⁸⁶ can only be seen as a major concession on the part of the Government.¹⁸⁷

Three types of criticisms were levelled at the measure. The first two may be dealt with briefly, as they were of lesser importance in the decision to strike the clause. First, criticism came from the police, in particular Col. James Fraser,¹⁸⁸ the Commissioner of Police for the Metropolis, that the clause would be rendered ineffectual in the absence of some method of discerning and proving previous convictions.¹⁸⁹ He thought that this defect might be remedied by the institution of a system of marking convicted felons. Although this suggestion was not incorporated into the 1869 Act, the problem of discovering previous convictions was addressed in the part of the Act providing for registration of criminals.¹⁹⁰

A more humane objection was urged by the Earl of Shaftesbury who stated that, as a matter of economic reality, second and third convictions were often the result of crimes "perpetrated under circumstances of the greatest

¹⁸⁰ *Supra* note 111, at col. 1265.

¹⁸¹ *Id.* at col. 1278.

¹⁸² Section 8.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ This only applied if the most recent conviction was within the last five years. The clause also imposed a mandatory one-year sentence of imprisonment on a convict found (a) under such circumstances as to satisfy the bench that he was about to commit, or aid in, a crime, or (b) in certain places without being able to account for his presence there.

¹⁸⁶ *Supra* note 111, at col. 1279.

¹⁸⁷ *Supra* note 26, at 194.

¹⁸⁸ See Boase in *MEB*, vol. V, *supra* note 67, at 351.

¹⁸⁹ *The Times*, March 13, 1869, *supra* note 49, at col. 2.

¹⁹⁰ Part II.

distress.”¹⁹¹ He doubted that the test of habitual criminality, with its consequent severe punishment, should simply be a matter of the number of convictions.¹⁹²

The objection that apparently caught the ear of the Government was less compassionate in nature. It was urged that while the penalty itself was not unduly harsh, it might be perceived to be so by juries and magistrates. The result of such a perception, it was argued, would be unjust acquittals. This point was made in the House of Lords by Lord Colchester¹⁹³ and the Earl of Lichfield.¹⁹⁴

In the Commons, Mr. Bruce recognized that “great objection had been taken to this clause,”¹⁹⁵ and indicated that the Government was prepared to consider an amendment either granting judges the power to remit the sentence, or deleting the clause altogether. An amendment to the latter effect was proposed by Mr. Thomas Chambers,¹⁹⁶ and agreed to by the House. The seven year mandatory sentence was thus struck from the Bill.

It is noteworthy that a strenuous objection to the clause had been made by certain members of the legal community. Mr. Barwick-Lloyd Baker expressed concern that, while the sentence was not unnecessarily severe, public sentiment might easily be aroused to encourage evasion of it.¹⁹⁷ He recommended that the clause be amended. This concern was also advanced, along with the related one that, in the interest of the legitimacy of judicial decisions, judicial discretion ought not to be fettered, by Mr. Sargeant Cox,¹⁹⁸ then Assistant Deputy Judge for Middlesex. Cox, who spoke from experience (he claimed that he tried one-seventh of England’s criminals), warned the legislators of the vagaries of sympathetic juries.¹⁹⁹

The Earl of Shaftesbury’s disdain for the severity of the statute was echoed in the *Law Times*, in an article by Matthew Davenport Hill,²⁰⁰ the Recorder of Birmingham.²⁰¹ He pointed out that “taking an apple which had fallen from a tree”²⁰² was a felony, and that to pass a mandatory sentence of seven years for three such crimes was difficult to justify. He identified an additional dimension of the severity — that had the Bill been passed one year

¹⁹¹ 194 *Parl. Deb.*, H.C. (5 March 1869), *supra* note 28, at col. 702.

¹⁹² This view was apparently shared by the editors of the *Law Times*. See, *infra* note 204.

¹⁹³ *Supra* note 128, at col. 1330-31.

¹⁹⁴ *Id.* at col. 1335. See Doubleday and DeWalden, 7 *The Complete Peerage* (London: St. Catherine’s Press, 1929) at 648.

¹⁹⁵ *Supra* note 111, at col. 1279.

¹⁹⁶ *Id.*

¹⁹⁷ *The Times*, March 8, 1869 at 4, col. 6.

¹⁹⁸ See Boase in 4 *DNB*, *supra* note 20, at 1334-35.

¹⁹⁹ March 27, 1869, 46 L.T. 404. Cox had only been unseated for eighteen days when this letter appeared.

²⁰⁰ See Hill in 9 *DNB*, *supra* note 20, at 853-55; Parker, *supra* note 55, at 150; Radzinowicz and Hood, *supra* note 12, at 1317; Davenport-Hill, *The Recorder of Birmingham: A Memoir of Matthew Davenport Hill* (1878); Hill, *An Autobiography of Fifty Years in Times of Reform* (1894).

²⁰¹ (1869), 47 L.T. 115.

²⁰² *Id.*

previously, no less than 3,570 people would have received the seven year punishment. He cited several such cases, of which the following is an example:

J. Preston, convicted before Justices of having stolen, in 1867, four packs of cards, and sentenced to seven days' imprisonment. Convicted again in 1867, for stealing butter, and sentenced to two months' imprisonment. Tried at Quarter Sessions, July, 1868 for stealing one pair of boots.²⁰³

Hill argued that a seven year penalty here would be absurd. He also echoed the concern that unjust acquittals could be the only result of such a provision, and likened the probable effect of it to the pervasive practice by juries of acquitting sheep-stealers.

The *Law Times* itself was quite forcefully opposed to the clause, and expressed great satisfaction when its stand was vindicated in the Commons.²⁰⁴

At this point it is worthwhile to note the involvement of Cox, Baker, Hill and the editors of the *Law Times* in the debate regarding this particular clause. Perhaps the decision to strike it, like the decision to proceed with the Bill itself, was substantially based on the views of an interested minority in the legal community. If so, this lends credence to the suggestion offered above, that the answer to the question "why legislative change?" is partly to be found in the minds of those who perceived the problem to be solved.

4. Registration of Licence Holders and Habitual Criminals

Although quite a substantial change was made to the clause respecting registration in the Commons, debate on it was rather sparse. In the original Bill, the clause was included in the part dealing with licence holders, and provided that a central register of "convicts" was to be kept in London. Thus, it was only convicts released on tickets-of-leave who were to be registered.

However, in the debates in the Commons, Mr. Bruce moved an amendment substituting the word "criminals" for "convicts", in order to provide for the registration of all convicted criminals.²⁰⁵ This amendment formed part of the Act.²⁰⁶

Not all were satisfied with the direction the Bill had taken here. In a letter to *The Times*, addressing the issue of treatment of the discharged prisoner, "A Gaol Chaplin" says, "he is commonly a very weak and helpless creature to whom a little kindly but judicious aid might be more worth our while than the most elaborate system of registration."²⁰⁷ Apparently, the legislators felt more

²⁰³ *Id.*

²⁰⁴ Aug. 28, 1869, 47 L.T. 323:

[T]he clause against which the *Law Times* so often and so earnestly protested, viz., that which made penal servitude compulsory on a third conviction, has been altered, and the discretion of the judge remains untouched. Had it become law as it passed the Lords, the consequences would have been very serious. The indiscriminate severity of the law would have defeated itself, and unjust acquittals would have marked the reluctance of juries to recognize as a fact what their experience would have told them to be untrue, that the number of convictions is a test of the calling of a convict. It is at the professional criminal that the new law was aimed, and the test of crime being a profession is not determined by previous convictions.

²⁰⁵ *Supra* note 111, at col. 1276.

²⁰⁶ Section 5.

²⁰⁷ *The Times*, Aug. 10, 1869 at 9, col. 1.

comfortable with a system of registration than with reliance on the benefits of philanthropy.

5. Amendment to the *Vagrancy Act*

The clause of the Bill amending the 1824 *Vagrancy Act*²⁰⁸ was preserved, without substantial amendment, in the 1869 Act. The 1824 Act had provided that any “suspected person” or “reputed thief” found frequenting certain places²⁰⁹ “with intent to commit Felony” would be deemed to be a rogue and vagabond. The 1869 Act²¹⁰ amended this section to provide that in proving the required intent, it was unnecessary to show any overt act on the part of the accused. The intent could be inferred from the circumstances of the case, and from his known character.²¹¹

No objection to the spirit of this clause was taken in the House of Lords. However, it did not pass through the Commons unscathed. Mr. Stapleton²¹² and Mr. Thomas Chambers objected that the clause provided that a reputed thief could be convicted without evidence and without ever having done any illegal act.²¹³ Nevertheless, the clause was agreed to by the Commons, with only a cosmetic amendment.²¹⁴

6. Receivers of Stolen Goods²¹⁵

Under the relevant clause of the Bill, any person previously convicted of an offence punishable by imprisonment and subsequently discovered to have stolen goods in his possession, was deemed to have known them to be stolen until he proved the contrary. This provision was aimed at curbing the activities of professional “fences”.

This clause did not find much favour in either House. In the House of Lords, the Earl of Carnarvon proposed an amendment deleting the words “punishable by imprisonment” and replacing them with “involving fraud or dishonesty”²¹⁶ in order to relate the subject of the previous conviction to the later charge and narrow the application of the reverse onus. This amendment was agreed to by Kimberley and, shortly thereafter, the House. Kimberley also agreed to an amendment proposed by Lord Romilly requiring seven days notice to be given to the accused of the intent to prove the previous conviction.²¹⁷ Romilly’s second proposed amendment, however, which would have allowed the receiver to testify on his own behalf, was not accepted by Kimberley or the House.²¹⁸ The clause, as amended, was agreed to.

²⁰⁸ 5 Geo. 4, c. 83.

²⁰⁹ See text accompanying notes 38-39, *supra*; and s. 4 of the *Vagrancy Act*, 5 Geo. 4, c. 83.

²¹⁰ Section 9.

²¹¹ *Id.*

²¹² See Boase, 3 *MEB*, *supra* note 67, at 714.

²¹³ *Supra* note 111, at col. 1279-80.

²¹⁴ The words “general circumstances” were reduced to the word “circumstances”.

²¹⁵ On the history of the criminal law with respect to receivers of stolen property, see Hall, *Theft, Law and Society* (2d ed., Indianapolis: Bobbs-Merrill, 1935) at 52-58, 61. The table on p. 61, which sets out the statutes and leading cases dealing with receivers, is particularly useful.

²¹⁶ *Supra* note 128, at col. 1341.

²¹⁷ *Id.* at col. 1342.

²¹⁸ *Id.* at col. 1343.

In the Commons, Mr. George Young,²¹⁹ the Solicitor General for Scotland, proposed amending the clause to provide that the fact of a previous conviction would only be evidence of knowledge that the goods were stolen.²²⁰ This amendment found its way into the Act.²²¹ Mr. Stapleton introduced a lengthy amendment granting the police wider powers to search for stolen goods; this amendment was likewise accepted and incorporated into the Act.

Mr. Young's amendment was to be responsible for a considerable amount of judicial confusion over the following year and a half.²²² It had diluted the presumption of guilty knowledge in the beginning of the clause, but had failed to remove the reference to a reversal of the onus near the end of it, which still provided that the accused "will be deemed to have known such goods to have been stolen until he has proved the contrary."²²³ The effect of this discrepancy will be considered below.

7. Assaulting a Police Officer

The Bill provided for an increase in the penalty for assaulting a police officer. This provision, somewhat out of place in the legislation, was undoubtedly included to stem an alarming increase in the number of assaults on police in the few years previous, especially in 1868. The only objection to this clause was that it did not go far enough.²²⁴ In the absence of other resistance, the increased penalty passed into law.

8. Pawnbrokers

Perhaps one of the more interesting developments in the passage of the Bill was the expurgation of the proposed clauses dealing with pawnbrokers. The clauses provided for strict supervision of the business of pawnbroking. Pawnbrokers were to be bound, at any time during business hours, to produce to the police all books describing articles pawned and all goods that the officer reasonably suspected to be stolen or fraudulently obtained. If required by the officer, the pawnbroker was compelled to deposit all such articles with the Chief of Police. In addition, if any officer provided information to a pawnbroker describing a certain stolen good and such good subsequently came into the pawnbroker's possession, he was bound to inform the police (although there was a "saving clause" for articles "difficult to identify"). Finally, any pawnbroker, who in any way defaced any good, about which information had been given and which was later proven to be stolen, would be proceeded against as a receiver of stolen goods.

Needless to say, the pawnbrokers' reaction to the proposed legislation was not favourable. *The Times* of 17 March 1869 reported a meeting, held "a few days before," of all of the pawnbrokers of the Metropolis.²²⁵ At that meeting a

²¹⁹ See Omond in *DNB*, Second Supplement (1910-1911), *supra* note 20, at 721-22.

²²⁰ *Supra* note 111, at col. 1281.

²²¹ Section 11.

²²² See Part IV, A, *infra*.

²²³ Section 11.

²²⁴ See Sir George Jenkinson's failed amendment, which provided for even tougher penalties on persons guilty of assaulting police, *supra* note 147, at col. 1369.

For statistics on police assaults and a discussion of them, see Figure 4.1 in Weinberger, "The Police and the Public in Mid 19th Century Warwickshire," in Bailey, ed., *supra* note 19, at 68. This clearly shows a rise in police assaults from 1860 to 1868, the latter being the peak year for the period 1859 to 1879.

²²⁵ *The Times*, March 17, 1869 at 12, col. 6.

resolution was passed to oppose these provisions of the Bill, and £1,000 was subscribed among them for that purpose. *The Times* also reported that many of the pawnbrokers present at the meeting vowed to shut their businesses down and to leave signs in their windows stating the reason for closing if the Bill, as it stood, became law.

It is hardly coincidental, it is submitted, that Lord Lyveden²²⁶ was to announce in the House of Lords on March 15 that he had been asked to move to strike the clauses "by a numerous, influential and respectable body of tradesmen who complained that they had been put into a Bill relating to 'habitual criminals', in company with the receivers of stolen goods and others concerned in crime."²²⁷ There can be little doubt that this speech followed within a matter of one or two days the meeting of the pawnbrokers, and that the pawnbrokers' powerful business lobby was the reason it was made. Be that as it may, the clauses relating to pawnbrokers were struck with the agreement of Kimberley²²⁸ and the House.

Perhaps being placed in the same Bill with habitual criminals was not the only objection pawnbrokers had to the proposed legislation. Were it enacted, the police would have been able to exercise their substantial new powers to supervise the pawnbrokers' activities. This may have raised a concern among the less respectable pawnbrokers that the police could act on knowledge that they had possessed since the eighteenth century: that pawnbrokers were often channels for the recirculation of stolen goods. It might also have disturbed the more established and respectable pawnbrokers, not only from the point of view of their reputation being tarnished, but also from the point of view that the law could have turned against them in cases where they acted, perhaps through carelessness, as inadvertent receivers.

B. *The Result*

It has been shown in the foregoing that the Bill was subjected to a number of important changes during its passage into law, some of which had the effect of making the Act more strict than had originally been intended and others of which had the opposite effect. The final product of this process, the 1869 Act, was a compromise in all senses of the word.

At least some interested persons, such as Mr. Baker, had held high hopes for the new legislation. In one of his letters to *The Times* he expressed the opinion that the new law was "probably the boldest and most sweeping, but, at the same time, the most beneficial, reform ever attempted in the repression of crime."²²⁹ His optimism was obvious: "[t]he effect of the Act in practice, I have no doubt, will be that in five years' time skilled burglaries will be very rare."²³⁰ Perhaps not surprisingly, this prediction never came true. The Act did not last five years. Even during the short period in which it was in force, its provisions were the subject of controversy in the press, in the courts and in

²²⁶ Williams in 18 *DNB*, *supra* note 20, at 524-25.

²²⁷ *Supra* note 128, at col. 1344.

²²⁸ *Id.* at col. 1347. Kimberley indicated that he and Bruce had agreed that the matter of pawnbrokers would be better dealt with in another Bill.

²²⁹ *The Times*, March 8, 1869 at 4, col. 6. Quoted in Radzinowicz and Hood, *supra* note 12, at 1341.

²³⁰ *Id.*

Parliament. The Act proved to be a product not only of compromise, but of careless and often uninformed compromise. That the 1871 Act which repealed it was not subject to the same degree of legislative give-and-take was, it is suggested, no accident.²³¹

IV. THE LIFE OF THE 1869 ACT

The early and mid-Victorians no sooner established an institution than they began to criticize it.²³²

The Act received neither unanimous praise nor condemnation during the short period in which it was in force. It caused several problems for the courts and was almost universally regarded as having been poorly drafted. Yet, many cited the benefits that it had conferred on society at large, despite the fact that it was an imperfect piece of legislation. The problems the Act was perceived to have had will be dealt with in section A, while section B will discuss its alleged beneficial effects.

A. *Perceived Problems*²³³

There were three forums in which the application of the Act was challenged; Parliament, the courts and the newspapers and legal journals. These will be considered in sequence.

1. Parliament

Questions concerning problems created by the 1869 Act were put to the Government on four separate occasions in 1870. The first of these was on March 24.²³⁴ On that day the Earl of Carnarvon inquired whether the Government had made plans to amend the 1869 Act since, in his opinion, it "had not been improved in passage."²³⁵ In fact, he said "[a] variety of clauses in the Act were so altered, mainly in the House of Commons as to make the Act quite impracticable in parts."²³⁶

He cited several examples in support of this position. First, he indicated that, insofar as the Act had relied on the *Industrial Schools Act, 1861*²³⁷ in allowing removal of children from their twice-convicted mothers to Industrial Schools,²³⁸ it was inoperative, as that statute had been repealed in 1866.²³⁹ Thus, the power to remove was non-existent. Second, the forms that were to be used in the administration of the Act were in Schedule 3 of the Act not, as the relevant section²⁴⁰ stated, in Schedule 2. This section was also rendered nugatory. Third, the clause of the Act respecting receivers of stolen goods²⁴¹

²³¹ See Part V, *infra*.

²³² *Supra* note 26, at 179.

²³³ Radzinowicz and Hood, *supra* note 12, at 1342-343 discuss the problems the 1869 Act encountered in operation.

²³⁴ *Supra* note 151, at col. 563.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Section 11.

²³⁸ *An Act for Amending and Consolidating the Law Relating to Industrial Schools, 1861, 24 & 25 Vict.*, c. 113.

²³⁹ *By The Industrial Schools Act, 1866, 29 & 30 Vict.*, c. 118, s. 3.

²⁴⁰ Section 14.

²⁴¹ Section 11.

had been nullified by a decision of Keating J.,²⁴² who had accepted the argument that the failure to delete the reference in the section to the burden on the receiver to prove lack of guilty knowledge was an oversight. Here, especially, said Carnarvon, the intention of the Lords had been frustrated. Fourth, the clause providing for up to seven years supervision for twice-convicted felons²⁴³ was ambiguous on the question of when the period of supervision began to run — at the time of conviction, or at the time of release. Fifth, he expressed his concern that no substitute had been arranged for the requirement of monthly reporting that the Act had eliminated.²⁴⁴ Finally, Carnarvon regretted that the Commons had chosen to omit the compulsory seven year sentence of penal servitude for thrice-convicted felons.

The Earl of Albermarle,²⁴⁵ who was a Justice of the Peace,²⁴⁶ stated that uncertainty had arisen as to whether legal proof of the previous conviction was required, that is, the certificate of conviction plus proof of identity in order for the Act to apply.

Kimberley replied by confirming the intention of the Government to amend the Act to eliminate its defects,²⁴⁷ which he said “were attributable to the Amendments made in the other House of Parliament.”²⁴⁸

Lord Redesdale²⁴⁹ was less inclined to blame the Act’s problems entirely on the Commons:

[A] sufficient explanation of the imperfections of the Habitual Criminals Act was that it only came up in its amended form to (the House of Lords) from the Commons on the 7th. of August, that it was not printed in that form until the 9th., on which day the Amendments were agreed to by a single vote, on the assurance of the noble Lord in charge of the Bill (Kimberley) that they were alright, in order that it might receive Royal Assent on the 11th. of August — the day Parliament was prorogued.²⁵⁰

The second occasion for questioning was April 11,²⁵¹ this time in the House of Commons. On that day Mr. Hunt²⁵² asked Home Secretary Bruce

²⁴² Presumably *R. v. Harwood* (1870), 11 Cox C.C. 388.

²⁴³ Section 8.

²⁴⁴ Section 4.

²⁴⁵ See Chichester in 12 *DNB*, *supra* note 20, at 43-44; Boase, *MEB*, vol. IV, *supra* note 67, at 60-61; Keppel, *Earl of Albermarle’s Fifty Years of My Life* (1876).

²⁴⁶ And, as such, admitted that he was “almost necessarily ignorant of the precepts of the law.” *Supra* note 151, at col. 567.

²⁴⁷ *Id.* at col. 568. Especially with respect to the extension to Scotland. See the Earl of Airle’s speech, at col. 570, where he reminds the House that he had suggested such extension in the first place, but had been frustrated in this attempt. He suggests that the presence of a piece of legislation such as this one in one jurisdiction and not another contiguous to it would cause a migration to the unprotected jurisdiction.

See also Lord Colonsay’s speech, at col. 570-71, in which he suggests that there is no objection to the extension of legislation similar to the 1869 Act to Scotland as long as its provisions “harmonize with the existing laws and institutions of that country.” Extension of the 1869 Act failed, he claimed, because it was effected so late in the Bill’s passage.

²⁴⁸ *Id.*

²⁴⁹ See Sanders in *DNB*, vol. 13, *supra* note 20, at 530-31.

²⁵⁰ *Supra* note 151, at col. 571.

²⁵¹ 200 *Parl. Deb.*, H.C. (3d ser.), col. 1601 (11 April 1870).

²⁵² See Boase in *DNB*, vol. 10, *supra* note 20, at 263-64.

whether the police had any means of ascertaining the number of persons under supervision or of identifying them. Bruce replied that no provision for supervision had yet been made for persons other than licence holders. The weekly returns of the liberation of ticket-of-leave men were being sent to all police. He assured the House that a Bill would soon be introduced to address the problem of the lack of supervision for other criminals.

On April 29²⁵³ Mr. Asheton-Cross²⁵⁴ asked whether any guidelines on the meaning and nature of the supervision created by the Act were forthcoming from the Home Department. Bruce replied only to acknowledge that the lack of a concrete definition of supervision was "open to criticism."

The erroneous reference to the *Industrial Schools Act, 1861* was the subject of the fourth series of questions²⁵⁵ on the problems the Act had caused. In the Commons, Mr. Knatchbull-Hugesson acknowledged the defect pointed out by Mr. Rowland-Smith's²⁵⁶ question, and confessed that "owing to the haste with which the *Habitual Criminals Act* was passed, several errors of omission and commission were allowed to pass in the Bill."²⁵⁷

2. The Courts

The few existing reported cases show two types of problems the courts had in interpreting the 1869 Act. The most serious problem arose in cases involving receivers of stolen goods. Mr. Justice Keating, in *R. v. Harwood*,²⁵⁸ held that no presumption that the accused knew the goods were stolen arose upon proof of a previous conviction and proof that the requisite seven days notice had been given. In his opinion, such a presumption would defeat the object of reforming an offender. *Harwood* was considered in *R. v. Davis*,²⁵⁹ which appears in two different reports and is reported differently in each. The case was reserved for the Judges by the Commissioner, who had held that the Act deemed the prisoner to have knowledge that the goods were stolen until he proved the contrary once the previous conviction and notice to the accused had been proven. Chief Baron Kelly said that the Commissioner had incorrectly interpreted the law. The headnote of one report of the case states that, "notice does not dispense with evidence of guilty knowledge on the part of the prosecution."²⁶⁰ Chief Baron Kelly's judgment in this report makes no direct statement on the point of law. It merely refers to the Commissioner's error. The headnote correctly states what the Chief Baron's reasoning must have been. The other report has the Chief Baron having said that: "the notice had not the operation which, on the face of it, it purported to have, and that the prisoner ought not to be deemed to have known that the goods were stolen."²⁶¹ In any case, the effect of the decision was to render the reverse onus clause inoperative.

²⁵³ 200 *Parl. Deb.*, H.C. (3d ser.), col. 2133 (29 April 1870).

²⁵⁴ See Fitzgerald in *DNB*, 1912-1921 vol., *supra* note 20, at 138-40.

²⁵⁵ 201 *Parl. Deb.*, H.C. (3d ser.), col. 628 (13 May 1870).

²⁵⁶ Little information is available about Rowland-Smith.

²⁵⁷ *Supra* note 255.

²⁵⁸ *Supra* note 242.

²⁵⁹ (1870), 22 L.T. 763, 18 W.R. 958.

²⁶⁰ *Id.* (L.T.).

²⁶¹ *Supra* note 259, at 959 (W.R.).

The second problem the courts encountered concerned the section of the Act²⁶² that punished anyone who knowingly harboured thieves or reputed thieves. In *Marshall v. Fox*,²⁶³ the appellant had been convicted of an offence against this section. He appealed on the grounds that the Magistrate had failed to exercise the discretion, conferred by the section not to convict when, as in this case, the meeting of the thieves was for an innocent purpose. Here the thieves had gathered in the appellant's inn to collect money to contribute to the defence of a comrade and to aid his wife and children while he served his sentence in jail.

Mellor and Hannen JJ. did not accept the appellant's argument, saying that *any* meeting of thieves on the appellant's premises exposed him to prosecution. The Court refused to hear the argument that the Act was only meant to apply when the thieves were harboured while meeting for an improper purpose. This decision substantially widened the liability of innkeepers and public house owners to prosecution.

3. The Press

Several alleged problems with the Act were discussed in the press and legal journals, some of which have already been mentioned. The general criticisms of the Act included allegations that it was "badly drafted",²⁶⁴ "hastily passed"²⁶⁵ and "singularly defective".²⁶⁶ In fact, the first charge was levied by no less prestigious a critic than John Stuart Mill.²⁶⁷

Mr. Sergeant Cox said that the problem with the statute lay in its very foundation as it had improperly defined the term "habitual criminal". He opposed the test of number of convictions for determining habitual criminality and said that the question should be whether the person was a *professional* criminal.²⁶⁸ The law should, he argued, seek to punish those "who pursue crime as a regular business, who calculate its risks and its gains, balance the one against the other, and speculate accordingly . . . For such a class exceptional laws are not merely permissible, they are necessary."²⁶⁹

Cox pressed this point in his address to the Social Sciences Congress of 1870 at Newcastle-upon-Tyne.²⁷⁰ He also expressed the opinion that "only a small number of criminals had actually come under the operations of the Act."²⁷¹

Cox's position, that the conviction test was an inappropriate means by which to judge habitual criminality, found support in a letter to the *Law Times*²⁷² by Mr. R. Leisinger, a German lawyer on a visit to England. He also doubted that a twice or thrice-convicted felon was necessarily an "habitual criminal", which he viewed as a person who lives on crime.

²⁶² Section IV.

²⁶³ (1871), 6 Q.B. 370, 19 W.R. 1108.

²⁶⁴ (1870), 14 J. of Juris. 39, at 39.

²⁶⁵ (1869), 47 L.T. 323, at 323.

²⁶⁶ (1870), 49 L.T. 63, at 63.

²⁶⁷ (1870), 48 L.T. 167, at 167.

²⁶⁸ (1869), 46 L.T. 404.

²⁶⁹ *Id.*

²⁷⁰ See (1870), 5 L.J. 557 for a report on Cox's speech.

²⁷¹ *Id.*

²⁷² *Supra* note 268, at 464.

More specific problems with the legislation's provisions were the subject of a number of letters. Mill stated that the effort to "root out" the receivers of stolen goods should be stepped up as they were "the solid support and foundation of all professional theft, and without them a criminal class, as a class, could not exist."²⁷³ The Chief Constable of Leeds recommended that the monthly reporting requirement be reenacted, as the police were forced, at present, to seek convicts out to supervise them.²⁷⁴ The *Law Times* concurred in this recommendation.²⁷⁵ One writer to *The Times* complained that the police felt that, despite the Act, their hands were still tied with respect to the arrest of suspicious persons observed "lurking about."²⁷⁶ That writer called for stricter legislation.

It appears that even Sir Walter Crofton was disappointed by the operation of the legislation. He conceded the need for improvements in the Act in a letter to *The Times* in early 1871.²⁷⁷ At a meeting of the Social Sciences Association in March of 1871,²⁷⁸ over which the Rt. Hon. Stephen Cave M.P.²⁷⁹ presided, Crofton presented a paper on the operation of the Act. In it he complained *inter alia* of the lack of monthly reporting and the excessive degree of espionage that the present supervision system required.

One of the most persistent problems with the operation of the Act disclosed by accounts in the press seemed to be the practices of the Magistrates. The *Law Times* reported that it was common among the Magistrates to accept pleas of guilty from prisoners without inquiring into their antecedents,²⁸⁰ regardless of whether or not they suspected a previous criminal record. The result, of course, was that such persons would receive lighter sentences, and could avoid supervision.

The Home Office sent a circular to the Magistrates instructing them that the proper way to proceed, when there is reason to suspect a prior conviction, is to remand the case and commit for trial at Quarter Sessions.²⁸¹ The *Law Times*, however, reported that the circular was being widely ignored by the Magistrates,²⁸² and cited a case where Mr. Woolrych, a London Magistrate, had openly disregarded a lengthy criminal record in sentencing the prisoner to only three months hard labour.²⁸³ This patent disregard for the state policy of the Act outraged the editors of the *Law Times*.

The same journal issued a practice note with respect to the Act in 1869.²⁸⁴ In it two defects in the legislation were pointed out. First, that the side-note to the section of the Act requiring supervision of twice-convicted felons²⁸⁵ was in-

²⁷³ *Supra* note 267.

²⁷⁴ *The Times*, July 7, 1871 at 12, col. 6.

²⁷⁵ *Supra* note 266, at 64.

²⁷⁶ *The Times*, June 9, 1870 at 5, col. 3.

²⁷⁷ *The Times*, Feb. 7, 1871 at 9, col. 4.

²⁷⁸ Reported in *The Times*, March 15, 1871 at 9, col. 6.

²⁷⁹ See Boase in *DNB*, vol. 3, *supra* note 20, at 1250.

²⁸⁰ See (1870), 49 L.T. 140, and 359.

²⁸¹ *Id.* at 140, and, for text, at 150.

²⁸² *Supra* note 280, at 359.

²⁸³ *Id.*

²⁸⁴ (1869), 47 L.T. 335.

²⁸⁵ Section 8.

accurate. It seemed to suggest that where a sentence of penal servitude was passed, police supervision did not follow. This was not what the section itself said — it provided that a person twice-convicted of certain felonies was subject to supervision in addition to and irrespective of the nature of any other punishment ordered. This is another glaring example of careless draftsmanship.

The note also referred to the lack of a procedure in the Act for proving previous convictions and reported that Mr. Sergeant Cox had been requiring strict legal proof.

Finally, the note dealt with a problem that has been discussed above — the uncertainty of the section respecting receivers of stolen goods.²⁸⁶ It stated that the reverse onus did in fact come into effect on proof of the conviction and notice.²⁸⁷

The *Law Times* later reported a dispute over the meaning of that section between Mr. Sergeant Cox and “A Barrister”.²⁸⁸ Cox and the *Law Times* took the position that the onus shifted. The barrister replied that the words following the notice requirement in the section, which purported to reverse the onus, were left in the statute by error and should have been struck with the presumption of guilty knowledge that formerly appeared in the beginning of the section. It appears from the *Harwood*²⁸⁹ and *Davis*²⁹⁰ cases that this argument won the day in the higher courts.

It has been seen that objection was taken both to the general nature and the specific provisions of the Act in Parliament, in the courts and in the press. The combined force of these objections was a formidable stimulus to a reconsideration of the Act.

B. *Alleged Benefits*

At least according to some, not all was gloom and doom in the wake of the 1869 Act. Some Parliamentarians, members of the legal community and contemporary historians ascribed some success to it.

During the series of questions on the Act posed in Parliament during 1870, the Earl of Kimberley said that, in his experience, the Act “had produced . . . much good, and was found on the whole to work very well.”²⁹¹ However, he was later to concede in the debates on the 1871 Bill, that the 1869 Act was “not as successful as it might have been if there had not been some mistakes in it which prevented it from working as well as it might otherwise have done.”²⁹²

Assurances were also forthcoming in the House of Commons. In response to a question put by Mr. Stapleton, Secretary Bruce provided some statistics on the operation of the Act between 9 August 1869 and 28 March 1870.²⁹³

²⁸⁶ Section 11.

²⁸⁷ But see *Harwood*, *supra* note 242, and *Davis*, *supra* note 259.

²⁸⁸ *Supra* note 284, at 335-36. The Barrister’s letter is in *The Times*, Aug. 26, 1869 at 10, col. 6.

²⁸⁹ *Supra* note 242.

²⁹⁰ *Supra* note 259.

²⁹¹ *Supra* note 151, at col. 568.

²⁹² 207 *Parl. Deb.*, H.C. (3d ser.), col. 1089 (4 July 1871).

²⁹³ 201 *Parl. Deb.*, H.C. (3d ser.), col. 272 (5 May 1870).

Bruce indicated that these figures showed, to his mind, that the Act was working well.

The question of the efficacy of the 1869 Act came up in the initial debates on the 1871 Bill. The Earl of Morley,²⁹⁴ who introduced the proposed legislation, intimated that the 1869 Act had done "a great amount of good."²⁹⁵ He claimed that particularly good results had been achieved in the registration of criminals. Further, in the battle to curb the activities of receivers of stolen goods and harbourers of thieves, the Act had proved "extremely beneficial."²⁹⁶

Members of the legal community chimed in praise for the Act. F.W. Ayde, the Incumbent of St. John's Chapel and a Magistrate in Luton, reported a drop in the crime rate in his jurisdiction due to the decreased activities of harbourers brought on by the Act.²⁹⁷ The Report of the Commissioner of Police for the Metropolis (1870) referred to a decrease in the number of persons of bad character at large, which it attributed unreservedly to the operation of the statute.²⁹⁸ James Wetherell, the Chief Constable for Leeds, was effusive in his praise of the Act:

No modern legislation has . . . been generally more effective or better calculated to control the predatory habit of the dangerous classes The prompt arrest of well-known thieves found loitering in the streets and on or in the vicinity of enclosed premises, and their subsequent conviction under the 9th. section of the Act (Vagrancy), caused a great exodus of criminals (from Leeds) . . . every class of crime has, consequently, decreased.²⁹⁹

The Act also impressed two historians of the time. In his empirical study *Crime in England and Wales* (1876),³⁰⁰ Hoyle expressed his opinion that the 1869 Act was partially responsible for the drop in the number of crimes committed in the period following its enactment.³⁰¹ He also observed generally that:

Since 1870, probably by the influence of the Habitual Criminals Act of 1869, seconded by the Prevention of Crimes Act of 1871 and aided by the Reformatories Act & c., there has been a diminution in the list of such crimes as are usually committed by professional criminals.³⁰²

A like opinion seems to have been held by Pike who, in his book *A History of*

²⁹⁴ See Sanders in *DNB*, Second Supplement (1901-1911), *supra* note 20, at 69.

²⁹⁵ *Supra* note 292, col. 1082.

²⁹⁶ *Id.* at col. 1083. This proposition was treated with skepticism by the Earl of Carnarvon (col. 1087) and Lord Houghton (col. 1087-88). The latter said the Act had "rather proved a failure." The former stated that "he could scarcely join in the praise the noble Earl (Morley) had bestowed on the working of the *Habitual Criminal's Act*" (col. 1086). Carnarvon specifically doubts whether the Act has anything to do with a drop in the number of receivers and public houses frequented by thieves (col. 1087).

²⁹⁷ *The Times*, Nov. 21, 1870 at 6, col. 6.

²⁹⁸ *The Times*, July 26, 1871 at 4, col. 4.

²⁹⁹ *The Times*, July 7, 1871 at 12, col. 6. Note that s. 9 of the 1869 Act was the provision facilitating proof of the intent to commit felony required for a conviction under the 1824 *Vagrancy Act* (see Part II, A, *supra*). This is an indication that the vagrancy legislation was viewed by the police as a valuable tool for controlling recidivists.

³⁰⁰ Hoyle, *supra* note 24.

³⁰¹ *Id.* at 50. A decline in crime between 1871 and 1874 is noted by Radzinowicz and Hood, *supra* note 12, at 1312.

³⁰² *Id.* at 56-57. The combined impact of the 1869 and 1871 legislation is discussed by Radzinowicz and Hood, *supra* note 12, at 1344-47.

Crime in England (1873-76),³⁰³ stated that the 1869 Act aided the police considerably in bringing down the number of criminals at large.³⁰⁴

Thus, there was a mixed reaction to the operation of the 1869 Act. There is, however, little doubt that the Act had too many defects to continue in force, regardless of its alleged beneficial effects. The voices of Parliamentarians, Judges and members of the legal community joined in a call for reform. Such a call was not likely to be, and was not in fact, ignored.

V. THE PREVENTION OF CRIMES ACT, 1871 AND THE "DEATH" OF THE 1869 ACT

"an old friend under a new name"

The Earl of Morley
introducing the new Bill

A. Legislative History

In response to questions in Parliament and to a growing concern among members of the legal community and the public at large, the Lord Chancellor's Prevention of Crimes Bill was presented and read for the first time on 23 June 1871. It was to experience none of the difficulties in passing that had plagued its predecessor. It received second reading on July 4, on which date a short debate took place.³⁰⁵ The Earl of Morley introduced the Bill, saying that the Government had "thought it better to re-enact almost all its [the *Habitual Criminals Act's*] provisions, remedying any defects in it, and making several changes recommended by experience."³⁰⁶ The Bill was considered in Committee on July 6, and was reported back without amendment, on the same day.

The Bill went back to Committee on July 18 and a brief debate ensued.³⁰⁷ However, no substantial amendment was made to the Bill at this stage either. The Committee reported on July 24 and the Bill was given third reading by the Lords on that day.

Home Secretary Bruce introduced the Bill to the Commons two days later and it was read without debate. It received a perfunctory second reading on August 14. It was considered in a Committee of the whole House on August 16 where it was subject to the only debate it was destined to get in the Commons. Objection was taken by Mr. Henley to the fact that the Bill had been brought to the House so late in the session,³⁰⁸ a complaint reminiscent of that of Sir Charles Adderly with respect to the 1869 Bill.³⁰⁹ Henley complained that the Bill effected great changes in the law and should have been the subject of full debate.

After the swift agreement of the House on the first eight clauses of the Bill, Mr. Muntz³¹⁰ felt compelled to speak. He stated that he "could not allow

³⁰³ *Supra* note 33.

³⁰⁴ *Id.* at 462-63.

³⁰⁵ See, *supra* notes 292, 295, 296, for references to key speeches in the debate.

³⁰⁶ *Supra* note 292, at col. 1082.

³⁰⁷ 207 *Parl. Deb.*, H.C. (3d ser.), col. 1950 (18 July 1871).

³⁰⁸ 208 *Parl. Deb.*, H.C. (3d ser.), col. 1756 (16 Aug. 1871).

³⁰⁹ *Supra* note 111.

³¹⁰ See Boase, 2 *MEB*, *supra* note 67, at 1031.

these clauses to pass without expressing his deep regret that in the present state of society it should be necessary to have such a restrictive Bill.”³¹¹ He further lamented that:

Every year there was a new Act for the prevention of crime, and every year crime continued to increase. How could anyone wonder at it? The old system of transportation, which had worked so well, had been abolished, and men were now discharged from prison, and left to wander about the country without any means of finding a livelihood.³¹²

The objections of these two members, however, went unheeded, as the Bill continued in its speedy passage. It was considered briefly on August 17, and the following day saw its submission to re-Committee, the report of the Committee *and* third reading — *all* without debate. The Bill received Royal Assent³¹³ on August 21, and by section 2 came into force on the 2nd of November, 1871.

Apart from a comparison of the actual clauses in the Bill with those in the Act of 1869, to be discussed below; the only noteworthy aspect of this Bill was its speedy passage into law. This stands in obvious contrast to the slow, studious consideration afforded its predecessor. Perhaps, with the possible exception of Mr. Muntz, the legislators had become accustomed to the principle of such legislation, having had the 1869 Act in place for one and a half years. There may also have been a dominant belief that the Bill was well drafted, and would, absent tinkering, solve the problems created by the 1869 Act.

Perhaps as surprising as the lack of Parliamentary discussion was the concomitant lack of public discussion. The provisions of the new Bill were never the object of challenge in the press. As one writer to *The Times* commented:

[I]t is a matter of surprise that so little notice appears to have been given by the public to the successful passing of a measure which, in its probable results, will alone go far to redeem the late session from the charge of ‘barrenness’ so freely bestowed on it.³¹⁴

Again, the reason may have been that the kind of people who normally wrote letters to the editor had become, grudgingly or otherwise, accustomed to the principle of the legislation. It is difficult to divine answers to such questions. However, it is possible that a not unrealistic proposition about human nature could provide a partial clue. Disenchantment is arguably a more compelling motivation for letters and depositions than is satisfaction. The new Bill was designed first, to accomplish the objectives sought by the 1869 Act and second, to rectify the mistakes that had been made in that Act. Since the achievement of both of these goals was desired in some quarters, perhaps it demanded no comment from them. Perhaps, for the time being, the interested minority was satisfied.

B. *The Form of the 1871 Act: A Comparative Perspective*

The 1871 Act implemented several important changes in the law as it stood under the 1869 Act, most of which tended to be increasingly severe. The most important alterations are noted here.

³¹¹ *Supra* note 308, at col. 1758.

³¹² *Id.*

³¹³ 34 & 35 Vict., c. 112.

³¹⁴ *The Times*, Sept. 6, 1871 at 8, col. 5 (By Tallack).

- a) Breach of the conditions of a ticket-of-leave licence exposed the holder to a three month term of imprisonment.³¹⁵ The 1869 Act had provided only for revocation and return to the balance of the term of penal servitude.
- b) Licence holders were required to notify the Chief of Police in the district in which they lived of any change of address, either within the district or from one district to another.³¹⁶ The 1869 Act did not require notification.
- c) Licence holders were compelled to report, personally or by letter, once a month, to the police.³¹⁷ This principle was specifically rejected in the earlier legislation.
- d) A licence holder at large for more than forty-eight hours who failed to notify the police of his location was compelled to prove to the Court that he had done his best to comply with the law. Failing to do so resulted in revocation and up to one year's imprisonment in addition to the balance of his previous sentence.³¹⁸ Again, the 1869 Act had no notification requirement.
- e) The central register of criminals established by the 1869 Act was to include photographs of all criminals.³¹⁹ The advantage of this had been mentioned to Kimberley in the debates on the 1869 Bill but he did not move to make it law.³²⁰
- f) For those twice-convicted of a felony, liability to one year's imprisonment could arise when, in addition to the three situations described in the 1869 Act,³²¹ the criminal gave a false name or address to the police.³²²
- g) Persons twice-convicted were subject to a period of up to seven years supervision, commencing with the time of release from custody.³²³ The 1869 Act was ambiguous as to the time of commencement, as noted above.
- h) Twice-convicted felons under supervision were subject to the same reporting and notification conditions as were licence holders³²⁴ and, save revocation of licence, to the same punishments for breach of them. Needless to say, this was also an addition to the 1869 Act's requirements.
- i) Keeping a brothel in which thieves were harboured became an offence.³²⁵
- j) Twice-convicted women were to lose their children under fourteen, pursuant to the provisions of the *Industrial Schools Act, 1866*.³²⁶ This rectified the drafting error in the 1869 Act.
- k) Previous convictions were to be proved by production of the certificate of conviction and proof of identity.³²⁷ No procedure was specified in the earlier statute. This section apparently confirmed contemporary practice, as noted above.

³¹⁵ Section 4.

³¹⁶ Section 5.

³¹⁷ Lord Houghton vigorously opposed this provision, and attempted unsuccessfully to strike it. *Supra* note 307, at col. 1930.

³¹⁸ *Id.*

³¹⁹ Section 6.

³²⁰ 194 *Parl. Deb.* (26 Feb. 1869), *supra* note 28, at col. 341.

³²¹ Section 8, *i.e.*, living by dishonest means, being found about to commit a crime, or being found in certain places without being able to account for one's presence there.

³²² Section 7.

³²³ Section 8.

³²⁴ *Id.*

³²⁵ Section 11.

³²⁶ Section 14.

³²⁷ Section 18.

- l) In a trial for receiving stolen goods, evidence could be given at any stage of the proceedings that the accused had been found in possession of other stolen property within the last year. This was evidence of guilty knowledge on the charge for which he was being tried.³²⁸ The lack of a notice requirement was novel.
- m) Once possession of the stolen goods was proved, if the accused had within the last five years been convicted of a felony involving fraud or dishonesty, evidence of that conviction could be given to show guilty knowledge, provided that seven days' notice was given.³²⁹ This clarified the confusion in the 1869 Act over whether the onus shifted.
- n) The indictment need not charge the previous conviction in order for it to be proved at trial.³³⁰ The law had been in a state of confusion here, as the 1869 Act had not dealt with this issue.

With very few exceptions, therefore, the 1871 Act was more severe than its predecessor. It seemed not only to resolve ambiguities in the previous Act, but to vest increased powers in the police for controlling certain kinds of criminals. It is for this reason that no discussion of the more punitive trend in penal legislation during this period is complete without reference to this Act. The 1871 statute is the logical conclusion of the move begun in the 1864 Act, and continued in the 1869 Act, towards isolating and controlling a "criminal class".³³¹ This objective had begun, with the 1871 Act, to become an accepted and entrenched public policy — one which survives to this day.³³²

VI. AN ANALYSIS OF THE 1869 ACT

I do not think that in this country and with the advance of what may be called civilization, it will ever be possible to put down the practices of those who carry out robbery and burglary on principles of high art . . . the highest order thieves and burglars are persons of high intellectual power, scientific knowledge and very considerable ingenuity, who, if they were engaged in honest pursuits, would, in any of them, be sure to rise to high distinction.

The Earl of Shaftesbury
on the 1869 Bill

This part will attempt an analysis of the Act from two perspectives. First, it will explore the historical relevance of the Act. Second, it will propose several possible reasons for its enactment in addition to those already discussed. The underlying question of this two-stage analysis is the "why" of the 1869 Act: *why* study it? And *why* enact it?

A. *Historical Relevance*

It is submitted that there are at least five reasons for regarding the 1869 Act as being of unique historical significance.

The foremost and by now most obvious reason is that it was the first piece of legislation in the English common law system to deal specifically and com-

³²⁸ Section 19. Apparently, Mill's hopes were realized.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See Davis, *supra* note 35, at 208-210, where she argues that it is the 1869 Act that concludes this trend.

³³² The *Prevention of Crimes Act, 1871* was succeeded by the *Criminal Justice Act, 1948*, 11 & 12 Geo. 6, c. 58, ss. 21-23. This was succeeded by the *Criminal Justice Act, 1967*, c. 80, ss. 37-38. This in turn was superceded by the *Powers of Criminal Courts Act, 1973*, c. 62, ss. 28-29, which are in force today.

prehensively with the members of the "criminal class". It pioneered a system for the isolation, supervision and control of recidivistic offenders that, although crude in retrospect, later matured into the sophisticated régime of crime prevention that is seen in England today. The principles of supervision and registration that formed the core of the Act have respective modern day analogues in the concept of parole and the computerization of criminal records.³³³ While the Act did not itself prove immediately successful, its significance as a precedent is undeniable. It was the first step on the long road to one type of solution to the perennial problem of the recidivistic offender.

Second, the Act is important as a major contribution to the process of the legitimation of the police. As such, it signified a change in Parliament's view of the role of the police. The "professional" police force was still a novel idea in much of England when the Act was passed, and in some parts of the country, one did not exist until some time later. Even in theory, a nationwide police force had only been "created" in 1856. Any grant of power to the developing police forces during this period served primarily to entrench them in the criminal justice system and the mind of the public. The police forces were somewhat suspect at this time. It was not long ago that they were corrupt, universally mistrusted and openly disliked. Overcoming the public resentment to their new found *niche* in society was a goal well served by legislation such as that under consideration here.

In addition to this legitimacy function, legislation such as the 1869 Act helped to increase the power of the police, and indirectly the state, over the individual in society. This Act is an unambiguous move to the principle of strong and comprehensive law enforcement at the expense of the vindication of individual rights.³³⁴

The third aspect of the Act's historical relevance is that it is a significant legislative attempt at controlling the "criminal capitalists". It is apparent from the clauses in the original Bill respecting receivers, pawnbrokers and harbourers that its intent was to control not only those members of the lower economic class who committed crimes, but also the tradesmen of a slightly higher economic class who chose to seek benefits from the commission of crime. Thus, Parliament explicitly recognized that crime was not exclusively a lower class phenomenon, and that, to adopt the words of Mao Tse-Tung, the veil of respectability sometimes hides the unpleasant face of criminal vice. Soon, other legislative anomalies based on class bias, such as the fact noted by Matthew Davenport Hill, that taking an apple was a felony, while embezzlement by an agent, banker or factor was not, would fall to this revelation. This

³³³ Radzinowicz and Hood, *supra* note 12, at 1347 claim that "the only tangible success to emerge from the habitual criminals legislation was the system of registration and identification."

³³⁴ Bartrip, *supra* note 19, at 175-76 argues that this Act, along with other legislation of the mid-Victorian era, is first and foremost "law enforcement" legislation, and that it was not immediately intended to "create" a criminal class, but to serve this predominant goal.

See also Hoyle, *supra* note 24, at 50-51, who deplored the frightening extension of police powers created by this Act. He argued that "[w]hat we want, is not better order through the medium of stern repression — the police strait-jacket — but such an improvement in the body politic as will render needless the severities of an 'Habitual Criminals Act'."

is one of the few senses in which the Act can be seen as “progressive” legislation.

The fourth point of historical significance is the recognition in the Act, on a wide scale, of the “right” of society, in its own interests, to treat certain kinds of criminals differently and to deprive them of the rights they would normally be entitled to. The Act proceeded on the assumption that, as the Earl of Kimberley said in Parliament,³³⁵ there is nothing unjust in putting certain kinds of persons at a disadvantage before the law — in subjecting them, in fact, to a different code of law. Thus, it made acts criminal for some that, if committed by others, were innocent. It reversed the burden of proof³³⁶ and provided extra or particularly stringent punishment for certain offenders. The examples are, as has been seen, numerous.

Particularly important here is the reversal of the burden of proof. While the legitimacy of such a course has been infrequently recognized in the past, particularly with respect to “end-gatherers” in the silk and worsted manufacturing industries³³⁷ and receivers of stolen goods (by 29 Geo. II c. 30), it had never, prior to this Act, been approved in so wide a context. The qualification of the presumption of innocence inherent in parts of the Act is a manifestation of the fundamental assumptions underlying it and other such legislation — that there exists a definable “criminal class”, and that it is desirable, if not essential, to treat the members of that class with a reduced tolerance. The argument justifying the abrogation of individual rights in the interests of a larger group — society — is one that continues to be popular today.

The fifth point of historical interest about the Act is that it represents a departure from the general trend in previous years towards the reformatory theory of criminal punishment.

As one commentator has remarked, the issue in this period was “what was the object of punishment in the form of prison sentences; retributive, deterrent, reformatory or a mixture of the three?”³³⁸ The penal legislation of the nineteenth century, especially that created after the early 1830s, reflected this conflict of objectives.

As Davis has pointed out in her article on the London Garotting Panic of 1862,³³⁹ the initial move towards the reformatory model was, for the most part,

³³⁵ 194 *Parl. Deb.* (26 Feb. 1869), *supra* note 28, at col. 340.

³³⁶ This reversal was made even in the face of the pre-existing law denying the accused the right to give evidence on his own behalf. This is a strong indication of the extent to which the ruling class in Victorian Society was prepared to abrogate a tradition of the recognition of individual rights in the courts in favour of a “larger” societal interest.

³³⁷ “End gatherers” were persons who were found in possession of small amounts of clothing material, which they were thought to have been collecting, retaining and selling after classifying them as “waste”. The laws with respect to the silk and worsted trades had placed the burden on such persons to show that the material in their possession was not dishonestly obtained.

For an earlier example of a reverse onus situation, see the Jacobean infanticide statute: *An Act to Prevent the Destroying and Murdering of Bastard Children*, 1623, 21 James I, c. 27.

³³⁸ Burn, *supra* note 26, at 176.

³³⁹ *Supra* note 35.

instigated by Sir Joshua Jebb,³⁴⁰ the Surveyor-General of Prisons. He and a small group of interested philanthropists succeeded, according to Davis, in imposing their minority view on society, in the face of "lack of proof of effectiveness (and the) objections of other prison experts."³⁴¹ This model went virtually unchallenged until the mid-nineteenth century, when popular dissatisfaction with it became manifest. Davis cites the penal servitude and prisons legislation of the time as clear evidence "that Jebb and the reformative principle were on the retreat."³⁴²

There is some support for the view that the 1869 Act was significant in this "retreat". In introducing the Bill to the Lords, Kimberley noted in passing that "failure" of Jebb's career in its later stages,³⁴³ referring undoubtedly to the declining popularity of his theory of punishment.³⁴⁴ In the Commons, Sir Charles Adderly recalled the move towards the reformative model that followed the end of hanging and the decline of transportation. He saw that the 1869 Bill was a move back to the principle of deterrence that transportation and capital punishment were designed to serve.³⁴⁵ It was in this context that Mr. Hadfield termed the Bill "a departure from the more humane tendencies of the criminal legislation of recent years."³⁴⁶

The Act is, in one way, not merely a departure from the reformative model, but an explicit rejection of the fundamental principle underlying it: that any "criminal" is capable of being reformed. The 1869 Act's basis postulate was that there existed a class of offenders in society that was unreformable — consciously and irredeemably "criminal".³⁴⁷ It is in this sense that it may be argued that the Act is one of the most significant developments, from a penological point of view, in the Victorian era.

B. *Some Proposed Reasons for Enactment*

There are at least five major reasons that the 1869 Act was passed when it was and in the form it was. Some of these were not explicitly recognized at the time; others were, albeit in different forms or contexts. They will be given individual consideration here.

First, the Act had a "house cleaning" or "housekeeping" objective. It seemed to proceed on the assumption that, as Burn has put it, "there soon

³⁴⁰ See Vetch in *DNB*, vol. 10, *supra* note 20, at 698-99; Radzinowicz and Hood, *supra* note 12, at 1336.

³⁴¹ *Supra* note 35, at 193.

³⁴² *Id.* at 208.

³⁴³ 194 *Parl. Deb.* (26 Feb. 1869), *supra* note 28, at col. 334.

³⁴⁴ Note Radzinowicz and Hood's observation that Jebb was "on the defensive in face of criticisms of his "incompetent management", " *supra* note 12, at 1336.

³⁴⁵ *Supra* note 111.

³⁴⁶ *Id.*

³⁴⁷ The sociological and psychological assumptions that legislation such as the 1869 Act proceeded on have been given an interesting interpretation by Radzinowicz and Hood, *supra* note 12, at 1313:

English criminological thought never fully embraced the tenets of social Darwinism, Italian Positivism, and Eugenics, but the influence of these movements, particularly at the turn of the century, should not be underestimated . . . [T]hey gave a particular bent to the way in which habitual criminals were regarded.

On nineteenth century theories of hereditary and inherent criminality see Radzinowicz and Hood, *supra* note 12, at 1315-317.

would be an embarrassingly large number of prisoners who had to be accommodated within the country"³⁴⁸ and that, consequently, something had to be done before the problem became intractable. In this respect the Act supports Burn's assertion that "one is conscious, in examining the 'sixties', of a note of impatience; the impatience, not of the fanatic or the revolutionary, but of the rational, tidy minded man, resolved to clear his premises of an accumulation of junk."³⁴⁹

In reference to the Act itself, Burn says that: "Disappointed hopes and occasional panics were, with an increasing desire for uniformity of administration and a more tolerant attitude towards centralization, the background to . . . the Habitual Criminals Act of 1869."³⁵⁰ This is undoubtedly correct.³⁵¹ Parliament was not, on its own admission, reacting to a panic in creating the Act. Rather, it was attempting to consolidate and strengthen the law respecting recidivistic offenders. This was not an "emergency measure" in the minds of its supporters, but a common sense, rational solution to an irritating problem. To pick up the metaphor once more, Parliament was not rebuilding the house, they were merely doing their spring cleaning.

There was an organizing sense to the legislation. Parliamentary debates and press reaction indicated a growing disenchantment with the piecemeal approach to the so-called habitual criminals and the ticket-of-leave men that had been in place prior to the legislation.³⁵² The call was for *comprehensive* legislation; the Act answered it.

In two senses, therefore, the Act was passed as a housekeeping measure; it got the country in order, and it got the law in order. It was not a panic measure, like the *Security From Violence Act, 1863*.³⁵³ It was a comprehensive, consolidating statute. These are the earmarks of what may be called housekeeping legislation.

It is significant in this regard that the Act was passed by a new Government in its first session of Parliament. The pressure on the new Liberal majority to clean up the home front must have been considerable. One possible reason for the timing of the Act was the desire of the new Government to move swiftly, and to be seen to be moving swiftly, on matters of public concern. Once the interested minority made the criminal class a matter of public concern, legislative action became almost certain.

The second reason for the creation of the Act was the desire of Parliament, and the group pushing Parliament to act, to identify, isolate and control the members of the criminal class. The means by which this objective was

³⁴⁸ Burn, *supra* note 26, at 181.

³⁴⁹ *Id.* at 194. In fact, Burn used the *Habitual Criminals Act, 1869* as an example of this impression.

³⁵⁰ *Id.* at 184.

³⁵¹ See, e.g., the "panic" dealt with by Davis, *supra* note 35, and Part IV, A, *supra*, on the rising disillusionment with the reformatory theory.

³⁵² See Part II, A, *supra*.

³⁵³ *An Act for the Further Security of the Persons of Her Majesty's Subjects From Personal Violence, 1863, 26 & 27 Vict., c. 44.* On the origins of this legislation, see, generally, Davis, *supra* note 35. Davis refers to this Act as the *Security Against Violence Act* or the *Garotters Act*. The correct short title is, however, the *Security From Violence Act*.

sought to be accomplished were supervision and registration, the successful operation of the combination of which would enable the state, through the mechanism of the police, to monitor and exert constant authority over the criminal class. This objective has been identified with mid-Victorian penal legislation in general, and with the 1869 Act in particular, by Davis³⁵⁴ who has argued on the general point that the 1860s was “a critical period, during which one of these ‘outcast’ groups within the working class, namely the ‘criminal class’, was defined by the policy makers and officials, and during which policies are initiated which would not only control this group, but also fix its boundaries.”³⁵⁵ She argues, with reference to the 1869 Act, that “it is clearly the next step, after the Penal Servitude Act (1864), towards defining and controlling a particular group of lawbreakers as distinct from the rest of the population — the ‘criminal class’.”³⁵⁶

Davis warns, however, that we should not be tempted to conclude from this, as she believes Foucault has, that the Act succeeded in achieving this objective.³⁵⁷ Absent empirical evidence for this claim, as Davis points out, it should not be accepted. This is surely correct.

Davis also raises the thorny issue of the extent to which this “intent” to isolate a criminal class was indicative of a deliberate “ruling class” strategy the object of which was to divide the working class.³⁵⁸ Davis seems to be prepared to reject this argument out of hand as displaying a similar lack of empirical support as the argument just considered.

As Davis presents it, however, the issue is ambiguous. A further question may be asked, namely, what the *purpose* of such a deliberate division is alleged to be. If the purpose alleged, as Davis seems to assume, is for the ruling-class to enable itself to “divide and conquer”, then perhaps on the ground of lack of empirical support, Davis’ skepticism should be shared.

There is, however, a less conspiratorial sense in which a deliberate strategy to divide the working class can be envisaged. On this view, one of the purposes of the isolation of the criminal class was to provide an opportunity to de-romanticize and de-legitimize it in the eyes of the working class. This is an educative strategy. First, the state identifies a class of persons whose behaviour is unacceptable; second, it publicizes the unacceptability of such behaviour by proceeding with legislation stigmatizing and severely punishing it. The very act of classifying a person as an “habitual criminal” is a step in this direction.

It is beyond argument that the legislators saw themselves as dealing with an identifiable class. It is, however, a matter for speculation whether one of their objectives was to stigmatize that class. It is submitted that the very tenor

³⁵⁴ *Supra* note 35.

³⁵⁵ *Id.* at 192.

³⁵⁶ *Id.* at 209. See also 210: “*The Habitual Criminals Act*, combined with the 1864 [*Penal Servitude*] Act, helped the authorities to police the border separating a now clearly defined deviant group, the so-called habitual criminals, from the rest of the population.” But see Bartrip, *supra* note 19, at 175-76 where he argues, *contra* the general point, that the policies that evolved during this period were more concerned with providing law enforcement than they were with creating “a criminal class.”

³⁵⁷ *Supra* note 35, at 211-13.

³⁵⁸ *Id.* at 191.

of the legislation was to do just that. It isolated the offender, branded him an habitual criminal, and subjected him to registration and police supervision. In effect, this procedure provided a powerful disincentive to citizens in the working class to emulate the conduct of the offender.

In addition, one should recall the impression gained by the philanthropist on his visit to the South of London that the professional criminals there were popularly admired.³⁵⁹ Such an attitude on the part of law abiding members of the working class towards a group of people dangerous to life and property must have been of some concern to the upper class gentlemen who sat in Parliament.

The third reason for the Act of 1869 was one that was especially dear to the hearts of upper class gentlemen in general and Parliamentarians in particular: the protection of property. As Davis has pointed out, it is on the perception of the rich and propertied that the solutions to the criminal justice problem in the 1850's and 1860's were based.³⁶⁰ The problem as they perceived it, was the imminent release of several thousand convicts onto the streets of England.³⁶¹ And though they may very well have feared for their lives, it is more likely that they feared for their wallets. Several reasons suggest that this is so.

First, there is the form of the legislation itself. The punishment of supervision only obtained when the previous and present convictions were for offences specified in two schedules to the Act. The offences specifically named therein were, without exception, property offences: counterfeiting, robbery, theft, fraud and the like. Also, the Act dealt specifically with receivers of stolen goods and harbourers of thieves. In addition, the first schedule incorporated *An Act to Consolidate the Statute Law, 1861*³⁶² which made certain acts misdemeanors. Those acts had essentially descended from what Professor Thompson has called the "first category of offences"³⁶³ in the so-called *Waltham Black Act of 1723*:³⁶⁴ being found, for example, with dangerous weapons or instruments with intent to break and enter, possession house breaking instruments or with face blackened by night. All of these offences related to property.

Second, Lord Romilly³⁶⁵ and the Earl of Shaftesbury³⁶⁶ acknowledged explicitly in Parliament that the Act was directed primarily at property offences. This is a powerful indication in itself of the *râison d'être* of the Act.

³⁵⁹ See Part I, *supra*.

³⁶⁰ *Supra* note 35, at 192.

³⁶¹ *Id.* at 199.

³⁶² 24 & 25 Vict., c. 96, s. 58.

³⁶³ See Thompson, *Whigs and Hunters* (Harmondsworth: Penguin Books, 1977) at 21-22.

³⁶⁴ *An Act for the More Effectual Punishing Wicked and Evil-Disposed Persons Going Armed in Disguise, and Doing Injuries and Violences to the Persons and Properties of His Majesty's Subjects, and For the More Speedy Bringing the Offenders to Justice, 1722*, 9 Geo. 1, c. 22. For an excellent history and analysis of this Act, see, generally, Thompson, *supra* note 363.

³⁶⁵ 194 *Parl. Deb.* (5 March 1869), *supra* note 28, at col. 693.

³⁶⁶ *Supra* note 128, at col. 1316. He says, "[w]e were now beset by thousands and

In this respect the 1869 Act can be lumped together with innumerable other statutes in English history that had been enacted by the propertied classes to protect their property. To the Lords and Members of Parliament the most dangerous of the "habitual criminals" were the thieves and the other property offenders. It was at them that the 1869 Act was deliberately directed.

The third reason for the enactment of the legislation has been referred to above, and therefore may be dealt with briefly here. It is simply that, with the death of transportation and the political impossibility of reviving capital punishment or life imprisonment, the Government had to find a new way to incapacitate the recidivistic offender. There was a great gap in the penal system where transportation used to be. Filling that gap with a type of punishment equally effective in crime prevention was the Government's goal. The 1869 Act was meant to achieve it.

The fourth reason for the Act was that it would stifle the growth of crime which, in some minds, had begun to plague society, and in others, would soon be doing so.

It is doubtful whether there actually had been any significant increase in crime in the years prior to the Bill. Although one professional journal spoke of "an alarming increase of crime,"³⁶⁷ there seems to be no foundation for such an opinion. Bartrip noted an "upward trend" in indictments during this period,³⁶⁸ but acknowledged the difficulty in relying on such statistics in estimating levels of crime.³⁶⁹ Davis doubted that there was any "crime wave"³⁷⁰ during this period. Hoyle's research at the time indicated a slight increase in offences against property in 1867 and 1868, but a general trend downward from 1861 to 1871.³⁷¹

The most thorough study in this area has been performed by Gatrell in his article "The Decline of Theft and Violence in Victorian and Edwardian England."³⁷² After exhaustive consideration of the available data, he concludes that the late nineteenth century disproves the theory that crime necessarily escalates with "progress",³⁷³ and that "the fact that the incidence of many common types of crime declined or held in the late nineteenth century

tens of thousands of a class of desperate characters who were preying upon society because at this moment they had no other means of living."

The acknowledgement by Shaftesbury, whose reputation was (and is) that of an outstanding humanitarian and friend of the unfortunate, of this objective in the legislation is illustrative of the proposition advanced by Professor Parker: "The child savers (and other social reformers) were not strictly philanthropic. They hoped to return the poor, dissolute and criminal to godly ways, but also to preserve private property and ensure a workforce which was honest, hardworking and decent." See Parker, *supra* note 55, at 160.

³⁶⁷ *Supra* note 264.

³⁶⁸ *Supra* note 19, at 167.

³⁶⁹ *Id.* at 156. That it is particularly unwise to rely on crime rate statistics compiled prior to 1893 is stressed by Radzinowicz and Hood, *supra* note 12, at 1312-1313. The Parliamentary Committee on the criminal statistics (1895), 108 P.P. 23 (in Judicial Statistics, England and Wales (1893) Part I — Criminal Statistics) noted the overhaul by the Home Office of previous statistics, and pronounced the old statistics "next to useless."

³⁷⁰ *Supra* note 35, at 212.

was a fact as remarkable as it has been rarely achieved."³⁷⁴ Gatrell shows this to be true even in the face of increases in the number of police *per capita*.³⁷⁵ His research, like Hoyle's, shows a decreasing incidence of property crime during this time.³⁷⁶

It seems, therefore, that the claims of some letter, article and editorial writers of the time were inaccurate. However, as noted above, Parliamentarians admitted that the Act was not created in response to an increase in the crime rates. Rather, it was created in anticipation of the possibility of one occurring. The fear was of the gradual accumulation of discharged prisoners and the effect that an increase in their number was likely to have on the level of crime. The legislation was enacted, at least in part, to alleviate concern about the possibility of an increase in crime in the near future.

VII. CONCLUSION

The Victorians . . . were trying to create an ordered society, and many of them were aware of the need for a just society as well. They knew and feared the forces of disorder, whether these were political and economic, or moral and social.³⁷⁷

The latter half of the nineteenth century was an era of change in many ways. It saw the rise of Liberalism side-by-side with a resurgence of Christian piety.³⁷⁸ It was the era of Dickens, Darwin and Tennyson. It was a time for sweeping reforms: the disenfranchisement of the Irish Church, the institution of elementary education and the reformation of the laws respecting trade

³⁷¹ *Supra* note 24, at 47. Hoyle's figures showed decreases for property crimes:

Year	With Violence	Without Violence
1861	1,970	12,695
1862	2,321	13,709
1863	2,198	14,075
1864	2,053	13,202
1865	1,979	13,465
1866	1,908	13,203
1867	1,940	13,354
1868	2,253	13,686
1869	2,155	13,091
1870	1,719	12,234
1871	1,509	11,265
1872	1,325	10,225
1873	1,233	10,516
1874	1,292	10,201

His figures for all classes of offences, except "miscellaneous crimes," decline between 1861 and 1874.

³⁷² *Supra* note 1. See, generally, Gatrell and Hadden, "Criminal Statistics and their Interpretation," in Wrigley, ed., *Nineteenth Century Society* (Cambridge: University Press, 1972).

³⁷³ *Id.* at 334-35.

³⁷⁴ *Id.* at 257.

³⁷⁵ *Id.* at 275, Table II. Between 1861 and 1871, the population *per policeman* dropped from 937 to 828, for all of England and Wales.

³⁷⁶ *Id.* at 282, Table III.

³⁷⁷ Derry, *A Short History of Nineteenth Century England* (New York: Blandford Press, 1963).

³⁷⁸ Butler, *A History of England 1815-1939* (London: Oxford U. Press, 1960) at 140.

unions. It saw the establishment of a uniform police force. The "feeling" of the time has been described by Sir John Butler: "The amazing rate of industrial progress, due to the concentration of capital and the new technology, gave the colour to men's thoughts and encouraged them to assure progress as the law of life in every sphere."³⁷⁹ Yet amid this progress was a major source of social turmoil and popular discontent: "[T]he contrast between the excessively rich and the excessively poor is, if not greater, at least as great as it was before."³⁸⁰ It was indeed a time of contrast, of economic and social progress and of economic and social distress.

It is in this context that the foregoing discussion must be seen. What has been undertaken here is an experiment in legislative history — an attempt to summarize the life of an Act from "birth" to "death", in order to understand its historical relevance and to see, reflected in it, the social context in which it operated. Appreciation of the nature of this social context is at least as important as the analysis of the purposes and effects of the Act itself. We have seen how factors as varied as the pressures of the demands of an interested minority, the desire for strong law enforcement, the interests of the propertied, the urge for statutory housekeeping and organization, the fear of the criminal class, the unavailability of viable alternatives and the repudiation of the reformatory model of punishment combined to produce the 1869 Act. The reasons for its rise and fall have been noted and its historical importance has become evident.

Perhaps, above all, the Act can be seen in the context of what Burn has called "the mid-Victorian fault of attempting to cure a deep seated social evil by a single, crude, punitive remedy."³⁸¹ Though this generalization doubtlessly has exceptions, the 1869 Act is not one of them. The attempt of the Victorian legislators to strike a blow to the supposedly blossoming criminal class with this legislation was doomed to failure. The halcyon days when criminals could be hanged, transported or otherwise disposed of and forgotten were gone. What remained was the need for a decision on how best to approach the new problem of a domestic criminal class.

The attempt to recreate the effect of transportation, life imprisonment and capital punishment — the incapacitation of the offender — was, in the context of this suddenly closed society, fruitless. It was undertaken in the absence of any socially conscientious effort to understand or aid the recidivistic offender. To seek incapacitation through supervision and registration was one way to proceed in dealing with the problem at hand. It was not the only way. A genuine appreciation of the social context in which the recidivistic offender existed would perhaps have produced a more satisfactory solution. That such an appreciation was not attempted then is no less a tragedy than the fact that it has not really been attempted to this day: as we inherited the tenets of this legislation in our present-day statutes, we also inherited its narrow perspective and innate faults.

³⁷⁹ *Id.* at 135-36.

³⁸⁰ Pike, *supra* note 33, at 412.

³⁸¹ Burn, *supra* note 26, at 155.